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

5A. Padukka Vidanalage Gunasena

7A. Pahala Vidanalage Don Vinee Perera

Both of Kosgama Pahala, Kosgama.

5A and 7A DEFENDANT - APPELLANTS

C.A. Case No. 853/1999 (F)

D.C. Avissawella Case No. 10624/P

-Vs-

Rupasinghe Arachchige Ason Singho,

Waga, Mavilgama.

and others

PLAINTIFF - RESPONDENT

1A. V.R. Rupasinghe,

Kosgama.

DEFENDANT - RESPONDENT

and others

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Anura Gunaratne for the Substituted 5A and 7A Defendant-Appellants.

Rohana Deshapriya for the 1st Defendant-Respondent.

Kapila Sooriyaarachchi with Dilini Wijesekara for the 8A Defendant-Respondents.

Argued on	:	04.09.2015
Written Submissions on:		19.10.2015 (For the 1st, 5th and 8th Defendant-Respondents)
Decided on	:	08.06.2016

A.H.M.D. NAWAZ, J.

The issue in this case revolves around an interpretation of Sections 25(2) and (3) of Partition Law, No. 21 of 1977 as amended. Here is an appeal of two Defendant-Appellants namely the 5A and 7A Defendant-Appellants (hereinafter sometimes referred to as "the Appellants") who neither filed a statement of claim nor raised any point of contest but they have sought to impugn the judgment of the learned Additional District Judge of Avissawella dated 08.10.1999. Be that as it may, the 8A Defendant-Respondent has raised a preliminary objection to the maintainability of the appeal on the premise that the Appellants lack *locus standi* as they have failed to agitate their claims before the District Court by way of a statement of claim and points of contest.

This partition suit has had a long and chequered history. It began in 1962 when five Plaintiffs (Plaintiff-Respondents) by their plaint dated 26.03.1962 instituted this action to partition a land called "*Hikgahawatte Kebelle*" as more fully described in the schedule to the plaint. The original 5th and 7th Defendants who are represented before this Court by 5A and 7A Defendant-Appellants had been allotted entitlements in the plaint (1/27th each of the corpus sought to be partitioned) but as I stated, they did not file any statement of claim in the District Court. The trial itself began on 20.07.1973 and the interlocutory decree entered in the case was set aside by the Court of Appeal on 25.05.1982 and the Court that comprised Atukorale J. and G.P.S. De Silva J. (as he then was) directed a fresh trial to be held-vide pp386-389 of the original record.

A commission had been issued to a licensed surveyor Sinnatamby Singanayagam to carry out a preliminary survey and accordingly Plan No. 721 and report of the Commissioner dated 15.01.1963 were filed of record.

Filing an amended statement of claim dated 29.05.1989, the original 8th Defendant (who is now represented by the 8A Defendant-Respondent before this Court) claimed that Lot 1 which is known as *Kankanigewatte* and depicted as such in the preliminary plan bearing No. 721 (marked as X) is a different land and therefore it should be excluded from the subject-matter sought to be partitioned in the case. In fact when one peruses the report filed by the commissioner along with his preliminary plan, one finds a reference to Lot 1 which the commissioner states to be in the possession of the original 8th and 9th Defendants. The original 8th Defendant also claimed that his predecessor in title had prescribed to Lot 1 and he had also succeeded to this lot by way of a deed of gift made in his favour as far back as 16.05.1937. So the case of the 8th and 9th Defendant-Respondents was that Lot 1 in preliminary plan bearing No. 721 must be excluded from the corpus sought to be partitioned in the case. It has to be stated at this stage that the preliminary plan bearing No. 721 depicted 5 lots and the contest of the 8th and 9th Defendant-Respondents was that the subject-matter for partition must be confined to a corpus comprising only Lots 2 to 5.

No Statement of Claim from the Appellants

As opposed to the position taken up by the 8th and 9th Defendant-Respondents to exclude Lot 1 and confine the partition to lots 2, 3, 4 and 5, the record pertaining to this case would demonstrate that the original 5th and 7th Defendants-the Appellants in the case before this Court, never filed a statement of claim nor did they raise any point of contest. It is the contention of the substituted 5A and 7A Defendant-Appellants that they could yet prosecute the appeal and have this matter decided on the merits despite the failure of their predecessors 5th and 7th Defendants to file their statements of claim in the District Court. Let me refer to the trial *de novo* in which the principal features relevant to the preliminary objections surface.

Trial *de novo*

Upon a perusal of the proceedings dated 20.08.1998 on which date the trial *de novo* began in the District Court of Avissawella. It is apparent that the Plaintiffs themselves raised a point of contest to the effect that the subject-matter for partition must be confined to Lots 2 to 5 as depicted in the preliminary plan bearing No. 724. By raising this issue, it is crystal clear that the Plaintiffs themselves appear to have agreed that the corpus should not incorporate Lot 1 - a position taken up by the 8A Defendant-Respondent.

According to the plaint filed in the case, the share allotment of the two Appellants was 1/27th each of the subject-matter sought to be partitioned and what in the mind of the Plaintiffs was the subject-matter that should be partitioned was made clear by the Plaintiffs when they raised issue No. 1 on 20.08.1998 namely whether, as depicted in the preliminary plan, it is only Lots 2 to 5 that should be partitioned in the case. In other words it is quite clear that by raising this point of contest, the Plaintiffs should be taken to have agreed that Lot 1 to which the 8th and 9th Defendants had staked their claim and whose exclusion they had sought, would not form part of the subject-matter sought to be partitioned in the case (*see* issue No. 1 at page 238 of the Appeal Brief). Therefore it is quite clear that the share entitlements as given by the Plaintiffs in the plaint to the respective Defendants were to flow from Lots 2 to 5.

If the Appellants before this Court- the 5th and 7th Defendants had a claim that their 1/27th entitlement each were to come from a larger land which included Lot 1, it was incumbent upon them to have their case presented before the learned District Judge and adjudicated upon on these lines. If the 5th and 7th Defendants had a claim to Lot 1, which they say should be included in the subject-matter for partition, it would go without saying that Lot 1 must be incorporated within the subject-matter to be partitioned and it was open to the Appellants to have this case presented before the learned District Judge. If it was the contention that their share entitlement was no doubt 1/27th but the 1/27th share should originate from a larger corpus namely Lots 1 to

5 and not from Lots 2 to 5, the 5th and 7th Defendants (the Appellants) could not rest content with the extent of corpus given by the Plaintiffs in their issue. The issues raised by the Plaintiffs at the trial particularly issue No. 1 were indicative of the fact that they would confine the partition suit to Lots 2 to 5. The 8th and 9th Defendants who were named by the licensed surveyor as the possessors of Lot 1 raised no issues, possibly because the Plaintiffs by implication did not include Lot 1 as part of the corpus to be partitioned. Though the Appellants had not filed their statement of claim by this stage, there was clear enough indication as to the case the Plaintiffs were proposing to present before Court and it was as plain as a pikestaff that the 8th and 9th Defendants were putting forward the identical case as regards Lot 1 namely it should be excluded. In the face of these claims unfolding at the trial, I must observe that the Appellants chose not to put forward their case either in the form of a statement of claim or a consequent point of contest. It must be stated though that the 22A and 23rd Defendants did include Lot 1 as part of the corpus-vide issue No. 5 at the trial.

The trial *de novo* began with the testimony of 1A1 substituted Plaintiff-Respondent on behalf of the Plaintiffs and their case was closed with the marking of documents from **P1** to **P4**. The 8A Defendant-Respondent namely Karunadasa Rodrigo gave evidence on the behalf of the 8th and 9th Defendants and closed their case with the marking of documents from **8V1** to **8V5**. The 22A and 23rd Defendants summoned one **Balasooriya Arachchige Leelawathi** to give evidence and upon the conclusion of the trial, the learned District Judge of Avissawella pronounced judgment dated on 09.10.1999 ordering the partition of a corpus which did not include Lot 1.

It is against this judgment that the 5th and 7th Defendant-Appellants (who are now represented by the 5A and 7A Defendant-Appellants) have preferred this appeal specifically pleading that Lot 1 should form a constituent part of the corpus. It was in these circumstances that the 8A and 9A Defendant-Respondents contend that this Court cannot proceed to hear this appeal when the case of the Appellants had not been properly placed before the learned District Judge of Avissawella.

Inclusion of Lot 1 neither pleaded nor put in issue by the Appellants

The surveyor had already reported that it was the 8th and 9th Defendant-Respondents who were in possession of Lot 1 when he carries out the preliminary survey. The 8th and 9th Defendant-Respondents prayed for an exclusion of Lot 1 in their statement of claim. The Plaintiffs confined the corpus to be partitioned to Lots 2 to 5.The 22A and 23rd Defendants included Lot 1 as part of the corpus-vide issue No. 5 at the trial. So what was in issue before the learned District Judge was whether Lot 1 should be excluded or not. However, the stark fact remains that the inclusion of Lot 1 was never prayed for by the Appellants. A statement of claim which operates as a springboard in partition law must clearly set out a prayer for what a Defendant wishes to obtain as a share, right or interest at the end of the trial. In ***Cinemas Ltd., v. Ceylon Theatres Ltd.,***[1] H.W. Tambiah J. (with T.S. Fernando J. and Manicavasagar J. agreeing) in setting out the effect of the corresponding provision of Section 19 in the repealed Partition Act No. 16 of 1951, said:

> *"On the summons returnable date, or a later date fixed by the court for the purpose, every defendant or other party to the action may file or cause to be filed in court a statement of the claims setting out the nature and extent of his right, share or interest to, of, or in the land. Any party to the action whose rightful share or interest to, of, or in the land is mortgaged or leased by an instrument registered under the Registration of Documents Ordinance should disclose or cause to be disclosed to the court the existence of mortgage or lease and the name of the mortgagee or lessee."*

In fact Section 19(1) of the prevailing Partition Law, No. 21 of 1977, mirrors the above provision:

> *(a) any defendant in the action may file or cause to be filed in Court a statement of claim setting out the nature and extent of his right, share or interest to, of or in the land to which the action relates and shall, if he disputes any averment in the plaint relating to the devolution of title file*

[1] (1965) 67 N.L.R 97

or caused to be filed in Court, together with his statement of claim a pedigree showing the devolution of title.

(b) Any party to the action whose right, share or interest to, of or in the land is mortgaged, or leased by an instrument registered under the Registration of Documents Ordinance shall disclose or cause to be disclosed to the court the existence of the mortgage or lease and the name and address of the mortgagee or lessee;

The court is empowered to decide disputes regarding the corpus of the land in case of any claim that the corpus should be enlarged or restricted. There was no such claim on the part of the Appellants that invited Court to a consideration whether the corpus should be enlarged.

What then is the consequence of the inaction of the appellants?

Consequences of Failure to File a Statement of Claim

Section 25(2) of the Partition Law, No. 21 of 1977 as amended sets out the following:

"If a defendant shall fail to file a statement of claim on the due date the trial may proceed ex parte as against such party in default, who shall not be entitled, ***without the leave of court*** *to raise any contest or dispute the claim of any other party to the action at the trial."*

Section 25(3) of the Partition Law, No. 21 of 1977 as amended is curative in the following tenor:

"A court may permit a party in default to participate in the trial after notice to the other parties to the action affected by the claim or dispute set up or raised by such party in default, on being satisfied of the bona fides of such claim or dispute, and upon such terms as to costs and filing of the statement of claim or otherwise as the court shall deem fit."

A Defendant who has not filed a statement of claim is not without a remedy. Unless and until the court has granted leave, he cannot raise any contest or dispute the claim of any other party. The Counsel for the Appellants contended before this Court that the original court permitted the Counsel for the Appellants to cross-examine the

Plaintiff and that course of action adopted by the learned District Judge was tantamount to leave being granted. I am not inclined to agree. If this view is adopted, any Defendant in default of a statement of claim may contrive to cross-examine a party through his attorney-at-law and claim that he has participated at the trial. If cross-examination is allowed to a party who has not followed the express provisions of Section 25 of Partition Law, it may be an event where a District Judge may not have foreseen fully, as the hurly burly of a trial so heavily fought before him may not have alerted him to the fact of a default unless it was brought to his notice. Section 25(2) of the Partition Law entails participation upon leave being granted to a Defendant in default and such leave cannot be implied merely because a District Judge who is quite oblivious to the default permits the Defendant to cross-examine a party. If a Defendant fails to file a statement of claim, he becomes a party in default and such default is cured only with leave being granted by court. The burden is on the defaulting Defendant to move the District Court for leave as leave is a condition precedent to participation.

Section 25(3) of the Partition Law expands on the consequences of leave being granted. Section 25(3) as set out before enumerates the steps that could be taken upon leave being granted.

A party in default must move for leave and in this case such leave was not expressly sought of the learned District Judge of Avissawella before the Counsel for the Appellants proceeded to cross-examine the Plaintiff. None of the requirements set out in Section 25 have been followed. The answers elicited in cross-examination of the Plaintiff entered the record owing to a violation of the express provisions of Section 25(2) and (3) of the Partition Law and the trial should be construed to have proceeded against the Appellants *ex parte* because evidence obtained in violation of Section 25(2) and (3) of the Partition Law was improperly and illegally received. One has to shut one's mind to this illegally obtained evidence. In any event I must observe that even the answers elicited through the Plaintiff in cross-examination do not

establish a case for inclusion of Lot 1 to the satisfaction of court. So much for the cross-examination of the Plaintiff by the Appellants.

Attempts to Cross-Examine 8th Defendant-Respondent

The Counsel who appeared for the Appellants in the original court made an attempt to cross-examine the 8th Defendant-Respondent but this application has been rejected by the learned District Judge in the interim order made on 20.05.1999 (vide p.277 of the Appeal brief).

It has to be stated that the interim order of the learned District Judge to disentitle the Appellants to cross-examine the 8th Defendant-Respondent was not appealed against. It is for the 1st time in this appeal that the Appellants call in question the propriety of the order of the learned District Judge dated 20.05.1999. Given that a party can canvass the propriety of an interim order in a final appeal, I have to bear in mind that the preliminary objection is to the effect that the Appellants have no right of appeal as they had been in default and they never followed the procedure as set out in Section 25(3) of the Partition Law to cure that default. Except for the application of the Counsel for the Appellants to cross-examine the 8th Defendant-Respondent, there is no specificity as to what contest the Appellants would be raising or which claim of any other party the Appellants would seek to dispute. A mere application to pose questions in cross-examination does not satisfy the requirement of leave that is contemplated within Section 25(2) of the Partition Law. Leave sought must be on a specific contest that a party in default wishes to raise or a claim that such party wishes to dispute. Once such a claim or contest is brought to the notice of court, leave would be granted to participate at the trial provided the other parties to the action are noticed and the *bona fides* of the claim or contest are satisfied. The Court can even order the filing of a statement of claim upon terms but in the court *a quo*, there was no attempt made to cure the default and enter into the case other than the application to cross-examine the 8th Defendant-Respondent. One cannot lose sight of the fact that a default is triggered upon a non filing of a statement of claim and the trial proceeds *ex*

parte. A defaulting party cannot proceed to cross-examine a party until the default is cured under Section 25 of the Partition Law. An application to cross-examine a party cannot be equated to an application for leave to cure default and enter into the case to raise a contest or dispute a claim. The application for leave must precede the application to cross-examine a party.

I would adopt the pertinent observations of Dheeraratne J. in the case of ***Mendis v. Dublin de Silva and two others***[2] where the learned judge stated:

> *"I find it difficult to subscribe to the proposition advanced on behalf of the appellant, that a defaulting party, who is disentitled to raise a contest or a dispute as a matter of right at the trial, acquires such a privilege once the trial is concluded."*

So the status of the Appellants as if in default has continued all the way up to the conclusion of the trial. A petition of appeal cannot cure such a default in these circumstances.

There is another reason that inclines me to uphold the preliminary objection. It is the contention of the Appellants before this Court that the corpus must be enlarged in that it should include Lot 1. This Court poses the question as to how the Appellant can seek to have Lot 1 excluded in the appellate court if he has not led any evidence at all on the exclusion of Lot 1 at the trial. Both the Civil Procedure Code and the Partition Law, No. 21 of 1977 contain salutary provisions which promote and protect the rights of parties by affording them process rights such as *audi alteram partem.* But the Appellants missed those opportunities every step of the way. I would sum up those missed opportunities. The opportunity to file a statement of claim was not availed of. Even the opportunity to cure the default was also missed. So the Appellants must be taken to be parties who just remained on record without having participated at the trial.

[2] (1990) 2 Sri.LR 249 at p 251

Section 754(1) of the Civil Procedure Code bestows a right of appeal only on a party who is *dissatisfied* with any judgment pronounced in a civil case to which he is a party. The Counsel for the Appellants argued that any aggrieved party can appeal to the Court of Appeal and in support of this proposition counsel cited the well known case of ***Bandaranaike v. Jagathsena and others***[3]-a decision of the Supreme Court which turned on the provisions of Section 260 of the Code of Criminal Procedure Act, No. 15 of 1979 which reads:

> *"Subject to the provisions of this Code and any written law every person accused before any criminal Court may of right be defended by an attorney-at-law, and every aggrieved party shall have the right to be represented in court by an attorney-at-law."*

This provision to extend the right of representation to an aggrieved party was introduced for the first time in the Code of Criminal Procedure Act, No. 15 of 1979 so that a victim who was subjected to an offence can be represented in any criminal court by an attorney-at-law. Such a right to an aggrieved party was not available in Section 287 of the repealed Criminal Procedure Code which stated:

> *"Every person accused before any criminal court may of right be defended by a pleader."*

This extension of a right made available to an aggrieved party such as a victim of an offence or a complainant in criminal case is by no stretch of imagination comparable to a party who is already guaranteed with such protections as in Section 25(2) and (3) of the Partition Law. A party *qua* Appellants who missed the opportunity of availing himself of putting forward his case in the original court cannot be treated on par with a victim of an offence who is so desirous of taking advantage of Section 260 of the Code of Criminal Procedure Act, No. 15 of 1979. If a party chooses not to make use of the curative provisions such as Section 25 of the Partition Law, he would be just a party who remained on the record without having participated at the trial. He cannot be an aggrieved or a dissatisfied the party. In those circumstances, I do not see

[3] (1984) 2 Sri.LR 397

an aggrieved party in the Appellants as the Supreme Court found one such aggrieved party in ***Bandaranaike v. Jagathsena and others.***[4] Therefore a recourse to ***Bandaranaike v. Jagathsena and others*** would amount to an attempt to compare the incomparable duo.

Who is an Aggrieved Party?

The question of whether the Appellants who remained on the record as mere parties to the case could become "aggrieved parties" can also be disposed of by recourse to the English precedent of ***In re Sidebotham***[5] which was also cited by Dheeraratne J. in ***Mendis v. Dublin de Silva and two others***[6]. In the case of ***In re Sidebotham*** Bramwell, LJ stated the general rule namely an appeal must be by the party who has endeavored to maintain the contrary of that which has taken place.[7] Further James, L.J described the attributes of a "person aggrieved" as follows:

> *"But the words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which wrongly deprived him of something, or wrongly affected his title to something."*[8]

These dicta of James L.J in ***Sidebotham, ex parte*** have been followed in ***Sevenoaks Urban DC v Twynam***[9] and ***Ealing Corp v. Jones.***[10] On the strength of the above precedents it is clear that in the context of a trial a legal grievance emanates from a cause that was placed by a party before a trier of facts who, through a misappreciation of facts or law, pronounced a decision wrongfully refusing a relief or title to which the party is entitled. If these elements are not present in a party, he has suffered no legal grievance, he has hardly suffered a *damnum*; if he alleges he has it is

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[4] *Supra*
[5] (1880) 14 Ch.D.458; also cited as *Sidebotham, Ex p.*
[6] *Supra fn* 2
[7] (1880) 14 Ch.D 458 at 466.
[8] (1880) 14 Ch.D 458 at 465.
[9] Lord Hewart C.J in (1929) 2 K.B.440.
[10] Lord Parker C.J in (1959) 1 Q.B. 384.

damnum absque injuria. A petition of appeal cannot operate as a statement of claim at this stage.

In the circumstances I hold that the Appellants have no *locus standi* to maintain this appeal and accordingly I proceed to uphold the preliminary objection and dismiss the appeal.

JUDGE OF THE COURT OF APPEAL