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

Dodangodage Don Jinadasa,
Withanaduwa,
Kalawila, Beruwala.
9th Defendant-Appellant (Deceased)
Dodamgodage Don Upul Presanna,
Withanaduwa,
Kalawila, Beruwala.
9D Defendant-Appellant

CASE NO: CALA/195/2002
DC KALUTARA CASE NO: P/4797

Vs.

Gamlakshage Don Hemechandra
Seneviratne,
Withanaduwa,
Kalawila, Beruwala.
Plaintiff-Respondent (Deceased)
Hirimuthugodage Ranjani Thilakarathne,
No. 28/8/D,
Paranawatta,
Hapugala,
Galle.
1A Plaintiff-Respondent
and several others

Before: Mahinda Samayawardhena, J.

Counsel: Manohara de Silva, P.C., with Hirosha Munasinghe for the 9D Defendant-Appellant.
Dr. Sunil Cooray with Sudarshani Cooray for the 1A Plaintiff-Respondent.

Argued on : 15.05.2018

Decided on: 25.05.2018

Samayawardhena, J.

The 1st, 3rd and 9th defendants filed this appeal with leave obtained from the order of the learned District Judge of Kalutara dated 14.05.2002 whereby the Plan No. 648B dated 27.12.2000 of D.R. Kumarage, L.S., was confirmed as the Final Partition Plan. However only the 9th defendant prosecuted the appeal.

In the Judgment dated 02.11.1987 delivered after trial, the 9th defendant was not given any soil rights in the corpus, but declared entitled to house No. 19 in Lot B of the Preliminary Plan No. 220 of E.T. Goonawardena, L.S. The appeal filed against the said Judgment by the 9th defendant was dismissed by this Court in case No. CA/732/87(F) on 11.01.1996[1] and leave to appeal sought against the said Judgment of this Court was refused by the Supreme Court on 27.06.1996 in case No. SC Special LA No. 62/96.[2]

According to Plan No. 648B, the said house No. 19 falls into Lot No. 11 allotted to the plaintiff.

[1] Appeal Brief pages 53-57
[2] Appeal Brief pages 49-50

The application of the 9th defendant before this Court in the prayer to the amended petition is to allot the portion of land where house No. 19 is situated to the 7th defendant so that he can continue to occupy the house as he is alleged to have obtained some soil rights from the 7th defendant and several others by way of Deeds executed after the Interlocutory Decree was entered. These alleged Deeds executed after the partition action was duly registered as a *lis pendens* are void as being obnoxious to section 66 of the Partition Law, No. 21 of 1977, as amended. *(Virasinghe v. Virasinghe[3])* The 9th defendant in any event does not make any claim on those Deeds in the present appeal.

It is significant to note that the 9th defendant made the same application before the District Judge (i.e. to prepare the final scheme of partition to include house No. 19 in the allotment of land to be given either to the 3rd or the 7th defendant), and the District Judge has refused that application by order dated 20.01.1998.[4] Moreover, the appeal preferred against the said order of the District Judge dated 20.01.1998[5] has been refused by this Court by Judgment dated 30.07.1998 in case No. CA/159/98(F).[6]

Thereafter proposed Final Plan No. 648 dated 28.11.1998[7] has been prepared and several parties including the plaintiff have objected to it.[8] Thereupon the District Judge has made the order dated 18.05.1999[9] whereby the learned Judge *inter alia* came to the strong findings that (a) the surveyor was wrong to have allotted the Lot to which house No.19 fell to the 7th defendant against the

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[3] [2002] 1 Sri LR 1
[4] Appeal Brief pages 673-678
[5] Appeal Brief pages 40-43
[6] Appeal Brief pages 45-47
[7] Appeal Brief page 449
[8] Appeal Brief pages 326-329
[9] Appeal Brief pages 693-696

earlier order dated 20.01.1998 and (b) the 9th defendant is also not entitled to compensation for house No. 19 in view of the order dated 26.07.1993 in Case No.3912/L (X5). It is significant to note that the 9th defendant did not file a leave to appeal application against this crucial order.

Thereafter proposed Final Plan No. 648A dated 28.08.1999[10] has been prepared in terms of the aforesaid order dated 18.05.1999 and the 9th defendant has objected to that Plan[11] on the basis that the Lot into which the house No. 19 fell was not allotted to the 7th defendant.

The impugned order dated 14.05.2002 has then been made accepting Plan No 648B as the Final Partition Plan on the simple ground that the said Plan has been prepared in terms of the earlier order dated 18.05.1999. The impugned order taken in isolation is a perfect order as the District Judge had no reason or right to make a fresh order contrary to the earlier order.

At the argument before this Court, what the Learned President's Counsel for the 9th defendant essentially did was to canvass not the impugned order dated 14.05.2002 but the earlier order dated 18.05.1999 (made more than three years before the impugned order) against which no leave to appeal was sought. Learned counsel for the plaintiff strenuously objected to that line of argument. I will leave that important question of law to be considered in an appropriate case as this appeal can be decided against the 9th defendant even if that question is answered in his favour.

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[10] Appeal Brief page 236
[11] Appeal Brief pages 346-349

It has been held in the unreported Judgment of this Court in *Bandara v. Hemalatha Kularatne*[12] that a party to a partition action who had no soil rights to the land to be partitioned (in that case a tenant) "*has no legal right to intervene in and canvass the scheme of partition.*"

In *Hamidu v. Gunasekera*[13] it was held that *"A person entitled merely to an interest in a building on a land which has become the subject of a partition action can only obtain compensation for the interest in the building, and cannot get any share of the land in the partition."*

In the instant action, the 9th defendant who does not have soil rights is not interested in compensation at all. His only plea before this Court is to allot the portion of land where the house No. 19 is situated to the 7th defendant. His application is legally untenable.

In any event, the 9th defendant is not entitled to compensation for improvements made after the Interlocutory Decree. As was held in *Podi Appuhamy v. Danial Appuhamy*[14] "*Where interlocutory decree has been entered in a partition action, a party to the decree is not entitled to claim as against the other parties the ownership of, or compensation for, improvements made on the common property subsequent to the date of the interlocutory decree*." I must add that when the Interlocutory Decree is entered is irrelevant as *"the entering of the decree is a purely ministerial act and the Interlocutory Decree when entered relates back to the date of Judgment." (Koralage v. Marikkar Mohomad*[15]*)*

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[12] CALA 66/2002 decided on 04.01.2004
[13] (1922) 24 NLR 143 at 145
[14] (1957) 59 NLR 307
[15] [1988] 2 Sri LR 299 at 305

After the Judgment in the partition action was pronounced and the Interlocutory Decree was entered, upon the 9th defendant making constructions on the land, the plaintiff has filed a separate case No. L/3912 against the 9th defendant. In that case, the 9th defendant has expressly agreed not to claim any compensation for any constructions made after the partition Judgment.[16] In view of the aforesaid settlement entered in the said case No. L/3912 and also the proceedings of the District Court in the partition action,[17] it is clear that the 9th defendant has made some constructions or substantial improvements to house No. 19 after the partition Judgment. The 9th defendant is not entitled to have compensation for those improvements.

It is true that house No. 19 was there when the preliminary survey was done as is seen from the Preliminary Plan. However no evidence has been led by the 9th defendant at the scheme inquiry to establish that what was in existence at the stage of scheme inquiry was the same house as depicted in the Preliminary Plan without any substantial alterations or improvements. There is no way to distinguish improvements made prior to and after the Interlocutory Decree. Hence the direction of the District Judge to the surveyor in the order dated 18.05.1999 not to assess building No. 19 for the purpose of payment of compensation to the 9th defendant, in the facts and circumstances of this case, is justifiable.

Taking all the circumstances into account I see no merit in this appeal. Appeal is dismissed but without costs.

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[16] Vide X5
[17] Appeal Brief page 698

Judge of the Court of Appeal