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

Kottalbadde Widanelage Dharmasena Gunasinghe (Deceased)

Kottalbadde Widanelage Wijeratne (Substituted)
Mahingoda, Eheliyagoda.

Plaintiff

Case No. C. A. 664/99(F)
D. C. Avissawella Case No. 469/P

Vs.

1. Dasanayake Ranasinghe Mudiyanseralahamilage William Richard Eheliyagoda

2. Dasanayake Ranasinghe Mudiyanseralahamilage Victor Eheliyagoda

3. Dasanayake Ranasinghe Mudiyanseralahamilage Arthur Eheliyagoda

4. Ranasinghe Arachchilage Edmond Singho

5. Ranasinghe Arachchilage James Singho

All residing in Eheliyagoda, Mahara.

Defendants

AND NOW BETWEEN

Kottalbadde Widanelage Dharmasena Gunasinghe (Deceased)

Kottalbadde Widanelage Wijeratne (Deceased)

Meegaha Arachchilage Princy Aleckman
(Substituted)
No. 75/D, Wiyalagoda Road, Eheliyagoda.

Substituted 1B Plaintiff-Appellant

Vs.

1. Dasanayake Ranasinghe Mudiyanseralahamilage William Richard Eheliyagoda

1A. Dasanayake Ranasinghe Mudiyanseralahamilage Victor Eheliyagoda

1B. Dasanayake Ranasinghe Mudiyanseralahamilage Arthur Eheliyagoda (Substituted)

2. Dasanayake Ranasinghe Mudiyanseralahamilage Victor Eheliyagoda

3. Dasanayake Ranasinghe Mudiyanseralahamilage Arthur Eheliyagoda

4. Ranasinghe Arachchilage Edmond Singho

5. Ranasinghe Arachchilage James Singho (Deceased)

5A. Janguralage Asllin Nona (Substituted)

All of Eheliyagoda, Mahara.

Defendant-Respondents

Before: Janak De Silva, J.

Counsel:

Widura Ranawaka with Menaka Warnapura for the Substituted 1B Plaintiff-Appellant

Neville Abeyratne P.C. with Kaushalya Abeyratne Dias and Shenali Gunawardena for the 1A, 1B, 2nd, 3rd, 4th and 5A Defendants-Respondents

Argued on: 06.03.2019

Written Submissions tendered on:

Substituted 1B Plaintiff-Appellant on 17.05.2019

1A, 1B, 2nd, 3rd, 4th and 5A Defendants-Respondents on 13.05.2019

Decided on: 28.02.2020

Janak De Silva J.

This is an appeal against the judgment of the learned District Judge of Avissawella dated 10.09.1999.

The plaintiff instituted the above styled action in the District Court of Avissawella seeking *inter alia* to partition the allotment of land marked Lot 1 depicted in plan no. 1604 dated 26.12.1962 made by S. R. Yapa, Licensed Surveyor situated in Eheliyagoda containing in extent A.1-R.2-P.27 morefully described in the schedule 'ඵ' to the plaint dated 27.03.1989 [page 43 of the Appeal

Brief]. The plaintiff averred that the land sought to be partitioned is a divided and a defined portion of a land called 'Kendagawapurana' alias 'Bandarapurana' alias 'Koratuwewatta' alias 'Kadewatte' morefully described in the schedule 'ඇ' to the said plaint.

It was further averred in the plaint that there is an existing action to partition Lot 3 in the said plan no. 1604 and Lot 2 in the said plan no. 1604 is seized and possessed by the villagers thus the land to be partitioned is limited to Lot 1 in the said plan no. 1604.

A commission was issued to survey the land to be partitioned. Accordingly, plan no. 3849 dated 09.04.1990 made by S. Ramakrishnan, Licensed Surveyor [page 372 of the Appeal Brief] and the surveyor's report dated 30.04.1990 [page 373 of the Appeal Brief] were produced. The land sought to be partitioned is depicted as Lots 1 and 2 in the said plan no. 3849.

The 1st – 3rd defendants filed their amended statement of claim on 12.07.1993 [page 50 of the Appeal Brief] averring that the plaintiff has fraudulently excluded Lots 2, 3 and 4 in the said plan no. 1604 from the land to be partitioned. They sought a dismissal of the action of the plaintiff.

The 4th and 5th defendants filed their statement of claim on 22.02.1991 [page 47 of the Appeal Brief] providing an alternative pedigree and claimed the buildings and cultivations in Lot 2 in the said plan no. 1604.

After a short trial, the learned District Judge dismissed the plaint holding that that the co-ownership rights of the parties to the action are not limited to Lot 1 in the said plan no. 1604 and hence the plaintiff cannot maintain the action without surveying the larger land. Being aggrieved, the plaintiff appealed.

There is no dispute that the land sought to be partitioned (i.e. Lot 1 in plan no. 1604 dated 26.12.1962 made by S. R. Yapa, Licensed Surveyor) is depicted as Lots 1 and 2 in plan no. 3849 dated 09.04.1990 made by S. Ramakrishnan, Licensed Surveyor. The contention of the defendants is that the land sought to be partitioned by the plaintiff cannot be partitioned alone as it forms part of a larger land. However, the defendants did not seek to have the larger land partitioned. They sought a dismissal of the action of the plaintiff.

The only question before this court is whether the land sought to be partitioned by the plaintiff (i.e. Lot 1 in plan no. 1604 dated 26.12.1962 made by S. R. Yapa, Licensed Surveyor or Lots 1 and 2 in plan no. 3849 dated 09.04.1990 made by S. Ramakrishnan, Licensed Surveyor) can be partitioned among the parties to the instant action without surveying and/or partitioning the larger land.

The evidence led, both oral and documentary, reveal that there had been a *rei vindicatio* action in 1964 in respect of the larger land in the District Court of Avissawella (case bearing no. 9865/L).

The said *rei vindicatio* action was instituted by the plaintiff and the father of the 1st – 3rd defendants of the instant action. The settlement entered by the learned District Judge in the said case no. 9865/L is marked as 'පැ14' [page 306 of the Appeal Brief].

A careful perusal of 'පැ14' shows that the subject matter of the said case no. 9865/L is depicted in plan no. 1604 dated 26.12.1962 made by S. R. Yapa, Licensed Surveyor as Lots 1 – 4. Under and by virtue of the said settlement, the plaintiffs of the said action (i.e. the plaintiff and the father of the 1st – 3rd defendants of the instant action) collectively became entitled to an undivided 22/24 share of Lots 1, 2 and 4 in the said plan no. 1604. They also became entitled to an undivided 1/3 share of Lot 3 in the said plan no. 1604.

Our law recognizes several ways of terminating co-ownership of a property. One such way is to institute an action under the provisions of Partition Law No. 21 of 1977 as amended. If not, all the co-owners can together dispose the co-owned property to a single person. An amicable partition is also recognized by law as a division that puts an end to co-ownership of a property [*S. J. Mas and Others v. S. R. Dias* (61 N.L.R. 116), *Appuhamy v. Premalal and Eight Others* (1984) 1 Sri.L.R. 299].

'පැ13' [page 300 of the Appeal Brief] is the plaint filed in the said case no. 9865/L. It is apparent by the contents of 'පැ13' that the plaintiffs of the said action (i.e. the plaintiff and the father of the 1st – 3rd defendants of the instant action) relied on the same deeds that were marked during the trial of the instant action in establishing their co-ownership to the larger land in order to obtain a declaration of title in their favour in the said case no. 9865/L.

However, a plan was prepared for the said case no. 9865/L dividing the larger land (which was the subject matter of the said case no. 9865/L) into four (04) allotments of land. A settlement was entered and it was read over and explained to the parties of the said case no. 9865/L. The parties have even signified their consent by signing the shorthand script of the decree [page 306 of the Appeal Brief].

Possession of divided portions by different co-owners is in no way inconsistent with common possession [*Wickremaratne and Another v. Alpenis Perera* (1986) 1 Sri.L.R. 190]. However, where co-owners executed deeds for divided shares and possessed different lots that will be indicative of the division of the entire land [*Girigoris Appuhamy v. Maria Nona* (60 N.L.R. 330)].

In view of the above, I hold that the plan prepared for the said case no. 9865/L dividing the larger land into four (04) allotments as well as the settlement entered in the same and the parties signing the shorthand script of the decree agreeing to the division are very clear evidence of the amicable termination of the co-ownership of the parties to the larger land.

Therefore, I hold that the co-ownership to the larger land came to an end when the settlement in the said case no. 9865/L was entered and it also created new co-ownership rights to the defined and divided allotments of the larger land. This is evidenced by deed no. 23052 dated 17.09.1969 (පැ22) wherein Albert Eheliyagoda (the predecessor of the 1st to 3rd defendant-respondents) expressly states that he was transferring the rights acquired by the judgment in D. C. Avissawella case no. 9865 (පැ14).

In view of the above, if the plaintiff so wishes, he is entitled to partition Lots 1, 2 and 4 in the said plan no. 1604 as he and the father of the 1st – 3rd defendants collectively became entitled to an undivided 22/24 share of the said lots. However, it does not prevent the plaintiff from instituting separate actions to partition the same. Hence the plaintiff is entitled to maintain an action to partition Lot 1 in the said plan no. 1604.

The above conclusion is based on the finding that the land sought to be partitioned is not part of a larger land. I wish to consider the position in the event that that the land sought to be partitioned is part of a larger land as submitted by the 1A, 1B, 2nd, 3rd, 4th and 5A Defendants-Respondents.

As I observed earlier, even though the defendants claimed that the land sought to be partitioned by the plaintiff cannot be partitioned alone as it forms part of a larger land, they did not seek to have the larger land partitioned. They sought a dismissal of the action of the plaintiff on the basis that he is seeking to partition only a portion of a larger land co-owned by the parties to the instant action.

Sections 19(2)(a) of the Partition Law reads –

> *"Where a defendant seeks to have a larger land than that sought to be partitioned by the plaintiff made the subject-matter of the action in order to obtain a decree for the partition or, sale of such larger land under the provisions of this Law, his statement of claim* ***shall*** *include a statement of the particulars required by section 4 in respect of such larger land ; and he* ***shall*** *comply with the requirements of section 5, as if his statement of claim were a plaint under this Law in respect of such larger land."*[Emphasis added]

The earlier legal position was that where a defendant to a partition action claims that the land sought to be partitioned is part of a larger land, he could make an application in terms of section 19(2) of the Partition Law to partition the larger land or he could move for a dismissal of the action on the basis that the plaintiff was seeking to partition only a portion of the land [*Dharmaratana Thero v. Siyadoris and Others* (1985) 2 Sri.L.R. 245].

However, later in *Soysa v. Silva and Others* [(2000) 2 Sri.L.R. 235] it was held that on a reading of section 19(2)(a) of the Partition Law, it is imperative on the part of the defendant who seeks to have a larger land than that sought to be partitioned by the plaintiff to follow the procedure laid down under sections 4, 5 and 6 of the Partition Law, which means that such defendant should act as a plaintiff in a partition action. However, *Dharmaratana Thero v. Siyadoris and Others* (supra) was not considered.

The word "shall" in its ordinary signification is mandatory though there may be considerations which influence the court in holding that the intention of the legislature was to give a discretion. But this word is not necessarily mandatory, nor always mandatory. Whether the matter is mandatory or directory only depends upon the real intention of the legislature which is ascertained by carefully attending to the whole scope of the statute to be construed [*Mahindasoma v. Maithripala Senanayake and Another* (1996) 1 Sri.L.R. 180].

In the case of *Nestle Lanka Limited v. Consumer Affairs Authority and Another* [(2005) 2 Sri.L.R. 138], Sripavan J. (as he was then) observed –

> *"The responsibility of the court is to construe and enforce the laws of the land as they are and not to legislate on the basis of personal inclinations. Thus, the function of a judge is to give effect to the expressed intention of Parliament as stated in the enactment. If the words of an Act are plain and clear, a court must follow them and leave it to Parliament to set it right rather than to alter those words to give a different interpretation."*

It is evident upon a plain reading of the preamble of the Partition Law that the intention of the legislature was to provide for the partition and sale of land held in common. Those who come before court in a partition action are those who cannot share and use the co-owned land peacefully. Therefore, when a co-owner is seeking to partition a land held in common, a duty is cast on court to accommodate such party to end the common ownership within the available legal framework. If the word "shall" is read as meaning "may", the whole of the provision in section 19(2) of the Partition Law becomes meaningless and superfluous as it will allow one co-owner to continue the common ownership of a land against the wishes of another co-owner who seeks to partition the same for the reason that it has become difficult to hold the land in common.

In view of the above, I hold that the word "shall" used in section 19(2) of the Partition Law should be read as mandatory and that it is imperative on the part of a defendant who claims that the plaintiff is seeking to partition only a portion of a larger land to follow the procedure laid down in section 19(2) of the Partition Law and move for the larger land to be partitioned. He cannot ask for dismissal of the action. Such a course of action is fair by all parties as it does not deprive the defendant of getting the larger land partitioned.

The 1st – 3rd defendants filed their amended statement of claim on 12.07.1993 and stated that the land to be partitioned should contain Lots 1 – 4 in plan no. 1604 aforesaid. Although the 1st – 3rd defendants sought to have a larger land than that sought to be partitioned by the plaintiff, they have not acted according to the provisions of section 19(2) of the Partition Law.

For all the foregoing reasons, I set aside the judgment of the learned District Judge of Avissawella dated 10.09.1999. I make further order directing the learned District Judge of Avissawella to enter fresh judgment on the merits of the case after considering the evidence already led and take further action according to law. I am moved to follow this course as the learned District Judge answered only a few of the issues relevant to the claim that only a small portion of a larger land is sought to be partitioned without answering all the other issues. If this court answers all the issues, it will be depriving parties the right of appeal they have against the judgment of the District Court after answering all issues.

The appeal is allowed with costs.

Judge of the Court of Appeal