

## NAVARATNE MANIKE VS. PADMASENA AND OTHERS

COURT OF APPEAL  
SRISKANDARAJAH. J.  
CA 1082/2003 (REV)  
DC KURUNEGALA 4530/P  
JUNE 20, 2007

***Partition Law - Section 19(3) - Section 24, Section 25(2) - Section 48 - Failure to file statement of claim - Failure to register address and tender costs - Mandatory? Due diligence - Dose Revision lie?***

The defendant-petitioner a claimant before the Surveyor was made a party - but did not file a statement of claim. He was absent on the trial dates, and judgment was entered.

It was contended that, court has failed to follow the mandatory provisions of Section 24 - which provides that Court shall give notice in writing the date of trial to all parties by registered post.

### **Held**

Per Sriskandarajah, J.

“Petitioner when complaining that the mandatory provisions of Section 24 is not complied with he should have satisfied this Court that he has furnished a registered address and tendered the costs of such notice as provided by Section 19 (3) - as he has not shown that he has furnished a registered address and tendered the costs of notice he is not entitled to claim that he was not noticed under Section 24”.

**APPLICATION** in Revision from an order of the District Court of Kurunegala.

### **Cases referred to:-**

- (1) Somawathie vs Madawela - 1982 Sri LR 15
- (2) Perera and other vs. Adline and others - 2000 3 Sri LR 93

Lakshman Perera for petitioner.

Kapila Perera for respondent.

June 20<sup>th</sup> 2009

**SRISKANDARAJAH. J.**

The above Partition action was instituted by the Plaintiff of partition the land called 'Munhena' described in the schedule to the plaint of the said Partition action. According to the said plaint the Plaintiff had been allotted  $\frac{1}{2}$  share and 1<sup>st</sup> Defendant has been allotted  $\frac{1}{2}$  share of the land described in the schedule. The plaint has described the 2<sup>nd</sup> Defendant Respondent as a person who was in forceful occupation of a portion of the land sought to be partitioned. The court issued a commission on K. Wijerathna L.C. for the preliminary survey. The surveyor has submitted to court the preliminary plan No. 173 dated 06.10.1997 and the report. The 3<sup>rd</sup> Defendant Petitioner (hereinafter referred to as the Petitioner) was a claimant at the said survey and was made a party to the said case on 07.01.1998. On that date the Petitioner obtained a date to file a statement of claim. But the perusal of the journal entries shows that the Petitioner did not file any statement of claim.

On the 1<sup>st</sup> date of trial i.e. the 30<sup>th</sup> of July 2002 and the 2<sup>nd</sup> date of trial i.e. 5<sup>th</sup> September 2002, the 2<sup>nd</sup> Defendant Respondent and the 3<sup>rd</sup> Defendant Petitioner were absent and unrepresented. As the said 2<sup>nd</sup> Defendant Respondent and the 3<sup>rd</sup> Defendant Petitioner are absent and unrepresented on the trial dates and as they have not filed a statement of claim the learned trial judge has correctly observed in his judgment that the said 2<sup>nd</sup> Defendant Respondent and the 3<sup>rd</sup> Defendant Petitioner are not contesting parties in this action.

Section 25(2) of the Partition Law Provides:

*25(2). 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.*

The 3<sup>rd</sup> Defendant Petitioner's allegation that the lie pendens has not been duly registered was not substantiated. The Land Registry extracts marked P6 shows that the lie pendens has been duly registered.

The 3<sup>rd</sup> Defendant Petitioner contended that the court has failed to follow the mandatory provisions of Section 24 which provides that the court shall give notice in writing the date of trial to all parties by registered post. The 3<sup>rd</sup> defendant Petitioner when complaining to this court that the mandatory provisions of Section 24 is not complied with, he should have satisfied this court that he has furnished a registered address and tendered the costs of such notice as provided by subsection(3) of section 19. As he has not shown that he has furnished a registered address and tendered the costs of notice he is not entitled to claim that he was not noticed under Section 24 of the said Law.

The learned District Judge after considering the evidence of the substituted Plaintiff Respondent and the 1(b) Substituted Defendant Respondent and after satisfying himself with the title of the said parties and the identity of the land to be partitioned has delivered the judgement and entered the Interlocutory Decree. In *Somawathie v. Madawela and others*<sup>(1)</sup> the court held; although Section 48 invests interlocutory and final decrees entered under the Partition Action with finality the reversionary powers of the Appeal Court are left unaffected. The position is the same under the Partition Law. In the same case the Court held the Court

of Appeal can intervene by way of revision, to prevent a miscarriage of justice. In this case the 3<sup>rd</sup> Defendant Petitioner has failed to show any ground that would have caused miscarriage of justice.

In *Perera and Others v. Adline and Others*<sup>(2)</sup> Jayawickrema, J. held:

“Although in an appropriate case this Court has jurisdiction to act in Revision and restitution-in-integrum, but where a party has deliberately not shown due diligence even after he was notified by the Surveyor to appear in Court and fails to apply to be added as a party, this Court will not exercise its jurisdiction in his favour.”

In this instant case the 3<sup>rd</sup> Defendant Petitioner has not shown due diligence even after he was added as a party to the action, under these circumstances the 3<sup>rd</sup> Defendant Petitioner is not entitled to invoke the reversionary jurisdiction of this court. For the aforesaid reasons this court dismisses this application without costs.

*application dismissed.*