VIRASINGHE
v.
VIRASINGHE AND OTHERS

SUPREME COURT
S. N. SILVA, CJ.,
BANDARANAYAKE, J. AND
YAPA, J.
SC APPEAL NO. 47/2001
CA NO. 707/93 (F)
DC COLOMBO NO. 14447/P
15 OCTOBER, 2001

Partition – Partition Law, No. 27 of 1977 – Monthly tenancy – Whether it comes within the scope of a partition action – At what stage may such claim be dealt with – Sections 5, 48 (1) and 52 of the Partition Law – Section 14 (1) of the Rent Act, No. 7 of 1972.

The plaintiff-appellant (the plaintiff) filed action for partition of a land which included premises No. 21/4, Bullers Lane, Colombo 7. The 4th defendant-respondent (the 4th defendant) claimed that he was a lessee of the premises upon an indenture of lease which had been notarially attested. At the trial of the action the 4th defendant put the lease in issue (issue No. 10) and further claimed that the Rent Act applies, that the plaintiff was estopped from denying tenancy and that he was a tenant of the co-owners of the premises (issues Nos. 11, 12 and 16). The 4th defendant also claimed that he was entitled to compensation for useful and necessary improvements which he had effected (issue No. 13).

Held:

In view of the provision of section 5 (*a*) read with section 48 (1), the claim of a monthly tenant is not within the scope of a partition action. It is not permissible to enter a finding, in a judgment, interlocutory decree of final decree, in a partition action with regard to any claim of a monthly tenant in respect of the land sought to be partitioned. Such question should be considered, if at all, at the stage of execution in terms of section 52 of the Law.

Per S. N. Silva, CJ.

> "In this instance the claims of the 4th defendant on the Indenture of Lease and compensation for improvements, have been validly brought within the partition action. But, the 4th defendant should not have been permitted to add another string to his bow by raising issues based on a monthly tenancy, being a matter in respect of which the Court could not enter a decree having finality."

Cases referred to :

1. *Peris* v. *Perera* – 1 NLR 362 at 364.
2. *Bernard* v. *Fernando* – 16 NLR 438.
3. *Seedin* v. *Thedias* – 53 NLR 63.

APPEAL from the judgment of the Court of Appeal.

Ikram Mohamed, PC with *Harsha Soza* and *A. M. Faaiz* for plaintiff-appellant.

Amarasiri Panditharatne for 4th defendant-respondent.

Cur. adv. vult.

March 22, 2002

SARATH N. SILVA, CJ.

The plaintiff instituted this action on 14. 08. 1985, in terms of partition 1
Law, No. 21 of 1977, for the sale of the land described in the 4th schedule to the plaint, subsequently depicted as premises bearing No. 21/4, Bullers Lane, Colombo 7, in the preliminary survey plan No. 3903 dated 24. 10. 1986, in extent 18 perches, which belongs in common to the 1st and 2nd defendants and himself. The plaintiff has sought a sale since a substantial house located in the premises covers almost the entirety of the land and a partition thereof is not possible.

The 1st and 2nd defendants and the plaintiff are brothers. They 10
together with another brother purchased the land in 1972 in equal shares. In 1981 the plaintiff purchased the share of the brother who

is not a party to the action and thereby became entitled to 1/2 share of the land. The 1st and 2nd defendants are entitled to 1/4 share each. Although, the proceedings in the partition action have gone on for more than 16 years, ironically there was no dispute as to the corpus, nor devolution of title according to the pedigree filed by the plaintiff and the respective shares of the parties.

Two lines of contest emerged when issues were formulated and recorded by Court, at the commencement of the trial in June, 1990.

These are issues 5-9 raised by the 3rd defendant (Bank of Ceylon) on the basis of a mortgage executed in favour of the Bank in respect of the corpus. The other, arising from the issues raised by the 4th defendant who claimed –

(i) that he was a lessee of the premises upon Indenture of Lease bearing No. 74 attested by S. Thurairajah, NP. (issue No. 10).

(ii) that, the Rent Act of 1972 applies in respect of the premises; the plaintiff is estopped in law from denying tenancy and that he is a tenant of the co-owners of the premises (issues Nos. 10, 11, 12 and 16).

(iii) that he has effected useful and necessary improvements to the premises and is entitled to compensation (issue No. 13).

Since there was no contest as to the devolution of title and the shares, the trial related to the aforesaid lines of contest.

At the conclusion of the trial, it was held that no money was due to the Bank on the mortgage. The Bank (3rd defendant) did not appeal from these findings and dropped out of the case. As regards the Indenture of Lease relied on by the 4th defendant, it was held that

the lease was executed after the *lis pendens* was registered and as such was void in terms of section 66 (2) of the Partition Law. This is undoubtedly so, and the 4th defendant has not appealed from these findings. As regards the claim for compensation, the Court has held that the documents produced as to the expenditure have not been proved and the 4th defendant failed to establish that he got the consent of the plaintiff and the 1st and 2nd defendants to effect any improvements. Therefore, these issues were also answered against the 4th defendant and he has not appealed from the findings.

The issues as to tenancy have been answered in favour of the 4th defendant and it was held that the Rent Act applies in respect of the premises and that he is the tenant of the co-owners (issues No. 10, 11, 12 and 16). The plaintiff appealed from the said findings to the Court of Appeal. The appeal was dismissed by the Court of Appeal.

This Court granted leave to appeal on questions raised in the petition of appeal as to the findings on tenancy; alternatively on the question whether the matter of a monthly tenancy can come within the scope of a trial in a partition action and whether such question should be considered, if at all, at the stage of execution in terms of section 52 of the Partition Law.

I would deal with the alternative question first since, if the matter of a monthly tenancy cannot come within the scope of a partition action and should be properly dealt with, if at all, at the stage of execution, we do not have to examine the merits of the findings of the District Court in regard to issues relevant to tenancy.

As the question involves the scope of a trial and the procedure in a partition action, it has to be dealt with on the basis of a conspectus of the applicable law. The history of this type of action and its evolution

which can be described as unique to this country, can be traced through the plethora of judgments on the subject, over the years.

Common ownership of property may arise from inheritance or from other means of acquisition of property. As pointed out by Bonser, CJ., in one of the early judgments in *Peris v. Perera,*[1] the common law of the Island differing from the English common law set its face against co-ownership and provided for two actions for division, that of, *familiae erciscundae and communi dividundo.* The former having application to the case of co-heirs and the latter to the case of co-owners who have become so otherwise than by inheritance. These two common law actions were replaced by the statutory action provided for in Ordinance, No. 21 of 1844, which gave a right to a co-owner to institute an action to compel the partition of co-owned property or, to compel sale where partition would be injurious or impossible. From a socio-legal perspective it is interesting to note that the recital to Ordinance, No. 21 of 1844 stated that –

> "the undivided possession of landed property is productive of very injurious consequences to inhabitants of the colony . . .".

It is a matter of common knowledge even one and half centuries later the situation remains the same with many festering disputes between persons that stem from common ownership of property. Be that as it may, the point I note, is that from its inception the action has been for the severance of common ownership of immovable property.

The formal procedure in a partition action with the first stage of an interlocutory decree deciding on the respective rights and shares, followed by a scheme of partition and a final decree declaring ownership of divided lots, which is preserved in the currently applicable Partition Law, No. 21 of 1977, (as amended by Acts 5 of 1981, 6 of 1987,

32 of 1987 and 17 of 1997); was introduced by Ordinance, No. 10 of 1863.

The characteristic feature of a partition action and its consequences as noted by Sampayo, AJ. in *Bernard* v. *Fernando,*[2] and by Rose, CJ. in *Seedin* v. *Thedias*[3] is that – "Partition decrees are conclusive by their own inherent virtue, and do not depend for their final validity upon anything which the parties may or may not afterwards do. They are not, like other decrees affecting land, merely declaratory of the existing rights of parties *inter se.* They create a new title in the parties absolutely good against all other persons whosoever".

Thus, a partition action transcends the characteristic of an *inter partes* action with a decree binding only on the parties and their successors in interest and, acquires the characteristic of an action *in rem* resulting in title good against world.

The significance of a partition action and its proceedings stems from the finality of the decrees that are entered in the course of such an action. They are, the Interlocutory decree entered in terms of section 26 of the Partition Law, which decides on the rights in respect of land and the shares and which may include an order for sale of the land in the whole or in lots and the final decree entered in terms of section 36, which confirms the scheme of partition of the corpus into specific lots to which the respective parties are entitled to.

The finality of these decrees is stated in section 48 (1) and the portion relevant to the matter at issue in this appeal provides that these decrees –

> "shall . . . be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes . . .".

It is further provided that –

"the right share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree."

The encumbrances that may come within the purview of a decree are defined in the subsection to mean –

"any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month."

Thus, it is seen that the Partition Law makes the same distinction as section 2 of the Prevention of Frauds Ordinance of 1840 as amended, in respect of the type of lease that would not be considered as an encumbrance affecting land. In both laws, whilst a lease for a specified period exceeding one month is considered an encumbrance affecting land and should be notarially executed, a lease at will or for a period not exceeding one month (same language used in both laws) is not considered an encumbrance affecting land.

Therefore, it is not permissible to enter a finding, in a judgment, interlocutory decree or final decree, in a partition action with regard to any claim of a monthly tenant in respect of the land that is sought to be partitioned.

A partition action as noted above is designed to terminate co-ownership of immovable property. The scope of the trial in such an action is the examination of the title to, any right, share and interest in the land claimed by the respective parties. The scope could extend to the examination of encumbrances that pertain to such right, share

or interest. The decree has the effect of wiping out encumbrances as are not specified therein. It is for this reason that persons who have any interest on the basis of encumbrances that pertain to title should be disclosed as necessary parties in terms of section 5 (*a*). Significantly, a person having a claim in respect of a lease at will or for a period not exceeding one month, is not necessary party to the action.

The provisions of section 5 should be construed in the light of the definition of "encumbrances" as contained in section 48 (1) and the reference to a "lease" in section 5 (*a*) should be limited to a lease 160
for a specified period exceeding one month which has to be notarially executed in terms of the Prevention of Frauds Ordinance.

Section 14 (1) of the Rent Act, No. 7 of 1972, also postulates that rights of a tenant as provided for by the Act are not affected by a decree in a partition action.

The clearly structured procedure of a partition action and the sanctity attaching to decrees that are entered in such an action, require that its scope should be restricted to the matters in respect of which under the law the decrees will have finality. A Court should desist from embarking on a trial as to claims in respect of which it 170
is not empowered to enter a decree having a finality.

In this instance the claims of the 4th defendant on the Indenture of Lease and compensation for improvements, have been validly brought within the partition action. But, the 4th defendant should not have been permitted to add another string to his bow by raising issues based on a monthly tenancy, being a matter in respect of which the Court could not enter a decree having finality.

The law contains adequate provisions to safeguard the interests of a monthly tenant and to protect him from unlawful eviction at the stage of execution. 180

Sections 52 (2) (*a*) and (*b*) of the Partition Law provides specifically as follows:

> 2 (*a*) Where the applicant for delivery of possession seeks to evict any person in occupation of a land or a house standing on the land as tenant for a period not exceeding one month who is liable to be evicted by the applicant, such application shall be made by petition to which such person in occupation shall be made respondent, setting out the material facts entitling the applicant to such order.
>
> (*b*) After hearing the respondent, if the Court shall determine that the respondent having entered into occupation prior to the date of such final decree or certificate of sale, is entitled to continue in occupation of the said house as tenant under the applicant as landlord, the Court shall dismiss the application, otherwise it shall grant the application and direct that an order for delivery of possession of the said house and land to the applicant do issue.

Section 52 (2) (*a*) appears to contemplate a situation where the applicant for an order for delivery of possession recognizes the person in occupation as a tenant but moves for eviction on the basis that he is not entitled to continue in occupation of the house as a tenant under the applicant as landlord. If, however, the applicant, on the premise that he does not recognize the person in occupation as a tenant, moves for an order for the delivery of possession in terms of section 52 (1), any person in occupation who claims to be a tenant entitled to continue such occupation of the house as tenant under the applicant as landlord, could resist the Fiscal and seek hearing from Court to establish his right in terms of section 52 (2) (*b*).

This provision incorporates the rule of *audi alteram partem* being a principle of natural justice and should be given effect to whenever

invoked by a party entitled to such hearing, whether he is named as a respondent or not in the application. 220

The foregoing analysis shows that the genuine claims of a tenant who is entitled to continue in occupation in that capacity under the applicant as landlord, are well safeguarded by the provisions of sections 48 (1) and 52 (2) of the Partition Law read with section 14 of the Rent Act.

It would be inconsistent with the scheme of the Partition Act and the provisions in the Rent Act to bring the claim of a monthly tenant within the scope of trial in a partition action.

Accordingly, I allow the appeal and set aside the findings of the District Court in respect of issues Nos. 10, 11, 12 and 16 on the 230 basis that these issues should not have formed the subject-matter of the trial in the partition action.

The judgment of the Court of Appeal is also set aside. The 4th defendant-respondent will pay a sum of Rs. 15,000 as costs to the plaintiff-appellant and also bear the costs of contest in the District Court.

BANDARANAYAKE, J. – I agree.

YAPA, J. – I agree.

Appeal allowed.