

TISSERA AND OTHERS
vs.
LEELAWATHIE AND OTHERS

COURT OF APPEAL
WIMALACHANDRA J.
C. A. 2163/2002
D. C. NEGOMBO 2243/P
JULY 27, 2004

Partition Law, 21 of 1977 - Section 25(3) - Lot claimed exclusively by certain Defendants - No Statement of Claim filed - Claimant absent on the date of trial - Settlement by other parties - Duty of Court to investigate title - In what circumstances should a party be permitted to file a Statement of Claim under Section 25(3)?

At the preliminary survey, a certain Lot (1) was exclusively claimed by the Defendant-Petitioner as no other party claimed the said Lot, no Statement of Claim was filed. On the date of trial, the Defendant-Petitioners were absent, and the parties entered into a settlement, with the Plaintiff being given a portion of Lot 1 - though all the parties conceded that Lot 1 was exclusively possessed by the Defendant Petitioners.

The application under Section 25(3) of the Partition Act by the Defendant

Petitioners was rejected by the trial Court.

HELD

- (i) It is to be observed that it is only the Defendant Petitioners, who claimed Lot 1 in the Preliminary Plan, and had claimed exclusive rights to same before the Surveyor, and if they are not before Court, it is not proper for the Judge to allow a compromise between parties present in Court, so as to permit the Plaintiff to have a portion of Lot 1.
- (ii) Language of Section 25 is wide enough to provide the Court with wide powers to examine the right, title and interest of each party and hear evidence in support thereof. The Court may permit, under section 25(3), a party in default to file a Statement of Claim if that party establishes the *bona fide* of his claim, upon such terms as to costs or otherwise as the Court shall deem fit.
- (iii) The Court has given its consent to a settlement thereby allowing the Plaintiff to have a portion of Lot 1, this settlement is prejudicial to the rights of the Defendant-Petitioners who had claimed Lot 1 exclusively.

AN APPLICATION in Revision from an Order of the District Court of Negombo.

Case Referred to :

1. *Cathirina vs. Jamis* - 73 NLR 49.

Padmasiri Nanayakkara with Ms Indika de Alwis for 3rd and 4th Defendant Petitioners.

Sanjeewa Dissanayake for Plaintiff Respondent.

September 10, 2004.

WIMALACHANDRA, J.

This is an application in revision from the order dated 15.02.2002 made by the learned District Judge of Negombo, refusing leave to file statement of claim made by the 3rd and 4(a) defendants in terms of Section 25(3) of the Partition Act.

Briefly, the facts relevant to this application as set out in the petition are as follows:

The plaintiff instituted this partition action in the District Court of Negombo

to partition the land called and known as "Dewatagalakurunduwatte". The Court issued a commission to a surveyor to carry out a preliminary survey. The preliminary plan No. 2843 made by the Commissioner was duly transmitted to the Court along with a report and a certified copy of his field notes. The lot (1) of the plan 2943 (marked X2) was exclusively claimed by the 3rd and 4(a) defendants. No other party disputed the claim of the 3rd and 4(a) defendants to the lot (1). Since no claim was made by any other party to lot (1) of the preliminary plan 'X2', the 3rd and 4(a) defendants did not file a statement of claim. It is to be noted that no party has made any claim to lot No. 1 in their statements of claim.

When the case was taken up for trial on 11.09.1998, the plaintiff, 1st, 2nd, 6th, 7th and 8th defendants were present in Court and the 3rd, 4th and 5th defendants were absent and unrepresented. The plaintiff and the other parties who were present in Court reached a compromise in respect of their disputes as to the *corpus* and settle it among the parties present before any evidence was led. This settlement was effected with regard to 1/3rd of the land. A commission was issued to a surveyor in terms of the said settlement to prepare a plan. When the case was called on 04.07.2001, a comprehensive settlement was entered into between the plaintiff and the 1st, 2nd, 5th, 6th, 7th, 8th and 9th defendants. The 3rd and the 4(a) defendants were not present. According to this settlement, the lot (2) was given to the 1st defendant, lot (4) to the 7th, 8th and 9th defendants and the plaintiff was given Lot 5 and a portion of Lot (1) of the preliminary plan. It is to be noted that, according to the preliminary survey report all the parties conceded that the lot (1) was exclusively possessed by the 3rd and the 4(a) defendants and did not make any claim to it.

It is to be observed that it is only the 3rd and the 4(a) defendants who claimed the lot (1) in the preliminary plan. When it appears that the 3rd and the 4(a) defendants who were in possession and had claimed exclusive rights to Lot (1) before the surveyor are not before the Court, it is not proper for the Judge to allow a compromise between the parties present in Court, so as to permit the plaintiff to have a portion of Lot (1). In my view, since this action being a partition action it is the duty of the Judge to bring the parties who had claimed exclusive rights and were in exclusive possession of lot (1), although the case had reached the trial stage. The law requires the Court to examine the rights of each party. It appears that when the learned Judge made the said order allowing the plaintiff to have a portion of Lot (1), he had not considered the fact that only the 3rd and 4(a) defendants had made their claim to lot (1) before the surveyor which had been in their possession.

In the impugned order the learned Judge has stated that the 3rd and 4(a) defendants failed to give valid reasons to the satisfaction of Court to permit them to file their statement of claim.

In the case of Cathrina Vs. Jamis⁽⁹⁾ it was held that when a defendant in a partition action fails to file a statement of claim on the due date, an *ex parte* hearing and disposal of his case are not authorised by the law.

At page 51, H. N. G. Fernando, C.J. said :

"The Partition Act, while it entitles a defendant to file a statement of claim and requires him to file a list of documents on which he proposes to rely, does not declare that a party may not prove his rights at the trial unless he has previously filed a statement of claim and a list of documents. If, for instance, a defendant relies solely on prescription, there is no provision in the (Partition) Ordinance which expressly prevents him from leading evidence at the trial to establish his right."

In the instant case the learned Judge has dismissed the 3rd and 4(a) defendants' application made in terms of Section 25(3) of the Partition Act, on the ground that they have failed to establish a *prima facie* right, share or interest in lot (1) of the *corpus* and that the application of the 3rd and 4(a) defendants was not made *bona fide*.

However, the language of Section 25 is wide enough to provide the Court with wide powers to examine the right, title and interest of each party and hear and receive evidence in support thereof. In terms of Section 25(3), the Court may permit a party in default to file a statement of claim if that party establishes the *bona fides* of his claim and upon such terms as to costs and filing of a statement of claim or otherwise as the Court shall deem fit.

The learned Judge in his order has failed to assess the fact that the 3rd and 4(a) defendants have been in exclusive possession of the lot (1) of the *corpus* and the fact that none of the parties had claimed any right, title or interest to lot (1). As the circumstances suggest, the 3rd and 4(a) defendants may be having prescriptive rights to lot (1).

Besides, the Court has failed to consider the compromise entered into

between the plaintiff and the 1st, 5th, 6th, 7th, 8th and 9th defendants, on 04.07.2001 (marked S17), where in the parties agreed to allow the plaintiff to have a portion of lot (1). The Court has given its consent to this settlement thereby allowing the plaintiff to have a portion of lot (1). This settlement is prejudicial to the rights of the 3rd and 4(a) defendants who claim lot (1) exclusively.

In these circumstances I am of the view that the learned Judge should have allowed the 3rd and the 4(a) defendants to file a statement of claim on such terms as to costs etc. which would have allowed them to participate in the trial, at least to establish a prescriptive right.

For these reasons the order of the learned District Judge dated 15.02.2002 is set aside and the learned Judge will now entertain the statement of claim subject to costs etc. in terms of Section 25(3) of the Partition Act.

Application allowed,

Defendant petitioners permitted to file statement of claim.
