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**YANOOS  
VS  
ZIARD AND OTHERS**

COURT OF APPEAL  
SOMAWANSA, J (P/CA) AND  
WIMALACHANDRA, J,  
CALA 450/2004  
D. C. COLOMBO 18591/99P

*Partition Law, section 26(2) b - Sale of corpus - Apartment Ownership Law, No. 11 of 1973, section 23 - Applicability ? - Old building - Condominium plan – Duty of court*

The plaintiff-respondent sought to partition the land and premises which consisted of a four storeyed building. At the trial as there was no contest, the plaintiff respondent invited court to act in terms of section 26(2) b - sale of corpus. The trial judge directed the sale of the corpus. The 4th defendant petitioner after obtaining a report from a Licensed Surveyor, moved court to act under the provisions of the Apartment Ownership Law. It was contended that the provisions of this Law was not brought to the notice of Court and sought the possibility of dividing the corpus amongst the co-owners. The trial judge rejected the application - On leave being sought -

**HELD:**

- (i) The property sought to be partitioned is not a building registered under Law, No. 11 of 1973 and no application had been made to register a condominium plan. Therefore section 23 of the said Law is not applicable.
- (ii) In any even the possibility of registering the building under the Law is very remote as the building in suit is more than 75 years old.

*Per Somawansa, J. P/CA.,*

"As the land and the building is not registered as a condominium property under the Apartment Ownership Law the District Judge was not obliged to go on a voyage of discovery on his own to consider the applicability of the said Law."

**APPLICATION** for leave to appeal from an order of the District Court of Colombo.

*Sanath Jayatilake* for 4th defendant petitioner.

*M. Farook Thahir* for plaintiff respondent.

June 22, 2005,

**SOMAWANSA, J.(P/CA),**

This is an application for leave to appeal against the order of the learned District Judge of Colombo dated 10.11.2004 refusing and rejecting the application of the 4th defendant-petitioner to inquire into the possibility of having the corpus partitioned amongst the parties to the action in terms of the Apartment Ownership Law, No. 11 of 1973 as amended.

The relevant facts are the plaintiff-respondent instituted the instant action in the District Court of Colombo seeking to partition the land and premises which consisted of a four storeyed building situated at Prince Street, Pettah, Colombo 11 morefully described in the schedule to the plaint.

When the trial was taken up all parties were represented by counsel and all of them informed Court that there was no dispute as to title or the identity of the corpus among the parties and sought permission of Court to lead evidence of the plaintiff-respondent and accordingly no points of contest were raised and the plaintiff-respondent's evidence was led. The plaintiff-respondent having given evidence as to the chain of title invited Court to act in terms of Section 26(2) (b) of the Partition Act and sought an order of sale of the corpus. There was no cross examination by any party on any point. Accordingly the learned District Judge by his judgment dated 13.05.2004 directed the sale of the corpus in terms of Section 26(2) (b) of the Partition Law. He further directed the entering of interlocutory decree in terms of the judgment and the issue of a commission to auction the corpus.

It is the position of the 4th defendant-petitioner that being perturbed with this order he sought advice and was advised that all parties had made a genuine mistake in coming to the conclusion that there was no alternative to the sale of the property but that there was an alternative in that in terms of Apartment Ownership Law, No. 11 of 1973 as amended there was a possibility of dividing the corpus amongst the parties which angle had not been examined as none of the parties nor the learned District Judge lent their minds to this aspect of the matter. The 4th defendant-petitioner thereafter obtained a report from a Licensed Surveyor who expressed the opinion that the corpus could be dealt with under the terms of Apartment Ownership Law, No. 11 of 1973 as amended. Accordingly the 4th defendant-filed a motion dated 16.08.2004 marked X2 and on direction from Court filed a petition and affidavit dated 25.08.2004 whereby he brought to the notice of Court that the possibility of dividing the corpus amongst the co-owners has not been considered by the parties and hence not considered by Court. The existence of Apartment Ownership Law, No. 11 of 1973 as amended has not been brought to the notice of Court and hence the possibility of having a building plan approved under the said law had not been considered and that the market price of the building will be adversely effected by the presence of so many tenancies and the price would be very much less than if it was otherwise. He further alleged that grave and irreparable loss and damage will be caused to the parties if the matter of the possibility of the approval of a condominium plan is not considered.

At the inquiry into this application, the learned District Judge had directed parties to tender written submissions if they so desired but the record does not indicate that the 4th defendant-petitioner sought to lead evidence of an expert or that the learned District Judge expressed the view that there was no need for oral evidence as the matter in issue is purely a question of law. The learned District Judge having considered the written submissions tendered by both parties by his order dated 10.11.2004 dismissed the aforesaid application of the 4th defendant-petitioner. It is this order that the 4th defendant-petitioner is seeking to set aside and vacate.

As stated above it is to be noted that at the trial all parties were present and were represented by counsel and all of them including the 4th defendant-petitioner and his counsel informed Court that there was no contest as to

shares or any other matter. It was also agreed by all parties that the property sought to be partitioned cannot be divided. The plaintiff-respondent in her evidence stated that the four storeyed building is more than 75 years old and is not possible to be divided or partitioned amongst the co-owners and prayed that the property be sold in terms of Section 26(2) (b) of the Partition Law. The plaintiff-respondent was not cross-examined by the counsel for the 4th defendant-petitioner or for that matter by any other counsel. The learned District Judge in his judgment refers to the preliminary survey report prepared by P. W. Fernando, Licensed Surveyor wherein he states that the building is very old which cannot be partitioned. The 4th defendant-petitioner was present when the Surveyor came for the survey.

The 4th defendant-petitioner in his application to the original Court as well as to this Court refers to the Apartment Ownership Law, No. 11 of 1973 as amended and states that there was a possibility of dividing the corpus. However it is common ground that the property sought to be partitioned is not a building registered under the Apartment Ownership Law, No. 11 of 1973 as amended and no application had been made to register a condominium plan. Therefore Section 23 of the Apartment Ownership Law, No. 11 of 1973 has no application to the property sought to be partitioned and in any event the possibility of registering the building under the aforesaid Apartment Ownership Law, No. 11 of 1973 as amended is very remote for the simple reason that the building in suit is more than 75 years old.

It is also contended by counsel for the 4th defendant-petitioner that parties had made a genuine mistake in agreeing to sell the property. However it is to be noted that the plaintiff-respondent and the other defendants-respondents do not concede that they have made a genuine mistake nor do they consent to the application made by the 4th defendant-petitioner. It is only the 4th defendant-petitioner who seeks to have the building registered under the Apartment Ownership Law, No. 11 of 1973 as amended and partitioned.

The 4th defendant-petitioner has in order to support his belated claim obtained a report from S. Rasappa, Licensed Surveyor who has expressed an opinion that the corpus could be dealt with under the terms of the Apartment Ownership Law which I must say appears to be a self serving document specially obtained by the 4th defendant-petitioner and not made available to this Court. In the circumstances, I have no opportunity

of examining this report. In any event, neither the plaintiff-respondent nor the other defendant-respondents have contested the validity of the interlocutory decree entered by Court or sought a variation of it.

It appears that only the 4th defendant-petitioner who at the trial had agreed to a sale of the property is now seeking a variation of the judgment as well as the interlocutory decree that has been entered in the action. I might say in this respect that if Courts were to entertain this type of application made by a party to a partition action simply because he has changed his legal advisors and has been advised to take a different stand to that what he agreed upon at the trial would in effect result in eradicating the finality given to the interlocutory decree as well as opening the flood gates for parties to canvass the judgment on flimsy grounds based on after thought or on ill advice received and to go back on the stand taken at the trial.

The counsel also submits that the failure to consider the Apartment Ownership Law, No. 11 of 1973 as amended makes the judgment of the learned District Judge to be a judgment *per incuriam*. There is no merit at all in this submission for the learned District Judge has based his judgment on the evidence placed before him and no party wanted the corpus to be partitioned, but all were in agreement that the corpus should be sold. In any event as the land and the building is not registered as a condominium property under the Apartment Ownership Law the learned District Judge was not obliged to go on a voyage of discovery on his own to consider the applicability of the Apartment Ownership Law, No. 11 of 1973. The allegation that the learned District Judge has failed in his statutory duty and that alone is sufficient for this Court to intervene is without any merit.

For the foregoing reasons, I have no hesitation in rejecting the application for leave to appeal. Accordingly the leave to appeal application will stand dismissed with costs fixed at Rs. 20,000.

**WIMALACHANDRA, J. -** I agree.

*Application dismissed.*