THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI ANKA

In the matter of an application for leave to appeal in terms of Section 5 c (1) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 (as amended).

1. Mapalagama Manage Nishantha Viraj,
   'Nihathamanee', Niyagama,
   Thalgaswala. (Minor)

SC Appeal No.90/2016
SC/HCCA/LA 324/12
SP/HCCA/GA/LA
Case No.14/2011
DC/GALLE Case No.10996/P

Plaintiff

By his next friend
Mapolagama Pathmini Sriyalatha,
'Nihathamanee', Niyagama, Thalgaswala.

Vs.

1. Thenuwara Acharige Sardhasena,
   'Nihathamanee', Niyagama,
   Thalgaswala.

2. L.P.Chandrasena Karunathilake,
   Gurugodella Estate, Niyagama,
   Thalgaswela.

3. Lokugamage Rupasena Karunathilake,
   Benthara Road,
   Elpitiya.

4. Sadini Maithree de Silva
   Dikwella Stores,
   Thalgaswela.

Defendants

AND

Mahagama Vidanalage Chandradasa,
'Rathna Radio Service'
Thalgaswala.

Petitioner

Vs.

Mapalagama Manage Nishantha Viraj,
'Nihathamanee', Niyagama,
Thalgaswala.

Plaintiff-Respondent

1. Thenuwara Acharige Sardhasena,
   'Nihathamanee', Niyagama,
   Thalgaswala.

2. L.P.Chandrasena Karunathilake,
   Gurugodella Estate, Niyagama,
   Thalgaswela.

3. Lokugamage Rupasena Karunathilake,
   Benthara Road,
   Elpitiya.

4. Sadini Maithree de Silva
   Dikwella Stores, Thalgaswela

Petitioner-Petitioner

Vs.

Mapalagama Manage Nishantha Viraj,
'Nihathamanee', Niyagama,
Thalgaswala.

Plaintiff-Respondent-Respondent

1. Thenuwara Acharige Sardhasena,
   'Nihathamanee', Niyagama,
   Thalgaswala.

2. L.P.Chandrasena Karunathilake,
   Gurugodella Estate, Niyagama,
   Thalgaswela.

3. Lokugamage Rupasena Karunathilake,
   Benthara Road,
   Elpitiya.

4. Sadini Maithree de Silva
   Dikwella Stores, Thalgaswela

1st to 4th Defendants-Respondent-Respondent

AND NOW BETWEEN

Mahagama Vidanalage Chandradasa,
'Rathna Radio Service'
Thalgaswala.

Petitioner-Petitioner-Petitioner

Vs.

Mapalagama Manage Nishantha Viraj,
'Nihathamanee', Niyagama,
Thalgaswala.

Plaintiff-Respondent- Respondent-Respondent

1. Thenuwara Acharige Sardhasena,
   'Nihathamanee', Niyagama,
   Thalgaswala.

2. L.P.Chandrasena Karunathilake,
Gurugodella Estate, Niyagama,
Thalgaswela.

3. Lokugamage Rupasena Karunathilake,
Benthara Road,
Elpitiya.

4. Sadini Maithree de Silva
Dikwella Stores, Thalgaswela

1st to 4th Defendants-Respondents-Respondent - Respondent

Before: Buwaneka Aluwihare, PC, J.

L.T.B.Dehideniya, J.

Murdu N.B. Fernando PC, J.

Counsels: Parakrama Agalawatta with Mohan Walpita and M.D.A.I. Gunathilake for the Petitioner-Petitioner-Appellant instructed by Lakni Silva.

Rohan Sahabandu, PC with Ms. Hasitha Amarasinghe for the Plaintiff-Respondent-Respondent-Respondent

Argued on: 30.05.2018

Decided on: 18.02.2019

L.T.B.Dehideniya J,

The Petitioner-Petitioner-Appellant (hereinafter some time called and referred to as the 'Appellant') has appealed to this court to set aside orders given by the District Court and the High Court in relation to a Partition action.

The Plaintiff-Respondent-Respondent (hereinafter some time called and referred to as the 'Respondent'), has instituted a partition action in the District Court of Galle, in respect of Lot No.3 of a land called Thalgaswala, Mathulana. This specific land includes the premises in which the appellant operates his business 'Rathna Radio Service'. Appellant states that, his father Mahagama Vidanalage Premadasa had been the monthly tenant of the said premises from about the year 1953 and the original landlord being Lokugamage Ariyadasa Karunatilaka. (Father of the 3rd Defendant Respondent). The appellant accentuates that his father, Mahagama Vidanalage Premadasa continued to stay as a monthly tenant after the death of Lokugamage Ariyadasa Karunathilaka and was not a party to the partition action and had no notice of the pendency of the partition action.

The learned district judge entered the final decree allotting 'Lot 3', where the business premises occupied by the Appellant was situated, to the Respondent. Fiscal has proceed to execute a writ of execution in respect of the subject matter of the case, but the resistance made by the appellant's father impeded the execution of the writ. The resistance was based on the fact that, 'he was the tenant of the premise'. This finally led to the institution of contempt of court proceedings against the appellant's father (Mahagama Vidanalage Premadasa). On 22.09.2008, the contempt of court proceedings were abated on the death of

Premadasa. The Appellant emphasizes his status as the 'statutory tenant' upon the death of Premadasa as there was a due maintenance of the contract of tenancy with the payment of necessary rents. The Appellant attorned to the (Plaintiff) Respondent, by letter dated 15.10.2009.

The Appellant made an application to the Rent Board of Galle, and sought a declaration that the (Plaintiff) Respondent is the 'statutory landlord' of the Appellant. The Respondent participated in the proceedings before the Rent Board, and was represented by a counsel. While the proceedings in the Rent Board were pending, the Respondent made an application to the District Court of Galle, for the re-issue of the writ of execution. The Appellant's contention is that, the mandatory procedure in the Section 52(2) (a) of the Partition Law had not been followed and further complains that the Respondent suppressed material facts including the Appellant's tenancy. Fiscal attempted to execute the writ on 26.11.2009 but the execution was aborted upon the representations of the Appellant. Consequently, the Respondent made an application against the Appellant for contempt of court. On 20.12.2009, the Learned District Judge has made an order for the service of charge sheet and summons on the Appellant, returnable on 10.02.2010. Though, the service was not effected, the Learned District Judge without ordering to re issue summons, re issued the writ of execution. The Appellant brought to the notice of court, about the non –service of summons and charges. As per the contention of the Appellant, the Respondent had acted *mala fide* in the execution of writ, suppressing material facts. On 17.05.2010, the Appellant filed an application in the District Court of Galle, and prayed that, he has a right to remain in the occupation of the premises, and the execution of the writ be stayed until the conclusion of the inquiry. He further sought, and prayed for declaration upon Appellant's entitlement to continue in occupation of the premises. Consequently, the Learned District Judge made an

order to stay the execution of writ and fixed the matter for inquiry. Consequently, the Respondent filed objections stating that, 'there are no legal provisions to have and maintain the said application of the Appellant under Section 52(2) of the Partition Law or Section 839 of the Civil Procedure Code. After considering the preliminary objections and the written submissions, the learned District Judge delivered the judgement dated 03.06.2011, and dismissed the application of the Appellant.

The Learned District Judge held that, Section 52(2)(a) of the Partition Law did not contain provisions under which the Appellant could seek relief, and there was no necessity for invoking the inherent jurisdiction of Court, in as much as an alternative remedy was available to the Appellant in the form of Section 328 of the Civil Procedure Code which provided a remedy for an ejected *bona fide* claimant. The Learned District Judge has further emphasized in the order that, it was risky to invoke the inherent jurisdiction of Court in respect of presumed contingencies.

The Appellant set an appeal to the High court, but the High Court delivered the judgement dated 27.06.2012, dismissing the appeal.

This Court granted leave to appeal to the Appellant on the following questions of law.

1) Whether the writ of execution (10996/P) of the District Court, Galle has wrongfully issued in contravention of the procedure laid down in Section 52 (2) of the Partition Law No: 21 of 1977 (amended).

2) Whether the remedy provided by Section 328 of the Civil Procedure Code is available only, to a person dispossessed of property by execution of writ

and not to a person such as the Petitioner who has been sought to be dispossessed by a writ issued contrary to the mandatory provisions of law.

3) Whether the only means available to the Petitioner to challenge the validity of the writ of execution was by invocation of the Inherent jurisdiction of Court.

4) Whether the judgements the High Court and the District Court are according to Law.

The submission made by the counsel for the Appellant, elaborates the Section 52(2) of the Partition Law No.21 of 1977 (as amended). As per the contention of the Appellant, Section 52(2) (a), affords a tenant in occupation of premises, in respect of which writ is sought to be executed, an opportunity of being heard as to why he should not be evicted. The Appellant insists on the fact, that along with the occurrence of above mentioned circumstances, he has a claim which had necessarily to be heard by the Court. The view of the Appellant is that, the Respondent recoursed to execute the writ while supressing the material facts by adhering to the Provisions of Section 52 (1) of the Partition Law. It is further submitted by the Appellant, that the Respondent could have sought to execute the writ only by having recourse to the procedure in Section 52(2) of the said Act and the Learned District Judge has erred himself when he made an order for the issue of writ without following the said procedure. The Appellant's perspective is that 'the only remedy' available to him in the face of repeated attempts of the Respondent to execute the writ without conforming to the procedure under Section 52(2) was to invoke the inherent jurisdiction of the Court. The Appellant further insists that the Learned District Judge has erred himself as he held that it was risky to invoke the inherent jurisdiction of Court in respect of a presumed future contingency.

The Learned District Judge and the High Court similarly held the view that, the Appellant could have resorted to the Section 328 of the Civil Procedure Code in the event of dispossession by execution of the writ. It has been submitted that, Section 328 of the Civil Procedure Code is available only to a person who has already been dispossessed of property by execution of writ and not to a person who confronted the situation such as the Appellant, who has been sought to be dispossessed by a writ issued contrary to the mandatory provisions of law. The Appellant has drawn the attention of the court to a Court of Appeal judgement, **Esabella Perera Hamine Vs. Emalia Perera Hamine [1990] 1Sri.LR 8**; where it has been held that,

> *'Section 52(2) of the Partition Law falls in to the category requiring naming of the Respondent. Section 52(2) (a) provides that, when it is sought to evict a person in occupation of land or house as a monthly tenant, he should be made a Respondent and the application has to disclose the material facts that entitle the applicant to secure such eviction. Section 52 (2) (b) requires that be heard before order is made- the principle of 'audi alteram partem' applies but breached. There was a failure to comply with Section 52(2) of the Partition Law. This makes the order nullity as the court had no jurisdiction. Hence, the order restoring the Respondent was correct and recourse to Section 328 of the Civil Procedure Code to recover the possession was not necessary.'*

The Appellant's contention is that, as the Respondent sought to have the writ executed by circumventing the mandatory provisions of Law by suppressing the material facts and misleading the court; the only remedy available to the Appellant to prevent the abuse of legal process was by invoking the inherent jurisdiction of Court.

The Respondent's contention in this regard is based on questions as to the applicability of certain provisions of law. The Respondent questions the applicability of Section 52 of the Partition Act to a third party or an alleged tenant. The Respondent states that Section 52 is applicable to a person who has been declared entitled to any land by any Final Decree or any person who has purchased rights in pursuance to a Final Decree to apply to Court for a declaration of possession of the land in question. The Respondent emphatically states that, the Appellant does not come under the category which the Section 52 defines, for three reasons; The Appellant alleges him to be a Tenant, he is not a party to the action and he does not have an entitlement to the corpus.

The submission made on behalf of the Petitioner- Respondent states that, according to section 52(2)(a)(b), 'if the person to be evicted is a Tenant- he should be made a Respondent, and if found to be a tenant after inquiry, the application will be dismissed and the tenant allowed to remain in occupation- who could make this application'. The Respondent's contention is that, 'the only person who could move under Section 52 is the one who got rights in respect of a portion of land or one who has purchased rights from one person-who had got a decree in his favour.' As the Respondent illustrates, the present application has been made by a person in occupation, alleging that he is a statutory tenant and seeks an order from the Court that, he is entitled to remain in possession. The contentions of the District Court and the High Court are similar stating that 'there

is no provision at all provided for such an application under section 52 for an alleged tenant to make an application under Section 52. The Respondent further emphasizes the fact, the courts did not make an error in Law in the contention of holding against the Petitioner.

The Respondent's stance is further positioned on the Inherent Jurisdiction of the Court. The Respondent further emphasizes the fact that, Inherent power of a court cannot be invoked to violate the express provisions, and as per the contentions of both the District Court and High Court, the section 338 is applicable. It is submitted that, a person who has a grievance in a partition action where a writ issued, when the fiscal seeks to evict him, he could resist if he has a claim to remain in possession. The Fiscal reports the matter under section 53 to the court, to punish the person for contempt of court. The Respondent emphasizes and directs the attention of this court to the Section 53(1) and states its applicability to a situation where an order for delivery of possession is given to the fiscal. Consequently, The Court holds an inquiry to ascertain the fact whether there is a contempt of Court. It is submitted by the counsel for the Respondent that, chapter 65 of the Civil Procedure Code, set out the procedures to be followed. It is emphasized that, the accused has a right to give evidence to show why he should not be dealt with for contempt of court. Section 797(2), specifies that if the court finds the accused is not guilty, it will dismiss the charge.

As the Respondent states, In **Esabella Perera Hamine Vs. Emalia Perera Hamine [1990] 1Sri.LR 8**; it has been stated that, Section 338 cannot be resorted to, as provision is made in the Partition Law- Section 52-to cater to a situation of a tenant. The ratio in that case is not that in every instance in a partition action-

section 52 should be resorted to evict person in possession /occupation –but it is only in cases where there is a tenant in occupation.

The Respondent illustrates by citing **Grisilda v. Baba Nona [2006] 2Sri LR253,** the inherent power could only be resorted in the circumstances, where there has been abuse of court process, where the court acted per in curiam, where there is manifest cheating or fraud, where the act of court has caused injury to a person and when there is present an incurable defect in the procedure. The Respondent emphasizes the fact that, inherent jurisdiction cannot overrule express provisions of the statutory Law. **Gunawardena v. Ferdinandis [1982] 1Sri L.R256,** where it has been stated that, Inherent powers are used, where there is no express provision in the code.

Section 52 of the Partition Act provides the procedure for *"Delivery of possession of land to parties and purchasers"*. The section reads thus;

> *(1) Every party to a partition action who has been declared to be entitled to any land by any final decree entered under this Law and every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court, shall be entitled to obtain from the court, in the same action, on application made by motion in that behalf, an order for the delivery to him of possession of the land :*
>
> *Provided that where such party is liable to pay any amount as owelty or as compensation for improvements, he shall not be entitled to obtain such order until that amount is paid.*
>
> *(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.

Under this section only two categories of persons seek Court's intervention in delivery of possession, i.e.

1) *declared to be entitled to any land by any final decree entered under this Law*

2) *every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court,*

They were authorized to move Court to put the mechanism of "delivery of possession" in to operation. The subsection 2 entered a pre-condition for the person applying for the writ of execution to inform by making him a Respondent "*any person in occupation of a land or a house standing on the land as tenant".*

In the present case the party who made the application for a writ of execution is the Respondent. He has not admitted the fact that the Appellant is a tenant of the premises. Therefore the pre-condition specified in the sub section 2 does not apply to the Respondent. He has made the application for a writ of execution without naming the Appellant as a respondent in the writ application.

Though the Appellant in the instant case claims that he is a monthly tenant, his tenancy cannot be declared in a final decree.

> Virasinghe V. Virasinghe and others [2002] 1 Sri LR 264 at 271
>
> *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 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.*

Appellant's contention it that his father was the original tenant and the writ of execution was originally issued against him. He resisted the fiscal and the writ was not executed and the contempt of Court procedure was abetted on the death of the father. Thereafter a writ of execution was issued against the Appellant and was also resisted by the Appellant. Contempt of Court proceedings are pending. The Appellant and his father established that they have a remedy.

The Appellant has no right to make an application under section 52 of the Partition Act and since he has an alternative remedy he cannot invoke the inherent power of the Court under section 839 of the Civil Procedure Code too.

I answer all questions of law in negative.

I dismiss the appeal subject to cost of this Court fixed at Rs. 25,000.00 and the Respondent is entitle to the costs of both lower courts too.

Judge of the Supreme Court

Buwaneka Aluwihare, PC, J.

I agree

Judge of the Supreme Court

Murdu N.B.Fernando, PC, J.

I agree **Judge of the Supreme Court**