

S.C.Appeal 211/14

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC  
OF SRI LANKA**

In the matter of a Leave to Appeal  
Application made under Section 5(a)  
of the High Court of the Provinces  
(Special Provisions) Amendment Act  
No.19 of 1990 amended by Act No.  
54 of 2006.

Magedera Gamage Jinapala  
Dasanayaka, No.12, Harmars Lane,  
Wellawatta.

**S.C.Appeal No. 211/2014**

**S.C.(HCCA)Leave to Appeal**

**Application No:-331/2014**

**WP/HCCA/MT/44/2011/LA**

**D.C.Mt.Lavinia case No:-1213/P**

**V.**

Magedera Gamage Nimal Dasanayaka  
(Deceased)

5(A) Hemasinghe Mudiyansele  
Swarnalatha (After marriage)  
Dasanayaka. No.90,  
Koswatta Road, Nawala.

**AND**

Hemasinghe Mudiyansele  
Swarnalatha (After marriage)  
Dasanayaka, No.90,  
Koswatta Road, Nawala.

**5A DEFENDANT-PETITIONER**

**V.**

Nagan Sinnaiah  
No.142 1/1, Galle Road,  
Colombo 6.

**RESPONDENT**

**AND**

Hemasinghe Mudiyansele  
Swarnalatha (After marriage)  
Dasanayaka, No.90,  
Koswatta Road, Nawala.

**5(A)DEFENDANT-PETITIONER-PETITIONER**

**V.**

Nagan Sinnaiyah  
No.142 1/1, Galle Road,  
Colombo 6.

**RESPONDENT-RESPONDENT**

**AND NOW BETWEEN**

Hemasinghe Mudiyanse  
Swarnalatha(After marriage)  
Dasanayaka, No.90,  
Koswatta Road, Nawala.

**5(A) DEFENDANT-PETITIONER-PETITIONER-APPELLANT**

**V.**

Nagan Sinnaiyah  
No.142 1/1, Galle Road,  
Colombo 6.

**RESPONDENT-RESPONDENT-RESPONDENT**

**BEFORE:- SISIRA J.DE ABREW, J.**

**ANIL GOONERATNE, J**

**H.N.J.PERERA, J.**

**COUNSEL:-Ikram Mohamed PC with Thisath Wijayagunawardena PC**

Nadeeka Galhena & Nirasha Nanayakkara for the 5A

Defendant-Petitioner-Petitioner-Appellant

Collin Amerasinghe with Ms.C.D.Wijayasekera for the  
Respondent-Respondent-Respondent

**ARGUED ON:-20.10.2017**

**DECIDED ON:-08.12.2017**

**H.N.J.PERERA,J.**

By the final decree entered in the Partition case bearing No.1213/P the District Court of Mount Lavinia declared that the 5<sup>th</sup> Defendant (deceased) is entitled to Lot 3070 in Final Plan No.2053. The 5<sup>th</sup> Defendant was also declared entitled in common with the 6<sup>th</sup> Defendant and the Plaintiff in the said case to Lot 3069 in the Final Plan 2053.

After the Final Decree was entered, the said Court issued writ of Possession directing the Fiscal Officer of the said Court to handover the possession of the said Lot 3070 and 3069 to the substituted 5A Defendant (wife of the 5<sup>th</sup> deceased Defendant) the 5A Defendant-Petitioner-Petitioner-Appellant (hereinafter referred to as the 5A Defendant-Appellant). When the Fiscal Officer attempted to execute the writ the Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) objected to the execution of the said writ.

Thereafter the 5A Defendant-Appellant made an application under Section 52(2)(a) of the Partition Law to eject the Respondent from the said premises and for the possession of the said lots 3070 and 3069.

The Respondent filed objections and claimed that he is a tenant of the premises situated in the said allotment No.3070 bearing assessment No.12 1/1, Galle Road, Wellawatta and that he is entitled to occupy the said premises as the tenant under the 5A Defendant-Appellant and for

the dismissal of the 5A Defendant Appellant's application. After inquiry the Learned District Judge by his order dated 28.09.2011 held that the Respondent is a tenant under the 5A Defendant-Appellant and is a protected tenant and dismissed the Petitioner's application. Being aggrieved by the said order of the Learned District Judge the 5A Defendant-Appellant made a Leave to Appeal application to the Civil Appellate High Court of Mt.Lavinia. At the said inquiry before the Civil Appellate High Court the Respondent took up a preliminary objection on the basis that the impugned order is a final order and as such leave to Appeal Application cannot be maintained.

The Civil Appellate High Court delivered order dated 16.06.2014 holding the impugned order is not a final order but dismissed the said application of the 5A Defendant-Appellant on the ground that the Respondent is a lawful tenant under the 5A Defendant-Appellant. Being aggrieved by the said order of the Civil Appellate High Court of Mt.Lavinia the 5A Defendant-Appellant has sought Leave to Appeal from the said judgment and this Court granted leave to appeal on the questions of law set out in paragraph 17 (1) to (1V) of the Petition dated 21.07.2014.

i) Has the Respondent established that he is a lawful tenant of the premises in question within the meaning of Section 52(2)(b) of the Partition Law?

II) Even if the Respondent is a lawful tenant in view of the admission by the Respondent that premises in question is a business premises, is he not entitled to continue to occupy the premises in terms of Section 52(2) of the Partition Law read with Section 14(1) of the Rent Act?

(III) Is the right granted by Section 52(2)(b) to continue in occupation of a premises available only to a tenant of a house as opposed to a business premises?

(IV) Is the burden of proof in terms of Section 52(2)(b) to establish that an occupant is entitled to continue to occupy, on the occupant who claims to be the tenant entitled to continue to occupy under that Section?

Section 52(2) of the Partition Law read as follows:-

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 to issue.

It was contended on behalf of the 5A Defendant- Appellant that an application made under section 52(2)(a) of the Partition Law shall be dismissed only where the Respondent satisfy Court that he is entitled to continue in occupation of the **house** in question. It was the position of the 5A Defendant-Appellant that the protection under section 52(2)(b) of the Partition Law extends only to tenants of houses and not to the tenants of Business Premises.

The title of the plaintiff in this case is not in dispute. The Respondent's contention is that he is the tenant of the premises in suit. It is an admitted fact that "Deluxe dry cleaners" is a business carried on by the Respondent and that he was carrying on the said business even when the

Partition action was pending. It is also accepted that “Deluxe dry cleaners” was also carried on in the premises by the Respondent that was allotted to the 5<sup>th</sup> Defendant in the Final decree.

In *Munidasa & Others V. Nandasena* (2001) 2 S.L.R 224, it was held that the Partition Law provides a specific remedy, and the Plaintiff-respondent is not entitled to resort to provisions of the Civil Procedure Code. It was further held that the provisions of the Partition Act are mandatory provisions and provides a simple and easy remedy of obtaining delivery of possession.

In the instant case the 5A Defendant-Appellant has made an application under section 52 (2)(a) of the Partition Act to obtain possession of the said premises which is allocated to him by the Final decree of the said Partition action.

The aforesaid section 52(2)(a) of the Partition Law which the application was made reads as follows:-

“Where the applicant for delivery of possession **seeks to evict** any person in occupation of a land or house standing on the land as tenant for a period not exceeding one month who is liable to be evicted by the applicant ...”

The learned President’s Counsel for the 5A Defendant-Appellant submitted that protection under section 52(2)(b) of the Partition Law extends only to tenants of houses and not to tenants of business premises. It was the contention of the Counsel for the Respondent that the aforesaid argument is not tenable as the application has been under section 52(2)(a) of the Partition Law which also fails to include tenants of business premises by the words. It was further contended that if the aforesaid argument for the 5A Defendant-Appellant is accepted then the said application is not in accordance with the provisions of the said

section 52(2)(a) and should fail to invoke the jurisdiction of the original Court in respect of the Respondent who was not a party to the Partition action.

In *Virasinghe V. Virasinghe and Others* [2002] 1 Sri.L.R 264 it was held that section 52(2)(a) appears to contemplate a situation where the applicant for an order of 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.

This application has been made by the 5A Defendant-Appellant under section 52(2)(a) of the Partition law. This is not an application made under section 52(1). It is stated in paragraph 6 of the affidavit of the 5A Defendant-Appellant dated 06.10.2008 that she earlier made an application under section 52(1) of the Partition Law to evict the Respondent and as the Respondent had claimed that he is a tenant of the 5A Defendant-Appellant she was compelled to make the present application under section 52(2)(a) of the Partition Law.

It is submitted on behalf of the Respondent, that the Final decree in the Partition action was entered in 11.11.1991 and the 5A Defendant-Appellant by her Attorney-at-Law by a letter under registered post, dated 22.10.1997 marked V1 invited the Respondent to attorn to the 5A Defendant-Appellant where the acceptance of the offer is depicted in the letter dated 27.07.1998 of the 5A Defendant-Appellant's Attorney-at-Law that refers to the remittance of Rs.12,500/- by cheque and by telegraph money orders of Rs.2500/- each by the Respondent. It is the position of the Respondent that the said offer was never withdrawn hence the offer and the acceptance caused a new contract.

The final decree in this case was entered on 11.11.1991. The undisputed facts in this case clearly establish that the Respondent was in possession



of the said business premises as a tenant of the 5<sup>th</sup> Defendant (deceased) since 1968. The Respondent was a tenant of the 5<sup>th</sup> Defendant (deceased) on the block of land allotted to the 5<sup>th</sup> Defendant (deceased) in the said final decree of the Partition action carrying on a business under the name of "Deluxe dry cleaners". The fact that the Respondent was a tenant carrying on a business in the said lot allotted to the 5<sup>th</sup> Defendant (deceased) is not in dispute in this case.

It was the contention of the 5A Defendant-Appellant that the premises in question is a business premises and hence it does not fall within section 52(2)(b) of the Partition Law, since the Respondent is only entitled to continue in occupation only "of a house", in terms of section 52(2)(b) of the Partition Law.

In the instant case the 5A Defendant-Appellant has not made an application to evict a person who is occupying a block of bare land or a person who is occupying a house or a residential premises in the said land allotted to the 5<sup>th</sup> Defendant (deceased) in the said Partition action. Section 52(2)(a) provides for the eviction of a person who is in occupation of a land or a house standing on the land as tenant for a period not exceeding one month. If the argument of the 5A Defendant-Appellant is accepted as submitted by the Learned Counsel for the Respondent there is no proper application made by the 5A Defendant-Appellant before the District Court invoking the said jurisdiction of the said Court under section 52(2)(a) of the partition Law.

On perusal of section 52(2)(a) of the Partition Law it is very clear that the intention of the Legislature was to protect tenants who have been in occupation of allotment of land one month prior to the date of such final decree or Certificate of sale. It could be a tenant of a bare land or a tenant of a house occupying the said allotment of land. What a tenant under section 52(2)(b) has to satisfy court is that the said tenant has been

a tenant of the of the said land or the house one month prior to the date of the final decree as a tenant and is entitled to continue as a tenant under the Applicant as Landlord.

Under section 52(2)(b) what the Court has to decide is whether 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 land or house as tenant under the Applicant as Landlord. This protection is given to a tenant who continue to occupy a bare land as a tenant of the Applicant as well as to a tenant of a house or of a residential premises. In my opinion section 52(2)(a) is not exhaustive. The said section is wide enough to protect the rights of a tenant who occupies a business premises in the said land as a tenant under the Applicant as Landlord. It is absurd to think that the Legislature intended only to protect a tenant who has been in occupation of a bare land or a house and did not intend to protect a tenant who occupied a business premises prior to the date of the final decree.

Section 52(2) of the Partition Law provides protection to each and every tenant who was in occupation of a land or a house prior to the date of such final decree or certificate of sale notwithstanding the fact whether such tenant's rights are protected by the Rent Act or not. The said protection is given to a tenant who has been in occupation of a bare land or a house prior to the date of final decree whether the said premises is governed by the provisions of the Rent Act or not.

Section 14 of the Rent Act provides a special protection to tenants who were in occupation of **residential premises** which is allocated to a co-owner under a decree for partition or purchased by any person under Partition Act.

Section 14 of the Rent Act states as follows:-

(1)Notwithstanding anything in any other law, the tenant of any residential premises which is purchased by any person under Partition Act or which is allocated to a co-owner under a decree for partition shall be deemed to be the tenant of such purchaser or such co-owner; as the case may be, and the provisions of this Act shall apply accordingly,.....”

Section 14(1) of the Rent Act makes provision for the tenants of **residential premises** to continue as such, under any co-owner who has been allotted the relevant premises under the final decree or who has bought the said premises under a certificate of sale.

Thus it is very clear that the said provision is intended to protect the tenants who were in occupation of the said premises one month prior to the date of the final decree being evicted by a party who is allotted a lot in the final decree in the said Partition action or by a person who becomes entitled to the said premises under Certificate of sale. Although section 52(1) of the Partition Law provides a very simple procedure for a party who is entitled to a lot to get possession of the said lot through Fiscal of Court, section 52(2)(a) has clearly been introduced to safeguard the interests of persons who has been in occupation of such premises as tenants one month prior to the date of final decree.

In the instant case, the Respondent, has been in occupation of the said premises as a tenant of the 5<sup>th</sup> Defendant prior to the date of the partition decree and thereafter the 5<sup>th</sup> Defendant has been allotted a lot including the said business premises occupied by the Respondent and the Respondent has continued to occupy the said premises as the tenant of the 5<sup>th</sup> Defendant and thereafter, after the death of the 5<sup>th</sup> Defendant under the 5A Defendant-Appellant who is the wife of the deceased 5<sup>th</sup> Defendant.

The main issue in this case is whether the Respondent has established that he is a lawful tenant of the 5A Defendant-Appellant of the premises

in question within the meaning of section 52(2)(b) of the Partition Law? The Learned District Court Judge has accepted the version of the Respondent and has held that the Respondent is a lawful tenant of the 5A Defendant-Appellant and that the 5A Defendant-Appellant has no right to evict the Respondent by way of executing a writ of possession under section 52(2)(a) of the Partition Law. In his order the learned trial Judge has held that from the year 1968 the Respondent has been a tenant under the deceased 5<sup>th</sup> Defendant.

Further it was observed by the Learned trial Judge that the premises in suit is governed by the Rent Act, and that in the case filed by the Respondent against the 5A Defendant-Appellant in the Rent Board it has been decided by the said Board that the Respondent is in occupation of the said business premises as the lawful tenant under the 5A Defendant-Appellant.

In the instant case the Respondent has satisfied Court not only that he was a tenant who was in possession of the said business premises allotted to the 5<sup>th</sup> Defendant very much prior to the date of the final decree but also the fact that he is protected by the provisions of the Rent Act.

I am of the view that the Respondent has clearly led sufficient evidence to satisfy court that he has been a tenant a of the deceased 5<sup>th</sup> Defendant of the said premises prior to the date of the final decree and that he is entitled to continue occupation of the said premises under the present 5A Defendant-Appellant as his landlord.

Therefore I answer all the questions of law raised in this case in the following manner.

(i)Yes

(ii)Yes

(iii)No

(iv)Yes

Accordingly, I affirm the judgment of the Civil Appellate High Court dated 16.06.2014 and dismiss the appeal of the 5A Defendant-Appellant with costs.

**JUDGE OF THE SUPREME COURT**

**SISIRA DE ABREW, J**

I agree.

**JUDGE OF THE SUPREME COURT**

**ANIL GOONERATNE, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

