SOYSA

v.

SILVA AND OTHERS

COURT OF APPEAL.
DE SILVA, J.
JAYAWICKRAMA, J.
CA NO. 143/98.
DC BALAPITIYA 3062/NP.
14TH JUNE, 1999.
13TH, 18TH OCTOBER, 1999.

Appeal - *Appeal dismissed on a technical ground - Revisionary jurisdiction of the Court of Appeal invoked - Sections 4, 5, 6, 12, 19(1) Partition Law not followed - Illegality - Civil Procedure Code, S.754, 759, 765.*

The Plaintiff Respondent instituted action to partition Lot A in extent 34 Perches. The Defendant contends that it consists of Lots A, B and C and is in extent of 3 Roods.

The District Court held that the corpus consists of lots A and B, and C, and further held that the 2nd Defendant Respondent had prescribed to the said land. Being aggrieved the 3rd Defendant Petitioner lodged an appeal which was rejected. Thereafter the Petitioner moved by way of Revision.

Held :

(i) The power given to a Superior Court by way of Revision is wide enough to give it the right to revise any order made by an original court. Its object is the due administration of justice and the correction of errors sometimes committed by the Court itself in order to avoid miscarriage of justice.

(ii) On reading S.19(2)(a) it is imperative on the part of the Defendant who seek to have a larger land than that sought to be partitioned to follow the procedure laid down in Ss. 4, 5, 6, of the Partition Law. The Defendant Respondent who sought to partition a larger land than that of the Plaintiff Respondent has not followed the imperative procedure laid down in S19(2)(g).

(iii) The mere registration of the lis pendens alone would not entitle the 2nd Defendant Respondent to have a larger land partitioned unless he follows the procedure laid down in S.19(2)(a)-(g).

Under S.19(2)(g) requirement of S.12 becomes applicable to a defendant who seeks to have a larger land partitioned.

(iv) Error in not following the provisions of S.19(1) amounts to an illegality, thus Revision lies.

APPLICATION to revise an order of the District Court of Balapitiya.

Cases referred to :

1. *Merino BF vs Seyed Mohammed* 69 CLW 34
2. *Atukorale vs Swaminathan* 41 NLR 165
3. *Silva vs Silva* 44 NLR 494
4. *Abdul Cader vs Sithi Nissa* 52 NLR 536
5. *Sinnathamby vs Meera Mohideen* 60 NLR 394

P.A.D. Samarasekera, P.C., with *Keerthi Sri Gunawardena* for 3rd Defendant-Petitioner.

Rohan Sahabandu for 2A Defendant-Respondent.

Cur. adv. vult.

November 10, 1999.

JAYAWICKRAMA, J.

This is an application to revise the order of the learned District Judge of Balapitiya dated 06. 12. 1998 wherein he held that the corpus consists of lot (A) and (B) (later marked as A,B and C) in Plan No. 681 (marked Y) and that the 2nd Defendant had prescribed to the said land.

The Plaintiff-Respondent instituted action for the partition of the land called Amuwatta alias Janis Naidege Watta alias Singho Muhandiran Ralahami Wagakala Watta in extent about 2 roods. The only dispute at the trial was relating to the identity of the corpus.

After trial the learned District Judge by his judgment dated 11. 09. 1978 held that as the Plaintiffs were uncertain as to the land which they sought to partition, and therefore they have failed to prove the corpus to be partitioned and as

such they were not entitled to maintain the action and the Plaintiff's action was dismissed. The Plaintiff appealed against the said judgment and the Court of Appeal by its order dated 03. 02. 1984 set aside the judgment and the case was remitted for a fresh hearing.

At the 2nd trial the question that arose for decision was whether the corpus consists of lot (A) in Plan No. 467 (marked X) or whether the lots (A) &(B) in Plan No. 681 (marked Y). Lot (B) had later been divided into two lots which are marked as (B) & (C).

After the 2nd trial the learned District Judge by his judgment dated 06. 12. 1988 held that the corpus consists of lots (A) & (B) (later marked as (A), (B) & (C) in Plan No. 681(Y) and further held that the 2nd Defendant had prescribed to the said land.

Being aggrieved by the said judgment the Petitioner filed an appeal C.A. No. 256/89(F) by filing a notice of appeal dated 07. 12. 1988 and a petition of appeal dated 31. 01. 1989.

However, the notice of appeal filed by the 3rd Defendant-Petitioner was signed by himself when he had a registered Attorney on record and when this matter came up before this Court, the appeal was dismissed as it was contrary to the provisions of Section 754 of the Civil Procedure Code. The partition action was instituted on 25. 05. 1973 (26 years ago) and the judgment was delivered in November 1988 (11 years ago). The appeal was rejected in 1988.

The Petitioner in anticipation of the result of the Court of Appeal due to the series of decision that such notice signed by the Petitioner when there is a registered Attorney on record is not valid and that the appeal may get rejected, for that reason without consideration of the merits of the appeal, the petitioner invoked the extraordinary jurisdiction of revision vested in this Court.

The learned counsel for the 2A Defendant-Respondent submitted that from 1988 till the matter came up before the Court of Appeal the defective appeal was pending in the Court of Appeal and without taking steps to cure the defects this revision application was filed after 10 years of the pronouncement of the judgment by the District Court. He further contended that there was a long delay on the part of the Petitioner to move the Court of Appeal by way of revision. He further submitted that there were two options available to the Petitioner under Section 759 or under Section 765 of the Civil Procedure Code. He contended that having failed to exercise his statutory rights under the above section for a period of 10 years, the petitioner cannot now move by way of revision after the appeal was rejected by the Court of Appeal.

The learned counsel for the 2nd Defendant-Respondent contended that the petitioner should not be allowed to move by way of revision after his appeal was rejected for non compliance with Section 754 of the Civil Procedure Code. A fatal error was on record for over 10 years which he could have corrected with valid reasons which he has not done. The learned counsel further submitted that although the powers by way of revision conferred on the Appellate Court are wide, the Appellate Court would exercise its discretion and grant relief by way of revision only and unless there is something illegal about the order. The learned counsel contended that the learned District judge is entitled to formulate an opinion on the facts and when acting in revision, the question to be decided is not whether a decision is right or wrong but whether it is lawful or unlawful.

The Court of Appeal is invested with a right to call for and examine the record of any case, whether already tried or pending trial, in any court, and satisfy itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such Court. (Section 753 Civil Procedure Code.)

This power of revision is an extraordinary power which is quite independent of and distinct from the Appellate Jurisdiction of the Court of Appeal.

It's object is the due administration of Justice and the correction of error, sometimes committed by the Court itself, in order to avoid miscarriage of Justice (*Merino B.F. vs Seyed Mohamed*[1]).

The power given to a Superior Court by way of revision is wide enough to give it the right to revise any order made by an original Court, whether an appeal has been taken against it or not. This right will be exercised in which an appeal is pending only in exceptional circumstances as, for example, to ensure that the decision given on appeal is not rendered nugatory. (*Athukorala vs Swaminathan*[2]; *Silva vs Silva*[3]).

In *Abdul Cader vs Sitti Nisa*[4], notwithstanding the fact when an appeal had been abated, the Supreme Court heard the Appeal by way of revision, observing that it did so as a matter of indulgence and interfered with the judgment on a point of law.

In *Sinnathamby vs Meera Mohideen*[5], it was held that the Supreme Court possesses the power to set aside, in revision an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to be abated, on the ground of non-compliance with some technical requirements in respect of the notice of security.

It must be noted in this case the Plaintiff filed this partition action to partition lot (A) in Plan No. 467(X) which is of extent only 34 perches. The learned District Judge rejected the evidence of the Plaintiff and accepting the evidence of the Defendant concluded that the land to be partitioned should be lot A, B & C of Plan No. 681(Y) which is a larger land than the land sought to be partitioned by the Plaintiff, in extent of 3 roods.

The learned District Judge accepted the evidence of the Defendants and concluded that the larger land should be the subject matter of this partition action.

Section 19(2)(a) of the Partition Law states that :

"Where the Defendant seeks to have a larger land than that sought to be partitioned by the Plaintiff made the subject matter of the action in order to obtain a decree for a partition or sale of such larger land under the provision of this law, his statement of claim shall include a statement of the particulars required of Section 4 in respect of such larger land; and he shall comply with the requirement of Section 5 as if his statement of claim were a plaint under this Law in respect of such larger land".

According to Section 19(2)(b),

"Where any Defendant seeks to have a larger land made the subject matter of the action as provided in paragraph (a) of this sub section, the Court shall specify the party to the action by whom and the date on or before which an application for the registration of an action as a lis pendens affecting such larger land shall be filed in Court, and the estimated costs of Survey of such larger land as determined by Court shall be deposited in Court".

According to Section 19(2)(c) where the party specified under paragraph (b) of the sub section fails to comply with the requirements of that paragraph, the Court shall make order rejecting the claim to make a larger land the subject matter of the action.

On a reading of Section 19(2)(a) it is imperative on the part of the Defendant who seeks to have a larger land than that sought to be partitioned by the Plaintiff to follow the procedure laid down under Section 4, 5 & 6 of the Partition law, which means that such Defendant should act as a Plaintiff in a partition action. It is abundantly clear that the Defendant who

sought to partition a larger land than that of the Plaintiff has not followed the imperative procedure laid down in Section 19(2) and (3) of the Partition Law.

The Plaintiff filed this partition action on 25. 05. 1973 and according to the Journal Entry dated 08. 06. 1973 the lis pendens has been registered under No. B 199/82 dated 30. 06. 1973.

Thereafter according to Journal Entry 5 dated 30. 08. 1973 the Plaintiff filed a motion stating that the lis pendens has been registered correctly and moved that the lis pendens be registered again. The relevant Journal Entry is as follows :

පැමිණිල්ලේ නීතිඥමයා මෝසමක් සමග අලුත් ලීස් පැන්ඩන් යුවලක් ඉදිරිපත් කරමින් එය ඉඩම් කන්තෝරුවට ලියාපදිංචි කිරීම සඳහා යවන ලෙස ඉල්ලා සිටී. මීට ප්‍රථම යවන ලද ලීස් පැන්ඩනය ලියාපදිංචි කර නිබෙන්නේ වැරදී හැටියට බව සඳහන් කරයි.

The above application was allowed and the lis pendens had been registered again under No. (b) 159/209 dated 03. 09. 1973.

The 2nd Defendant filed his statement of claim under Section 19(1) of the Partition Law on 07. 11. 1974. The 2nd Defendant in his statement has stated that the corpus should be of 3 roods and not 34 perches as stated in the plaint.

The 2nd Defendant prayed that as the lis pendens has not been properly registered that the plaint be dismissed or to partition the larger land as depicted in his statement of claim.

Although the 2nd Defendant seeks to have a larger land than that sought to be partitioned by the Plaintiff he has not acted according to the provisions of Section 19(2) of the Partition Law.

On the 1st date of trial i. e. on 12. 11. 1974 the 2nd Defendant moved that a commission to depict a larger land

than which is sought to be partitioned by the Plaintiff and accordingly a Commission was issued and the Commissioner after executing the Commission returned his Plan No. 681 on 24. 10. 1975.

According to Journal Entry 54 dated 21. 03. 1977 which was a trial date, the 2nd Defendant stated to Court that he was not ready for trial and obtained a date on payment of costs. On that day the following journal Entry appears on record "නඩුව විභාග රෝලෙන් ඉවත් කරන්න, පියවර ගන්න. ලිස් පැන්ඩනය රෙජිස්ටර කිරීමට 77/5/5 ට."

Thereafter according to the Journal Entry 65 dated 08. 12. 1977 the lis pendens has been registered under B 199/82. Journal Entry 65 is as follows:

බලපිටිය ඉඩම් රෙජිස්ට්‍රාර් 199/82 හි ලිස් පැන්ඩනය ලියාපදිංචි කර එවයි.

On a perusal of the above Journal Entries it is not clear on whose instance the lis pendens has been registered for the 3rd time.

Thereafter the case was fixed for trial and judgment was delivered on 11. 09. 1978 which judgment was subsequently set aside on an appeal made to the Court of Appeal.

Thereafter the case was fixed for trial again and the judgment was delivered on 06. 12. 1988 against which this revision application had been filed.

On a perusal of the above Journal Entries and the documents of the photo stat copy of the case record, it is not clear whether the 2nd Defendant had taken the necessary steps to register the lis pendens inaccordance with Section 19(1)(b) of the Partition law. The Journal Entry 54 dated 21. 03. 1977 does not indicate whether the application to register the lis pendens was made by the 2nd Defendant or whether it was

another application to get the lis pendens registered correctly as it was done earlier by the Plaintiff.

It is to be noted here that the lis pendens was earlier registered on the application of the Plaintiff under No. (B) 159/209 whereas on 08. 12. 1977 the lis pendens had been registered under (B) 199/82.

Even if one is to assume that the registration of the lis pendens under B 199/82 was made by 2nd Defendant-Respondent for the larger land it is manifestly clear that the rest of the provision of section 19(2) & (3) have not been adhered to by the 2nd Defendant.

The mere registration of lis pendens alone would not entitle the 2nd Defendant to have a larger land partitioned unless he follows the procedure laid down under Section 19(2)(a) to (g).

After the action is registered as the lis pendens affecting the larger land the procedure laid down under 19(1)(b)(e)(f) and (g) has to be followed.

According to Section 19(2)(g) requirements of Section 12 becomes applicable to a Defendant who seeks to have a larger land partitioned.

On a perusal of the case record I find none of the above provisions have been adhered to by the 2nd Defendant.

In any event the 2nd Defendant has prayed for a dismissal of the action in his statement of claim.

In such a situation the only order which a Court could make is under Section 19(2)(c) and reject the claim to make a larger land partitioned. When one considers the above provisions and the relevant Journal Entries in the case record it is very clear that the learned District Judge had erred in law by directing that a larger land be partitioned.

It is to be noted at this state that the learned District Judge has disbelieved the evidence of the 1st Plaintiff and he has concluded that the 1st Plaintiff was not able to identify the corpus to a certainty.

On a perusal of the evidence led in this case the 1st Plaintiff initially has stated that the corpus should be only lot (A) but subsequently, he has stated that lot (C) should be included, whereas the 3rd Defendant contested this position of the Plaintiff and has stated that lot (B) & (C) should be excluded from the corpus and only lot (A) should be partitioned.

Further it is to be noted that in answering issue No. 2, the learned District Judge had decided that the 2nd Defendant has prescribed to his rights but he has not indicated to what extent of the corpus he has prescribed.

For the aforesaid reasons I hold that the error in not following the provision of Section 19(1) of the Partition Law amounts to an illegality. Hence I cannot agree with the contention of the learned counsel for the 2A Defendant-Respondent that the error is in relation to a question of fact.

For the above reasons we set aside the judgment of the learned District Judge of Balapitiya dated 06. 12. 1998, and we therefore dismiss the plaint of the Plaintiff as he has not proved and identified the corpus which is sought to be partitioned. We also dismiss the claim of the 2nd Defendant to have a larger land be partitioned.

Application for revision is allowed.

We make no order as to costs.

J.A.N. DE SILVA, J. - I agree.

Application allowed.