JAYARATNE AND ANOTHER
v
PREMADASA AND OTHERS

SUPREME COURT
S.N. SILVA, C.J.
ISMAIL, J. AND
WEERASURIYA, J.
S.C.APPEAL NO. 20/2003
C.A.L.A. NO. 28/2002
D.C. RATNAPURA No. 940/P
17 NOVEMBER, 2003

Partition – Preliminary survey discloses much larger land than claimed - Decree for the larger extent – Power of the court to order partition of the larger land and thereafter on a petition by strangers to vary the corpus to 30 acres – Court's power to give relief under section 48(4) of the Partition Law.

The original plaintiff filed an action for a partitioning of a land of 30 acres. The surveyor who did the preliminary survey produced a plan for 71 acres 1 rood and 30 perches. At the trial judgment was delivered without a contest which was followed up with an interlocutory decree and further steps were taken to partition the larger land, on a Final Plan.

Thereafter three persons who were not parties to the action applied to set aside the judgment or alternatively to vary the corpus to 30 acres and for rights to that land.

The surveyors had after the preliminary survey failed to seek directions from court: and no steps to amend the plaint and *lis pendens* were taken.

Held:

(i) The court had no jurisdiction to vary the judgment. The decree is final subject to appeal under section 48(1) and also revision or *restitutio in integrum*. The court may also vary the judgement under section 48(4) only in respect of the parties and in the limited circumstances prescribed by that section of the law as amended by Act, No.17 of 1997.

(2) The proceedings of the District Court leading up to the trial and interlocutory decree were bad and should be set aside.

APPEAL from the judgment of the Court of Appeal.

Case referred to:

1. *Somawathie* v *Madawala* (1983) 2 SRI LR 15

Manohara de Silva for 2nd plaintiff-appellant.

The petitioners respondents and 3-8 plaintiff-respondents absent and unrepresented.

Cur.adv.vult

February 13, 2004

WEERASURIYA, J.

The original plaintiffs instituted action in the District Court of Ratnapura seeking to partition the amalgamated lands called Galinnhena, Abeyhena, Imbulehena, Pitaowitehena, Kehelella, Paragahahena and Kadjugahahena in extent about 30 acres. S.Ramakrishnan, Licensed Surveyor who was commissioned to do the preliminary survey, surveyed an extent of 71 Acres 1 Rood 20 Perches as forming the corpus and submitted his plan and report bearing No.1020, dated 05.04.1976. The trial which commenced on 29.06.1983 was concluded without a contest and the judgment was delivered on the same day allowing a partition of the land as depicted in the preliminary plan containing an extent of 71 Acres 1 Rood an 20 Perches. The interlocutory decree was entered in terms of the judgment and a commission was issued to prepare the final plan and after a long delay, Commissioner C.G. Punchihewa submitted his final plan and report bearing No.487 on 05.03.1999. On 19.03.1999 the petitioner-respondent-respondents filed an application seeking to set

aside the judgment and the interlocutory decree or in the alternative to restrict the corpus to 30 acres. Learned District Judge after hearing the parties, by his order dated 27.01.2000, allowed the application to vary the judgment and the interlocutory decree by restricting the corpus to 30 Acres.

The Court of Appeal granted leave to appeal on the application by the appellants and thereafter upon the conclusion of the hearing by its order dated 07.03.2002, dismissed the appeal and affirmed the order of the District Judge.

The appellants sought special leave to appeal from the order of the Court of Appeal on 07.03.2003, and this Court granted them leave on the following questions of law as set out in paragraph 19 of their petition.

1. Did the Court of Appeal err in upholding the order of the District Court, when the District Court lacked jurisdiction to make such order and/or to alter the judgment and interlocutory decree entered by Court?
2. Did the Court of Appeal err in upholding the order of the District Court made in 940/P D.C. Ratnapura which limited the extent of the corpus to 30 acres without identifying the same?
3. Did the Court of Appeal err in upholding the said order of the District Court when the District Court had misdirected itself in allowing the respondents' application to limit the corpus to 30 acres inasmuch as the said respondents had only made a claim to 9 3/4 acres from the surveyed land?
4. Did the Court of Appeal err in upholding the order of the District Court when the respondents had failed to show, trace or prove their title to the land which they were seeking to exclude from the corpus?
5. Did the Court of Appeal err in upholding the order of the District Court when the respondent's application was totally misconceived in law inasmuch as they were not entitled to have and maintain an application under section 48 of the Partition Law and/or section 839 of the Civil Procedure Code?
6. Did the Court of Appeal err in upholding the order of the District Court when the respondents were estopped in law from making their application?

7. Did the Court of Appeal misdirect itself in not properly considering the grounds of appeal set out in paragraph 16 of the petition made to the Court of Appeal and the questions of law formulated in the written submissions of the petitioners.

It is convenient to deal with questions 1-5 together since they concern with the scope and content of section 48(4) of the Partition Law and its applicability to the circumstances of this case.

The Court of Appeal has sought to justify the order of the District Judge by reference to the inherent powers of the District Court in terms of section 839 of the Civil Procedure Code. It is apparent that the learned District Judge had acted solely in terms of the provisions of section 48 of the Partition Law since he made express reference to it in the course of his order and made no mention of section 839 of the Civil Procedure Code. Even the petitioners had failed to plead the invocation of the provisions of section 839 of the Civil Procedure Code.

Section 48(4) of the Partition Law as amended by Act, No.17 of 1997 makes provision for a party to a partition action, as enumerated hereinafter whose right, title or interest in respect of the land has been extinguished by reason of the entering of the interlocutory decree or otherwise prejudiced by the interlocutory decree to make an application for special leave to establish the right, title or interest in respect of the land. This provision seeks to provide such relief to a limited category namely to a party (a) who has not been served with summons or (b) being a minor or a person of unsound mind who has not been duly represented by *a guardian ad litem* or (c) being a party who has duly filed his statement of claim and registered his address fails to appear at the trial. Any application for such relief shall be by petition supported by an affidavit setting out the nature and extent of his right, share or interest to the land and shall specify to what extent and in what manner the applicant seeks to have the interlocutory decree amended, modified or set aside and the parties affected thereby.

The application of the petitioner-respondent-respondents dated 19.03.1999 was to set aside the judgment and interlocutory decree entered or in the alternative to restrict the corpus to 30 acres as described in the schedule to the plaint. It would be clear that this application was outside the scope of section 48(4) of the Partition Law for several reasons, namely (a) it was not made by the parties to the

action, (b) it was intended to set aside the interlocutory decree or in the alternative to restrict the corpus to 30 Acres, (c) it did not set out the nature and extent of the right, share or interest of the parties to the land to which the action relates and (d) it did not specify to what extent and in what manner the parties seek to have the interlocutory decree amended, modified or set aside. It must be noted that a party could make an application to set aside the interlocutory decree only where the party is entitled to the entirety of the property.

It is significant that section 48(1) of the Partition Law gives final and conclusive effect to the interlocutory decree subject to the decision on any appeal which may be preferred therefrom and sub section (4) as referred to earlier. Having regard to the stringent provisions of section 48 of the Partition Law which had as their object the finality of the interlocutory decree it is obvious that learned District Judge had acted in blatant disregard of the provisions of section 48.

On a consideration of the above material it would be manifest that District Court had no jurisdiction to entertain the application of the petitioner-respondent-respondents to seek the relief they prayed for and the application was misconceived. The Court of Appeal has taken the erroneous view that notwithstanding the provisions of section 48, learned District Judge was justified in restricting the corpus to 30 acres using the inherent powers of Court in terms of section 839 of the Civil Procedure Code. For the foregoing reasons I hold that the Court of Appeal has erred in affirming the order of the District Judge which was patently outside his jurisdiction. Therefore, I set aside the order of the District Judge dated 04.11.1998 and the order of the Court of Appeal dated 07.03.2002.

The petitioner-respondent-respondents were not parties to the action and therefore no question of estoppel would arise in respect of their application to claim relief.

It is not necessary to consider the material referred to in question No.7, since most of the matters arising from paragraph 16 of the petition of appeal presented to Court of Appeal had been dealt with in discussing the other questions.

The revisionary powers of the Appellate Court are unaffected although section 48 of the Partition Law invests interlocutory decrees entered under the Partition Law with finality. Thus the exercise of pow-

ers of revision and *restitution in integrum* to set aside partition decrees when it is found that the proceedings were tainted by what has been called fundamental vice is available to the Appellate Court.(1)

Licensed Surveyor Ramakrishnan who was commissioned to do the preliminary survey had failed to locate and identify the amalgamated lands as described in the schedule to the plaint. By surveying an extent of 71 Acres, which exceeded the extent he was commissioned to survey by 41 Acres, the Commissioner had failed to comply with the terms of the commission. The Commissioner should have reported the fact that he was unable to locate a land of about 30 Acres and asked for further instructions from the District Judge. It is unfortunate that even the learned District Judge who heard the case had failed to give due consideration to the wide discrepancy in the extent. On a perusal of the supplementary report of the Commissioner it would appear that on a superimposition of lot 33 of F.V.P. 259 on the preliminary plan certain lots would fall outside lot 33 and therefore certain exclusions had been recommended from the corpus. At the trial contents of the supplementary report appear to have received scant attention of the Court.

On the above material, I hold that the District Court had acted wrongly in proceeding to trial in respect of what appeared to be a larger land than that described in the plaint and not properly identified. In any event the peremptory steps relating to an amendment of the plaint, the registration of a new *lis pendens* and the fresh declaration in terms of section 12 have not been complied with. Therefore, I set aside the proceedings in the District Court leading up to the trial and the judgment and the interlocutory decree. However, I make no order as to costs.

S.N. SILVA, C.J. – I agree.

ISMAIL, J. – I agree.

Appeal allowed.