RICHARD AND ANOTHER

v.

SEIBEL NONA AND OTHERS

COURT OF APPEAL.
JAYASINGHE J.
JAYAWICKREMA J.
CA 761/97
D.C. GAMPAHA 28978/P
12TH NOVEMBER, 1999
10TH JANUARY, 2000
4TH and 14TH JULY, 2000
5TH OCTOBER, 2000
3RD NOVEMBER, 2000

Partition Law - S. 16 - 19, S.48(1) (a), S.49 - Settlement - Intervention - Refusal - Revision - Restitutio - in - Intergrum - Can an outsider move court? - Finality of Interlocutory decree - Instances where it could be set aside - Identity of corpus - court accepting a larger land than the land to be partitioned - Investigation of title.

The Interlocutory Decree was entered by way of settlement. The Intervenient Petitioners who were not parties made an application to intervene in the action, which was refused. Being aggrieved they moved in Revision and / or in Restitutio - in - Integrum.

It was contended that as the Petitioners were not parties to the Partition Action they cannot move in Revision or seek Restitutio - in - Integrum and that as the Interlocutory Decree is final and conclusive it is not open for the Petitioners to invite Court to exercise the extra ordinary revisionary jurisdiction due to their own conduct. It was further contended that the only remedy available at this stage is to institute an action under S. 49 for damages.

Held :

(i) The parties were not able to identify the land to be partitioned. Court has accepted as the land to be partitioned a larger land than the land sought to be partitioned - as given in the plaint, court has failed to decide on the corpus.

(ii) Court has completely acted in violation of the provisions of the Partition Law and has accepted by way of a settlement, the evidence of

the 1st Defendant, without investigating into the title of all the parties as required by the Partition Law. A partition decree cannot be entered by settlement, it is the duty of the Judge to fully investigate into the title to the land and shares.

Per Jayawickrema J.,

> "In the event of any party seeking to have a larger land to be made the subject matter of the action, court shall specify the party to the action to file in Court an application for the registration of the action as a lis pendens affecting such larger land and the Court shall proceed with the action as though it has been instituted in respect of such larger land after taking necessary steps under S. 16, S. 17, C. S.18, S. 29."

(iii) In terms of the proviso to S. 48(3) the powers of the Court of Appeal by way of Revision and restitutio in integrum shall not be affected.

AN APPLICATION in Revision and/or Restitutio in integrum.

Cases referred to :

1. Manchinahamy as Muniweera - 52 NLR 409
2. *Fernando vs Perera* - 1 Tamb. 71
3. *Juan Perera vs Stephen Fernando* - 3 Brownes 5
4. *Caldera vs Santiagopillai* - 22 NLR 155
5. *Thambirajah vs Sinnama* - 36 NLR 442
6. *Samarakoon vs Jayawardane 12 NLR 316*
7. *Fernando vs Shewakram* - 20 NLR 27
8. *Umma Sheefer vs Colombo Municipal Council* - 36 NLR 38
9. *Kanagasabai vs Velupillai* - 54 NLR 241
10. *Jayasekera vs Perera* - 26 NLR 198
11. *Amarasuriya Estates Ltd., vs Ratnayake* - 59 NLR 476
12. *Banda vs Weerasekara* - 23 NLR 157
13. *Eliyathambi vs Kanapathy Veeragathie* - 35 NLR 211
14. *Cook vs Bandulahamy* - 4 Tamb. 63
15. *Banda vs Weerasekera* - 23 NLR 157
16. *Fernando vs. Mohammadu Saibu* - 3 NLR 321
17. *Visvalingam vs Thampoo* - 5 Tam. 49
18. *Silva vs Paulu* - 4 NLR 179
19. *Golagoda vs Mohideen* - 40 NLR 92
20. *Uberis vs Jayawardena* - 62 NLR 217
21. *Bininda vs Sediris singho* - 64 NLR 201

P. A.D. Samarasekera, P.C., with *G.L. Geethananda* for the Intervenient-Petitioner-Petitioners

Ranjan Suwandaratne for Plaintiff Respondent.

N.R.M. Daluwatta, P.C with *P. Bandara* for 9th Defendant Respondent.

Cur. adv. vult.

December 12, 2000.

JAYAWICKREMA J.

This is an application in Revision and/or Restitutio In Integrum to set aside the proceedings and the order dated 12/12/1996 and also to set aside all proceedings after the preliminary survey and direct the District Court to add the petitioners as necessary parties and permit them to file their statements of claim and then proceed to hear and determine the action.

According to the judgment of the learned District Judge dated 22/2/1994, interlocutory decree was entered in this Partition Action by way of a settlement between the Plaintiff and the 9th Defendant. Only the Plaintiff and the 9th Defendant were present and were represented by counsel when they agreed to enter decree by way of a settlement and the 1st Defendant, the daughter of the Plaintiff gave evidence and she was the only witness in this Action. According to an admission recorded on that date the land to be partitioned was Lot 01 and 02 in Plan No 41/1990 dated 24/5/90. Made by surveyor, K.T.P.R. Ahugammana. Thereafter the Learned District Judge, who succeeded the judge who delivered the judgment on 22/2/1994 amended the interlocutory decree on 12/12/1996 in accordance with another settlement entered into between the Plaintiff, the 7th defendant and the 9th defendant.

The Intervenient-Petitioner-Petitioners were not parties to this Partition Action. The Petitioners made an application to intervene in the action and the matter was inquired into on 25/7/1994 and thereafter the Court made order on 16/8/1995 refusing the application for intervention.

The learned President's Counsel for the Intervenient - Petitioner -Petitioners submitted that the Co-owners had amalgamated a number of contiguous lands and amicably divided it into several separate lots and possessed them as distinct and divided lots, (vide documents A1, A2, A3, A4 and A5) and one party had even obtained a partition decree in 1961 from District Court, Gampaha in case No. 9319/P, (vide A5) in respect of one such without any claim or objection from any others.

The learned President's Counsel further contended that the Petitioners were not parties to this action in the District Court nor were they represented, and the Petitioners application to be added as parties was rightly refused as the remedy was to seek relief form the Court of Appeal.

The learned President's Counsel for the 9th Defendant - Respondent submitted that as the petitioners were not parties to the Partition Action, they cannot move in revision on the principle that revision will lie only at the instance of a party to an action and that it is an extraordinary remedy given to a party to an action and the relief is given only at the discretion of this Court and that restitutio - in - intergrum is applicable only to a party to a legal proceedings. (vide *Manchinahamy vs. Muniweera*[1].

He further submitted that the material the petition refers to in page 2 and 3 of their written submissions were not before the learned Trial Judge and therefore the learned Trial Judge cannot be faulted for not considering material which were not before him. The learned President's Counsel further contended that if this court accept the submission of the Intervenient-Petitioner-Petitioners, that the Plaintiff's action be dismissed as the corpus in plan 41/96 (A10) marked as "X" at the trial is not the land sought to be partitioned. He further contended that the Plaintiff cannot in the same Partition Action seek to partition a particular corpus, when that judgment is set aside by a Superior Court, and seek to partition a different corpus at a 2nd trial in the same action.

The learned Counsel for the plaintiff-respondents submitted that as the interlocutory decree has been already entered, it has a final and conclusive effect in terms of section 48 (1) of the Partition Law. He further submitted that it was not open for the Petitioner to invite this Court to exercise the extra-ordinary revisionary jurisdiction of this Court due to their own conduct.

He further contended that in the circumstances that it was not open for the Petitioner to allege that they were unaware of the said Partition Action for a period of about 10 years and therefore the Petitioners cannot in law at this belated stage seek to set aside the proceedings and the interlocutory decree duly entered in the said Partition Action and the only remedy at this stage available to the Petitioner is to institute an action under section 49 of the Partition Law for damages.

Final decrees in partition actions have been set aside by the Supreme Court where imperative provisions of the Partition Ordinance have not been complied with.

In *Fernando vs. Perera*[2] a final decree was set aside as it had been entered of consent. (vide *Juan Perera vs. Stephen Fernando*[3] *Caldera vs. Santiagopillai*[4] *Thambirajah vs. Sinnamma*[5]).

Where the record of the case discloses a number of serious irregularities, the decree is not one "given as hereinbefore provided" (vide: *Samarakoon vs. Jayawardene*[6], *Fernando vs. Shewakram*[7], *Umma Sheefa vs. Colombo Municipal Council*[8]).

It was held by a full Bench in *Kanagasabai vs. Velupillai*[9] that the failure to register duly a lis pendens in a partition action deprives the decree in the action of the "conclusive effect" by reason of the fact that it is not a decree entered "as hereinbefore provided".

In *Jayasekera vs. Perera*[10] the land referred to in the partition action and in respect of which the parties proved their

title and obtained an interlocutory decree was not the land depicted in the survey plan referred to in the final decree. It was held that the final decree cannot be regarded as a decree "given as hereinbefore provided", in section 9 of the Partition Ordinance (vide *Amarasuriya Estate Ltd. vs. Ratnayake*[11]).

The Plaintiff filed this Partition Action to partition a land called Kelagahawatta in extent of 3 acres 3 roods as described in the schedule to the plaint dated 23/6/1986.

The Court issued a commission to survey the land and surveyor R.M. Ranasinghe tendered his preliminary Plan No. 257 dated 3/8/1988, according to which the land was in extent of 2 acres and 28 perches. The Plaintiff being not satisfied by the preliminary plan moved for a second Commission on the basis that only a portion of the land was surveyed and also that the surveyor had not correctly recorded what transpired at the survey. Consequently, a Commission was issued to another surveyor by the name of K.T.P.R. Ahugammana who tendered his Plan No. 41/90 dated 24/5/1990 (A20 & A21), according to which the extent of the land was 4 acres 1 rood 18.908 perches which is a larger land, than the land sought to be partitioned as described in the schedule to the plaint.

The 1st surveyor in his report states that the land is situated in another village to that of the village named in the commission and that the parties present were not able to show the boundaries given in the schedule to the plaint. The relevant paragraph 'X1' of the report of the survey marked as A17 is as follows:-

'බෙදුම් නඩුව විනිශ්චය කිරීම සඳහා අවශ්‍ය විය හැකි හෝ ඊට ආධාර විය හැකි මැනීමට අදාල හෝ මනින ලද ඉඩමට අදාල කරුණු දේවල් සහ පරිවේෂ්ඨයන් මෙම නඩුවේ පැමිණිල්ලේ උපලේඛණයේ සඳහන් වන ඇති ඉඩමේ ප්‍රමාණය අ.3 රූ 3 ප.00 කි. නමුත් දැනට ඇති ප්‍රමාණය අ. 2 රූ 0 පර් 28.8කි ඉඩම පිහිටා ඇති ගමේ නම පිරිස්යාල කියා සඳහන්ව ඇතත් දැනට ඉඩම පිහිටා ඇති ගමට ව්‍යවහාර කරණු ලබන්නේ අඩුපේ නම්න්ය. ඉහතින් කී උපලේඛණයේ සඳහන් කර ඇති පැරණි පිඹුරුවල මායිම් භූමියේ පෙන්වීමට පාර්ශ්වකරුවන්ට නොහැකිවිය.'

The second surveyor in his report states that he is unable to state definitely whether the land he surveyed is the same land which is described in the schedule to the plaint. The relevant paragraph 5 of his report marked as A21 is as follows:-

"පාර්ශ්වකරුවන් විසින් මා වෙත සපයන ලද යාබද ඉඩම්වල විස්තර සහ පැමිණිල්ලේ උපලේඛණයේ දක්වා ඇති මායිම් විස්තර සසඳ බලන විට මවිසින් මනින ලද පැමිණිල්ලේ උපලේඛනයේ සඳහන් ඉඩම දැයි නිශ්චිතව කිව නොහැක."

In view of the above statements of the two surveyors it is clear that the parties were not able to identify the land to be partitioned.

In view of the above facts, the Court is of the view that the land which the learned District Judge has accepted as the land to be partitioned is a land which is larger than land sought to be partitioned by the Plaintiff in his schedule to the plaint.

On 22/2/1994 the learned District Judge pronounced judgment by way of a settlement and evidence was led on the conditions of settlement agreed upon between the Plaintiff and the 9th Defendant. Even in the interlocutory decree it is stated that the decree was entered in accordance with the terms of settlement. The relevant portion of the interlocutory decree is as follows:-

"..... විභාගය පිණිස ගන්නා ලදුව පාර්ශවකරුවන් අතරේ මෙම නඩුව සමථයට පත් වී ඇති හෙයින් එකී සමථ කොන්දේසි මත මෙහි පහත සඳහන් පරිදි තීන්දු ප්‍රකාශ කරනු ලැබේ".

When one take into consideration the above facts, I find that the learned District Judge has failed to decide on the corpus which is to be the subject matter of this partition action and has not investigated the title to the land. The learned District Judge has completely acted in violation of the provisions of the Partition Law and has accepted by way of a settlement, the evidence of the 1st Defendant and he has delivered judgment without investigating into the title of all the

parties as required by the Partition Law. It is the duty of a judge in a partition action to investigate into the title and clearly state in the judgment, the shares of each of the parties entitled to from the corpus.

In *Banda vs. Weerasekera*[12] *Bertram C.J.* held that ***"the court regards with strong disapproval any attempt to use the Partition Ordinance for the purpose of dealing in an action with distinct portions of land in which shareholders and the interests are not the same".***

It was held by *Garvin S.P.J. - in Eliyatambi vs. Kanapathy Veeragathie* [13] that it is not contemplated by the provisions of the Partition Ordinance that any more than one land will be partitioned in one proceeding.

The practice in Partition Actions has been to disapprove of any attempt to include as subject matters in one action distinct portion of land in which the shareholders and interests are not the same *(vide Cook vs. Bandulahamy*[14] *Banda vs. Weerasekera*[15]*).*

In the instant case some portions of land shown in Plan No. 41/1990 were the subject matter in an earlier Partition Action.

The duty of a judge in a Partition Action is to ascertain who the actual owners of the land are, and to decide the other matters. This duty is a personal one. It is an imperative duty in all Partition Actions that the court should examine the title of each party to the action. It was held in *Fernando vs. Mohammadu Saibu*[16] *that "the Court must in all cases of partition carefully investigate all titles, and must refuse to make title on admissions or insufficient proof."*

It was held in *Visuvalingam vs. Thampoo*[17] that a partition decree cannot be entered by settlement even after some evidence, and that in partition suits, it is the duty of the judge

to fully investigate into the title to the land and shares. In that case *Grenier, J.* Said *"The District Judge instead of proceeding with the trial of the case and investigating into the title of the parties, allowed them to settle the case. I find on reference to the proceedings had before him on that date that at a certain point of the examination of the plaintiff a settlement was proposed and that later a paper of settlement was put in and an interlocutory decree entered up according to the terms embodied therein. I need hardly remark that this was highly irregular, and in the teeth of the plain requirements of the Partition Ordinance by which the duty is cast on the judge to investigate into the title of the parties as carefully as he can in view of the far reaching consequences of a decree in a partition action."*

In partition suits the court ought not to proceed on admission, but must require evidence in support of the title of all the parties and allot to no one a share except on good proof *(vide Silva vs. Paulu*[18]*).* In *Golagoda vs. Mohideen*[19] it was held that ***"the court should not enter a decree in a partition action unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. Investigation of title by the Court is a necessary pre-requisite to every partition decree".***

In the instant case the lis pendens has been registered to a land of 3 acres and 3 roods in extent. This clearly proves the fact the lis pendens has not been registered in respect of the land shown in Plan No. 41/1990 which is of 4 acres I rood and 18.908 perches.

It was held in *Uberis vs. Jayawardane*[20] that *"an action in respect of one land cannot be converted into an action in respect of another land by an amendment of pleadings and that when a plaint in a Partition Action is amended so as to substitute a new corpus, for the one described in the first plaint. A fresh lis pendens would be necessary."*

In *Bininda Vs. Sediris Singho*[21], it was held in preparing a preliminary Plan in a Partition Action it is irregular for a surveyor, to survey and include in the corpus any land other than that which is referred to in the plaint and which his commission authorises him to survey.

In the event of any party seeking to have a larger land to be made the subject matter of the action the Court shall specify the party to the action to file in Court an application for the registration of the action as a lis pendens affecting such larger land and the court shall proceed with the action as though it has been instituted in respect of such larger land after taking necessary steps under sections 16, 17, 18 and 19 of the Partition Act. In the instant case this procedure has not been followed.

When one takes into account the facts disclosed in this case it is abundantly clear that the learned District Judge has acted in violation of the imperative provisions of the Partition Law. Hence it will be a travesty of Justice to allow the judgment and the interlocutory decree to stand in this case.

According to the proviso to section 48 (3), the powers of the Court of Appeal by way of revision and restitutio in integrum shall not be affected by the provisions of this subsection.

For the above reasons, acting in revision I set aside the judgment, interlocutory decree and the amended interlocutory decree of the learned District Judge. Further I dismiss the plaint of the plaintiff in this Partition Action with costs payable by the Plaintiff to the petitioner in a sum of RS. 5,000/=

JAYASINGHE, J. - I agree.

Application allowed