

**CAROLINE PERERA AND ANOTHER**  
**v.**  
**MARTIN PERERA AND ANOTHER**

COURT OF APPEAL  
WEERASURIYA, J., (P/CA) AND  
DISSANAYAKE, J.  
CA NO. 872/93 (F)  
DC KALUTARA NO. 5701/P  
MAY 03, 2001  
JUNE 08, 2001

*Partition Law No. 21 of 1977 – s. 48 – Settlement – Can the plaintiff abandon the position pleaded – No investigation of title – Duty of Court to use its inherent power to repair injuries done by its act – Civil Procedure Code s. 91, s. 408, s. 839.*

The plaintiff-appellant instituted action to partition the corpus and averred that one A, one of original owners, died leaving behind the 1st defendant-respondent. The 1st defendant-respondent did not file a Statement of Claim. At the midst of the trial, the parties who were present came to a settlement which amounted to complete reversal of the earlier position, the position that rights of A devolved on the 1st defendant-respondent was abandoned. After judgment and interlocutory decree, the 1st defendant-respondent sought to have the interlocutory decree amended on account of the denial of his rights to the land. The District Court allowed the application.

**Held:**

- (1) Though the 1st defendant-respondent was precluded from raising a contest or disputing the claim of any party without leave of Court due to his default in filing a Statement of Claim, he is not precluded from relying on the title pleaded by the plaintiff-appellant.
- (2) The 1st defendant-respondent cannot be deprived of his rights by a private arrangement made by the plaintiff-respondent with other defendant-respondents, the Court has failed in its duty to examine title.
- (3) It is possible for parties to a partition action to compromise their disputes, provided the Court has fully investigated the title of each party and satisfied itself as to their respective rights.

- (4) A Court whose act has caused injury to a suitor, has an inherent power to make restitution – this power is exercisable by a Court of original jurisdiction as well as by a superior Court.

**APPEAL** from the judgment of the District Court of Kalutara.

**Cases referred to:**

1. *Kumarihamy v. Weragama* – 43 NLR 265.
2. *Babyhamine v. Jamis* – 46 CLW 5.
3. *Salim v. Santhiya* – 69 NLR 490 at 492.
4. *Potman v. Inspector of Police* – 74 NLR 115 at 117.
5. *Sivapathalingam v. Sivasubramaniam* – 1990 1 SLR 378.

*C. J. Laduwahetty* for 1st and 2nd plaintiff-appellants.

*Bimal Rajapakse* for 3rd, 4th, 8th and 9th defendant-respondents.

*W. Prematilake* for 1st defendant-respondent.

*Cur. adv. vult.*

August 31, 2001

**WEERASURIYA, J. (P/CA)**

This is an appeal arising from the order of the District Judge dated 18. 11. 1993, directing to amend the interlocutory decree entered in this case. <sup>1</sup>

The amendment of the interlocutory decree was sought by the 1st defendant-respondent on account of the denial of his rights to the land in suit. The plaintiff-appellant in his plaint dated 24. 07. 1989, averred that Agiris Perera who was entitled to 5/3360 undivided rights, died leaving 1st defendant-respondent (Martin Perera). The 1st defendant-respondent failed to file a statement of claim and was, therefore, precluded from raising a contest at the trial or disputing <sup>10</sup> the claim of any party except with leave of Court.

Initially, the plaintiff-appellant relied on the pedigree as pleaded in the plaint to establish his rights as evident from his testimony. However, in the midst of the trial the parties who were present and represented by Counsel came to a settlement which amounted to a complete reversal of the earlier position of the plaintiff-appellant. In this purported settlement the position adverted to by the plaintiff-appellant that rights of Agiris Perera devolved on his only heir Martin Perera (1st defendant-respondent) was abandoned.

Learned District Judge has taken the view that Court has 20 inadvertently failed to consider the rights dealt in deeds produced at the trial marked P1-P4. Applying the principle that, a Court whose act has caused injury to a suitor, has an inherent power to make restitution, he directed to amend the interlocutory decree.

Learned Counsel appearing for the plaintiff-appellant submitted that learned District Judge has erred in amending the interlocutory decree.

The 1st defendant-respondent was clearly precluded from raising a contest or disputing the claim of any party, without leave of Court due to his default in filing a statement of claim. However, it has to 30 be borne in mind that he is not precluded from relying on the title pleaded by the plaintiff-appellant. He is entitled to produce his title deeds relying on the title pleaded by the plaintiff-appellant. Therefore, the question that would arise, is how far it is permissible for the plaintiff-appellant to abandon the position pleaded in the plaint in terms of the deeds and appropriate to himself any share, allotted to the 1st defendant-respondent in the guise of a settlement.

Admittedly, the plaintiff-appellant's initial position was that Agiris Perera's rights devolved on Martin Perera, 1st defendant-respondent. Therefore, it would not be appropriate for the plaintiff-appellant to 40 arrive at a compromise in respect of rights of Martin Perera.

It is possible for parties to a partition action to compromise their disputes, provided the Court has fully investigated the title of each party and satisfied itself as to their respective rights.

In *Kumarihamy v. Weragama*<sup>(1)</sup> it was held that an agreement which is entered into in a partition action affecting only the rights of parties *inter se* and which is expressly made subject to the Court being satisfied that all parties entitled to interests in the land are before it and are solely entitled to it, is binding on the parties and is not obnoxious to the Partition Ordinance. 50

In *Babyhamine v. Jamis*<sup>(2)</sup> at the trial where the points in dispute were settled among the parties before evidence was led and the interlocutory decree entered so as to give effect to the settlement but the compromise was lacking in precision and did not strictly conform to sections 91 and 408 of the Civil Procedure Code it was held that in the interest of justice, the purported settlement and the judgment entered upon the basis of that settlement should be set aside and the trial should proceed *de novo* upon the issues framed.

The 1st defendant-respondent who was entitled to rely on the rights given to him in the plaint, was deprived of his rights by a 60 purported settlement arrived at by the parties in his absence. In the circumstances, this purported settlement could be attacked for want of mutuality. There is no justification for the plaintiff-appellant in the absence of the 1st defendant-respondent to claim his rights in the light of his own evidence, and the deed marked P1-P4.

However, the question that arose for determination before the District Judge was, as to the manner in which relief could be granted to the 1st defendant-respondent in the face of the unfair and illegal manner by which the rights of 1st defendant-respondent were denied. Admittedly, the 1st defendant-respondent was not entitled to relief in 70 terms of section 48 of the Partition Law.

Thus, it remains now, to consider whether the 1st defendant-respondent is entitled to relief using inherent powers of the Court.

In *Salim v. Santhiya*<sup>(3)</sup> at 492 it was observed that it is a rule that a Court of justice will not permit a suitor to suffer by reason of its own wrongful act and that it is under a duty to use its inherent power to repair the injury done by its act.

The following observations in *Potman v. Inspector of Police*<sup>(4)</sup> at 117 are relevant:

"This Court would no doubt be extremely hesitant and cautious <sup>80</sup> before it makes any order in revision which is contrary to an order which this Court itself has made upon appeal, but there would appear to be a precedent for orders of this kind where the original order is based upon a manifest error."

In *Sivapathalingam v. Sivasubramaniam*<sup>(5)</sup> it was held that a Court whose act has caused injury to a suitor has an inherent power to make restitution and this power is exercisable by a Court of original jurisdiction as well as by a superior Court.

Despite 1st defendant-respondent's default in filing a statement of claim, he could claim the rights allotted to him by the plaintiff-appellant. <sup>90</sup> Therefore, he cannot be deprived of his rights by a private arrangement made by the plaintiff-appellant with other defendant-respondents. Learned District Judge having failed in his duty to examine the title, under this compromise, is entitled to rectify his lapse, using the inherent powers of Court.

Thus, it seems to me that District Judge was correct in granting relief to the 1st defendant-respondent by invoking the inherent powers of Court.

It must be recalled that learned District Judge has made order to keep the rights of Martin Perera unallotted leaving him the option to <sup>100</sup> prove his entitlement.

In the circumstances, this appeal is dismissed with costs.

**DISSANAYAKE, J.** – I agree.

*Appeal dismissed.*