

SOPAYA SILVA AND ANOTHER
v.
MAGILIN SILVA

COURT OF APPEAL
ABEYWIRA, J. AND S. N. SILVA, J.
C.A. NO. 474/82(F)
D.C. MATALE NO. 1375/P
OCTOBER 17, 1988

Partition – Discrepancy in extent of corpus surveyed with corpus described in plaint and commission – Duty of Commissioner – Lis pendens – District Judge deciding on point not argued and on which parties were not heard – Natural Justice – Sections 18(1)(a)(iii), 18(2), 19(2) of the Partition Law.

The plaintiff filed plaint to partition a land of 8A 3R 29P and *lis pendens* was registered in the folios where the deeds for this land were registered. When the Commission was taken out the surveyor surveyed an extent of 11 AR 1 - P 33. No contest was raised about the registration of the *lis pendens*. At the trial the contest was resolved and evidence led accordingly. The learned District Judge dismissed the case holding that the *lis pendens* was wrongly registered.

Held –

- (1) It was not open to the District Judge to dismiss the case on the point of wrong registration of the *lis pendens* – a point on which there was no contest and, no argument was heard. It is a violation of natural justice.
- (2) The *lis pendens* being registered in the folios where the deeds of the land described in the plaint were registered was correctly registered.
- (3) On receipt of the surveyor's return which disclosed that a substantially larger land was surveyed the District Judge should have decided on one of the following courses after hearing the parties:
 - (i) to reissue the Commission with instructions to survey the land as described in the plaint. The surveyor could have been examined as provided in section 18(2) of the Partition Law to consider the feasibility of this course of action.
 - (ii) to permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of consequential steps including the registration of a fresh *lis pendens*.
 - (iii) to permit any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that defendant and the taking of such other steps as may be necessary in terms of section 19(2) of the Partition Law.

- (4) The surveyor under section 18(1)(a)(iii) of the Partition Law must in his report state whether or not the land surveyed by him is substantially the same as the land sought to be partitioned as described in the schedule to the plaint. Considering the finality and conclusiveness that attach in terms of s. 48(1) of the Partition Law to the decree in a partition action, the Court should insist upon due compliance with this requirement by the surveyor.

Case referred to:

1. *Brampy Appuhamy v. Monis Appuhamy* 60 NLR 337.

APPEAL from judgment of the District Judge of Matale.

H. Soza for plaintiff-appellant.

D. C. W. Wickremasekera for defendant-respondent.

Cur. adv. vult.

November 16, 1989.

S. N. SILVA, J.

The Plaintiff-Appellants have filed this appeal against the judgment dated 5.10.1982 entered by the District Judge of Matale. By the said judgment the action of the Plaintiff-Appellants was dismissed without costs.

The Plaintiff-Appellants filed action in the District Court of Matale to partition the land called "Atuwamula Putukakule Ulpahena" fully described in the schedule to the plaint. According to the schedule the land is in extent A8-R3-P29.

The 1st and 2nd Defendant-Respondents filed a statement of claim. However, on 31-8-1982 when the case was taken up for trial the contest was resolved and only the 2nd Plaintiff-Appellant gave evidence. He was not cross-examined and the District Judge fixed a date for documents to be tendered and the documents were duly tendered by the Plaintiff-Appellants.

By his judgment, the District Judge dismissed the action solely on the ground that the *lis pendens* had not been correctly registered. It is stated in the judgment that although the *lis pendens* was registered in respect of A8-R3-P29 (being the extent described in the plaint) the corpus according to the preliminary survey is in extent A11-R1-P33.

Counsel for the Plaintiff-Appellants made two submissions in

support of the appeal, to wit:

- (1) That there was no contest between the parties with regard to the due registration of the lis pendens and that the District Judge arrived at his finding without hearing the parties on this matter;
- (2) That the lis pendens was correctly registered in respect of the land described in the plaint and the error lay in the preliminary survey which covers a larger extent of land. Counsel relied on the judgment of *Basnayake, C.J.* in the case of *Brampy Appuhamy v. Monis Appuhamy* (1) where it was held that if the surveyor was unable to locate a land of about the extent described in the commission he should report the fact to Court and seek further directions.

Counsel for the Defendant-Respondents submitted that the Plaintiff-Appellants were present at the survey and subsequently proceeded to trial on the basis that the land to be partitioned was as depicted in the preliminary plan. In these circumstances the District Judge acted correctly by dismissing the action of the Plaintiff-Appellants.

An examination of the proceedings reveal that the parties were not at issue regarding the due registration of the lis pendens. Even the District Judge did not raise this matter as an issue at the trial. Therefore no party had an opportunity to address Court as to the regularity of defects in the lis pendens that was registered. It appears that the discrepancy in extent of the land as described in the lis pendens and the preliminary plan was discovered by the District Judge at the stage of writing the judgment and that he proceeded to make the order without hearing the parties. The procedure adopted by the District Judge is in violation of a basic rule of natural justice which requires that the parties be afforded a due hearing before a determination is made. This appeal has to succeed on that ground alone.

The application for the registration of the lis pendens should in terms of section 6(1) of the Partition Law be filed in Court by the Plaintiff with the plaint in the action. The application must conform to the requirements of the Registration of Documents Ordinance and specify inter alia the extent of the land sought to be partitioned. In

this case the District Judge has found that the lis pendens had been registered in respect of the same land as described in the plaint. Hence, there is no defect in the registration of the lis pendens. The error lies, as correctly submitted by the Counsel for the Plaintiff-Appellants, in the preliminary survey.

Section 16(1) of the Partition Law requires that a commission be issued "to a surveyor directing him to survey the land to which the action relates". It implies that the land surveyed must conform substantially, with the land as described in the plaint (and in respect of which a lis pendens has been registered), as regards the location, boundaries and the extent. Further, it is for this reason that section 18(1)(a)(iii) requires the surveyor to express an opinion in his report "whether or not the land surveyed by him.....is substantially the same as the land sought to be partitioned as described in the schedule to the plaint". Considering the finality and conclusiveness that attach in terms of section 48(1) of the Partition Law to the decrees in a partition action, the Court should insist upon a due compliance with the requirement by the surveyor.

If the land surveyed is substantially different from the land as described in the schedule to the plaint, the Court has to decide at that stage whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land as surveyed.

In the case of *Brampy Appuhamy v. Monis Appuhamy* (supra) it was held that the Court acted wrongly in proceeding with a partition action where the land surveyed was substantially smaller than the land as described in the plaint. The reasons underlying the decision of the Supreme Court i.e. the finality and conclusiveness attaching to the interlocutory and the final decrees in terms of section 48(1), apply with even greater force to a situation where (as in this case) a larger land is surveyed. Therefore we hold that the District Judge erred in proceeding with the action to partition the substantially larger land as described in the preliminary survey. On receipt of the Surveyor's return to the commission, which disclosed that a substantially larger land was surveyed, it was incumbent on the District Judge to decide on one of the following courses of action, after hearing the parties, viz:

- (i) to reissue the commission with instructions to survey the land

as described in the plaint. The Surveyor could have been examined orally as provided in section 18(2) to consider the feasibility of this course of action:

- (ii) to permit the Plaintiffs to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of other consequential steps including the registration of a fresh lis pendens.
- (iii) to permit any of the Defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claim of that Defendant and the taking of such other steps as may be necessary in terms of section 19(2).

For the reasons set out above, we allow the appeal and set aside the order dismissing action. We direct that proceedings commence afresh from the stage of the return to the commission by the Surveyor. Fresh proceedings will be held on the basis of the guidelines stated above. We make no order as to costs of the appeal.

ABEYWIRA, J. – I agree.

*Appeal allowed.
Case sent back.*
