

**UMMA**  
**v.**  
**ZUBAIR AND ANOTHER**

COURT OF APPEAL  
UDALAGAMA, J. AND  
NANAYAKKARA, J.  
CALA NO. 49/1998  
DC KURUNEGALA NO. 1774/P  
NOVEMBER 09, 2001

*Partition Law, No. 21 of 1977, sections 12, 14 (1) and 48 (3) – Interlocutory decrees entered – Vacation of same – Summons/notice not issued – Lis pendens not correctly registered – Non-compliance with section 12 – Could the interlocutory decree be set aside by the trial court?*

The petitioner-respondent sought to intervene in the partition action subsequent to an alienation by the 4th defendant, who allegedly also disclosed the petitioner-respondent as a necessary party, and moved to vacate the interlocutory decree entered on the basis that he was not issued with summons/notice and further that the *lis pendens* was not correctly registered, and that there was non-compliance with section 12.

The District Court allowed the application.

**Held:**

- (1) Section 48 (4) could not bar a court from holding that in the event summons had not been even issued from coming to a finding that such non-issue was improper or that the court had no jurisdiction to proceed. Section 48 (4) could not suppress the rights of parties to claim their due rights in partition actions which are decrees *in rem*.
- (2) There has also been blatant disregard to section 14 (1) and deliberate non-compliance with section 12; even the registering of the *lis pendens* is not in the correct folio.
- (3) Notwithstanding section 48, the District Court is not precluded from giving effect to an unlawfully obtained interlocutory decree causing a grave miscarriage of justice.

**APPLICATION** for leave to appeal from the Order of the District Court of Kurunegala.

**Cases referred to :**

1. *Somawathie v. Madawala* – (1993) 2 SLR 13.
2. *Mononmani v. Velupillai* – 60 NLR 289.
3. *Ittapana v. Hemawathie* – (1981) 1 SLR 476.
4. *Perera v. Commissioner of National Housing* – 77 NLR 361.
5. *Siriwardena v. Jansu Umma* – 59 NLR 400.

*Reza Muzni* for petitioners.

*Faiz Musthapa*, PC for petitioner-respondent.

*Ranjan Suwandaratne* for 1st defendant-respondent.

*Cur. adv. vult.*

May 02, 2002

**UDALAGAMA, J.**

As per the submissions of the learned counsel for the plaintiff by a <sup>01</sup> judgment dated 13. 03. 1997 the predecessor to the District Judge who made the impugned order directed that interlocutory decree be entered accordingly.

The petitioner-respondent, one Zubair, by his petition and affidavit in or about August, 1997, sought intervention subsequent to an alienation by the 4th defendant to the action who allegedly also disclosed the petitioner-respondent as a necessary party.

The petitioner-respondent also moved to vacate the interlocutory decree already entered on the basis that he was not issued with <sup>10</sup> summons or notice and further that the *lis pendens* was not correctly registered.

It is submitted by the learned counsel for the petitioner citing *Somawathie v. Madawala*<sup>(1)</sup> that the learned District Judge had no power to allow intervention after the entry of the interlocutory decree and further that the petitioner-respondent could have his remedy by way of revision or *restitutio in integrum*. Although the above submission is not without merit I am inclined to the view that even if this application is dismissed the petitioner-respondent would not be precluded from moving in revision and would only result in further delay in concluding 20 this matter before the original court.

As held by Soza, J. in *Somawathie v. Madawala* referred to above, His Lordship observed, *inter alia*, that : "the immunity given to a partition decree from being assailed on the ground of omissions and defects of procedure as now broadly defined and failure to make persons concerned parties to the action should not be interpreted as a license to flout the provisions of the partition law. This court will not hesitate to use revisionary powers and give relief where a miscarriage of justice has occurred resulting from non-conformity with the specific provisions of the Partition Act." 30

The finality of the interlocutory decree as contemplated in section 48 (3) of the Partition Act in my view could not prevent or preclude a District Judge even to act under inherent powers to make right a miscarriage of justice occasioned.

The learned District Judge by his order dated 23. 02. 1998 set aside the interlocutory decree entered in the instant case and permitted the petitioner to tender a statement of claim. I would not fault the learned District Judge for the above reasons for having come to the said conclusion.

I would further hold that section 48 (4) of the Partition Act 40 No. 21 of 1977 could not bar a court from holding that in the event summons had not been even issued in an action for partition from coming to a finding that such non-issue was improper or that the court

in such instance had no jurisdiction to proceed. Besides, section 48 (4) referred to above could not suppress the rights of parties to claim their due rights in partition actions which are decrees *in rem*.

As held by the learned District Judge there appears to have been a blatant disregard to section 14 (1) of the Partition Law and deliberate non-compliance to section 12 of the Partition Law too.

I would hold that the learned District Judge was correct in his finding <sup>50</sup> that non-compliance of section 12 of the Partition Act renders the proceedings void *ab initio*. The learned District Judge appears to have relied on a number of authorities particularly, *Mononmani v. Velupillai*,<sup>(2)</sup> *Iththapana v. Hemawathie*,<sup>(3)</sup> *Perera v. Commissioner of National Housing*,<sup>(4)</sup> *Siriwardena v. Jausu Umma*,<sup>(5)</sup> to come to a finding that the failure to notice the parties and even to register the *lis pendens* in the proper folio is not in accordance with the law and that notwithstanding section 48 referred to above that a District Judge is not precluded from giving effect to an unlawfully obtained interlocutory decree causing a grave miscarriage of justice. 60

I see no reason to interfere with the order of the learned District Judge which in fact only sets aside a part of the proceedings.

This application is dismissed with costs fixed at Rs. 5,250.

**NANAYAKKARA, J.** – I agree.

*Application dismissed.*