

AMEEN
v.
SALAHUDEEN & OTHERS

COURT OF APPEAL
WIGNESWARAN, J.,
JAYAWICKREMA, J.
C.A.L.A. NO. 276/95
D.C. COLOMBO NO. 5794/ZL
AUGUST 17, 1998
SEPTEMBER 9, 1998

Civil Procedure Code – S. 18, 3 & 4 (1), 327, 343, 345, 404, 839 – Addition of Parties – After consent decree was entered – Can the decree be set aside.

A consent decree was entered among the plaintiff-respondent, 1st respondent-respondent and 2nd defendant-petitioner. The plaintiff-respondent failed and neglected to fulfil his obligations under the decree, and the 2nd defendant-petitioner sought to enforce the consent decree. While this Inquiry was pending, the petitioner-respondent who was an outsider filed papers for intervention under s. 18 of the C.P.C. The learned District Judge allowed the application.

Held:

Per Wigneswaran, J.

"It is not open to third parties to set aside a consent decree unless of course the parties to the consent decree had no contractual capacity or there was lack of jurisdiction on the part of the court due to statutory reservations or such other grounds which made it necessary for the court to reconsider whether the consent decree should stand.

In this case the fraud alleged relates to the non disclosure of the consent decree entered in this case, in another case and the person pleading fraud is an outsider who was not a party to the consent decree".

- (1) The purpose of addition of parties according to s.18 (1) is to enable the court to "effectually and completely to adjudicate upon and settle all the questions involved in an action.
- (2) Once court enters decree, it is functus barring its right to enforce the decree or execute its writ.

APPLICATION for leave to Appeal against the Order of the District Judge, Colombo.

Cases referred to:

1. *Cooray v. Gaffar* CA 92/80 DC Panadura (552) CAM 18.2.1983.
2. *Pitisinghe v. Ratnaweera* 62 NLR 572.
3. *Norris v. Charles* 63 NLR 501.
4. *Richford Trading Company vs Miyanawita Estate Co., Ltd. and another* – CA 790/84 DC Colombo 47303RE – CAM 13.9.1985.

S. Maheuthiran for the 2nd defendant-petitioner.

F. C. Perera with M. F. Miskin for the petitioner-respondent plaintiff respondent, 1st defendant-respondent absent and unrepresented.

Cur. adv. vult.

December 2, 1998.

WIGNESWARAN, J.

Leave to Appeal against the order of the learned Additional District Judge, Colombo, dated 30.11.1995 was granted by this court on 25.08.97.

In this case a consent decree was entered in the District Court of Colombo among the plaintiff-respondent, 1st defendant-respondent and 2nd defendant-petitioner on 27.02.1991. In terms of the agreement reached between parties, the plaintiff-respondent had to pay the 2nd defendant-petitioner a sum of Rupees Two Million Five Hundred Thousand (Rs. 2,500,000/-) on or before 31.12.91. If so paid, the plaintiff-respondent was entitled to take out writ. If not paid, the 2nd defendant-petitioner was entitled to eject the plaintiff-respondent from the land and premises which were subject matter of the action.

Since the plaintiff-respondent failed and neglected to fulfil his obligations under the decree, the 2nd defendant-petitioner sought to enforce the said consent decree.

While inquiry into the enforcement of the decree in favour of the 2nd defendant-petitioner was pending, the petitioner-respondent who was an outsider as far as the parties to the original case were concerned, filed papers for intervention and for addition as a party

in terms of section 18 of the Civil Procedure Code. This was objected to by the 2nd defendant-petitioner.

After written submissions and documents were filed by both parties, the Additional District Judge, Colombo, made order on 30th November, 1995, allowing the intervenient to be added as a party in this case (No. 5794/ZL) *after* consent decree had been entered.

The learned counsel for the 2nd defendant-petitioner has taken up the following matters for consideration by this court :

- (1) Since rights of original parties to the case had *crystallised* in a decree the District Court was *functus* and it had no jurisdiction to reopen the case and act under section 18 of the Civil Procedure Code to consider extraneous claims.
- (2) The purported intervention is an act in concert between the plaintiff-respondent and the Interveniient-petitioner-respondent.
- (3) The claim of the petitioner-respondent had nothing to do with the principal action which related to title to property.
- (4) In any event the alleged claim of the petitioner-respondent against the 2nd defendant-petitioner had culminated in a decree in the District Court of Colombo in case No. 17031/L.

The only argument put forward by the counsel for the Interveniient-petitioner-respondent was that there had been fraud on the part of the 2nd defendant-petitioner. He applied for reliefs under sections 343, 344, 345 & 404 of the Civil Procedure Code. He also applied for court's intervention under section 839 of the Civil Procedure Code.

The fraud perpetrated, if any, to the extent this court is able to gather from the written submissions filed by the petitioner-respondent, related to the filing of case No. 17031/L in the District Court of Colombo against the petitioner-respondent by the 2nd defendant-petitioner *without disclosing* the consent decree entered in the instant Case No. 5794/ZL. If any such fraud had been perpetrated on the petitioner-respondent in case No. 17031/L he should have taken the matter up in that case. But he had failed to do so since an *ex parte* decree is said to be validly existing against him in that case. The person

or persons who could attack the consent decree entered in this case on the ground of misrepresentation or fraud would be the parties to the consent decree themselves. It is not open to third parties to set aside a consent decree unless of course the parties to the consent decree had no contractual capacity or there was lack of jurisdiction on the part of the court due to statutory reservations or such other grounds which made it necessary for the court to reconsider whether the consent decree should stand. In this case the fraud alleged relates to the non-disclosure of the consent decree entered in this case in another case and the person pleading fraud is an outsider who was no party to the consent decree.

The learned Additional District Judge seems to have misunderstood the scope of section 18 (1) of the Civil Procedure Code. The section reads as follows:

"The court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added".

The purpose of addition of parties according to section 18 (1) is to enable the court to "effectually and completely to *adjudicate* upon and settle all the questions involved" in an action.

When the consent decree in this case had adjudicated upon and settled all questions involved in this action there was no room for the addition of parties because the decree as pointed out by the learned Counsel for the 2nd defendant-petitioner had crystallised within itself rights and interests of parties which were brought to the notice of court for determination at the beginning of the case. Once the court

entered decree it was functus barring of course its right to enforce the decree or execute its writ.

In the following cases addition of parties after decree was held to be *ex facie* bad in law:

- (i) *Cooray v. Gaffar*⁽¹⁾
- (ii) *Pitisinghe v. Ratnaweera*⁽²⁾
- (iii) *Norris v. Charles*⁽³⁾
- (iv) *Richford Trading Company v. The Miyanawita Estates Co., Ltd. and another*⁽⁴⁾.

In the last case above-mentioned Justice Jayalath stated as follows:

"It appears to me however, that the petitioner-appellant preferred to come to this court by way of revision in order to seek a stay order to prevent the writ being executed. This indeed is a ruse often adopted by tenants and sub tenants in defiance of the rent law and calculated to prevent the law to take its course in order to remain in the premises as long as possible".

One wonders whether the application by the petitioner-respondent in this instance was an application made by him in concert with the plaintiff-respondent who was unable to abide by the terms of the consent decree, to frustrate the efforts made by the 2nd defendant-petitioner to obtain relief under the consent decree.

In the same case Justice Jayalath went on to state:" But where a subtenant was not so added, and the landlord had already obtained the decree against the tenant alone and has applied to be placed in possession of the premises, the proper procedure for the court to adopt in the first instance is to direct that 'constructive delivery' of the premises be given by the Fiscal to the landlord under the proviso to section 324 (1) and thereafter to investigate the landlord's claim under section 327 of the Civil Procedure Code".

Thus the procedure ordinarily to be adopted in case the execution of a decree affects adversely a person not a party to a case, is laid down above.

There is no doubt that the claim of the petitioner-respondent has nothing to do with the principal claim in this case. The principal claim related to certain declarations prayed for and ejection. The petitioner-respondent sought to intervene on the basis that he had entered into a Notarial Agreement with the 2nd defendant-respondent to purchase premises bearing No. 20/7, Madampitiya Road, Colombo 15, allegedly a portion of the land and premises which formed the basis of the main action. His problem therefore appears similar to the problem of the sub tenant not added referred to by Justice Jayalath above.

Finally it is to be noted that the 2nd defendant-petitioner had sued the petitioner-respondent for ejection in DC Colombo No. 17031/L. *Ex parte* decree was entered therein against the latter. An application made by the petitioner-respondent to vacate the *ex parte* decree was refused. Thus the petitioner-respondent having lost his rights in case No. 17031/L cannot now hope to attack the decree entered in the earlier case collaterally by the ruse of having himself added as a party in this case.

The contents of sections 343, 344, 345 and 404 of the Civil Procedure Code are not relevant to the question of whether the petitioner-respondent should have been added as a party under section 18 of the Civil Procedure Code.

We are therefore satisfied that the order dated 30.11.1995 allowing the addition of the petitioner-respondent as a necessary party after decree was entered, was *ex facie* bad in law and therefore set it aside and declare void all steps taken by court based on that order as from the time of such order.

The petitioner-respondent will pay Rs. 10,500 as costs to the 2nd defendant-petitioner. The plaintiff-respondent and the 1st defendant-respondent shall each bear their own costs.

JAYAWICKRAEMA, J. – I agree.

Appeal allowed.