ABEYGUNASEKERA
v.
WIJESEKERA AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
CA NO. 1098/98 (F)
DC NO. 10486/P
FEBRUARY 15, 2002
MARCH 27, 2002

Partition Law – S. 48 (4) Inquiry – Dismissal – Appeal lodged – Is the Order Final or Interlocutory? – Could the objection as to the maintainability of the appeal be taken up by way of a motion? – Is there any legal provision which can be referred to a rule? – Will prejudice be caused to the appellant as an application to exercise revisionary jurisdiction? – Cannot be made without the complete record – Civil Procedure Code S. 755 (3), 839 – Inherent powers cannot be invoked to disregard express statutory function – Constitution – Article 141.

The 19th defendant-appellant appealed against the order made under s. 48 (4) of the Partition Law. The plaintiff-respondent, raised a preliminary objection by way of a motion that no appeal lies against an order made under s. 48 (4).

The 19th defendant-petitioner challenged the procedure adopted stating that the application is premature, without any legal or lawful provision which cannot be referred to any rule.

Held:

(1) The process adopted cannot be referred to any procedure laid down either in the CPC or in the SC rules.

(2) However, one has to concede the fact that the said procedure adopted is not prohibited in any way.

(3) Court has the power and jurisdiction to entertain the motion by which the preliminary objection was raised and s. 839, CPC make provision for conferring power and jurisdiction to Court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of Court.

(4) The 19th defendant-appellant has no right of direct appeal against the impugned order, therefore, it will not cause any prejudice to him.

Per Somawansa, J.

"I am inclined to take the view that inherent power of Court could be invoked only where provisions have not been made, but where provision has been made and are provided in s. 754 (2) CPC inherent power of this Court cannot be invoked; inherent powers cannot be invoked to disregard express statutory provisions."

Per Somawansa, J.

"As the law now stands such a course – in seeking to invoke revisionary jurisdiction even if Court were to uphold the objections is not permissible in view of Rule 3 (1)*b* or other relevant Rules of Court of Appeal (Appellate Procedure) Rules 1990 published in *Government Gazette Extraordinary* No. 645/4 of 15. 01. 1991; where the procedure for revision applications is laid down.

Objection taken *in limine* to the maintainability of an appeal, from the District Court of Matara.

Cases referred to:

1. *Ranjit* v. *Kusumawathie and Others* – (1998) 3 Sri LR 232.
2. *Seneviratne* v. *Abeykoon* – (1986) 2 Sri LR 6.
3. *Goonesekera* v. *Adirian* – 14 NLR 79.
4. *Karunaratne* v. *Mohideen* – 43 NLR 102 at 105.
5. *Leechman Co., Ltd.* v. *Rangalla Consolidated Ltd.,* – (1981) 2 SLR 373.
6. *Gunarathne* v. *Thambinayagam* – (1993) 2 Sri LR 355.

Rohan Sahabandu with *Sitari Jayasundera* for the 19th defendant-appellant.

N. R. M. Daluwatte, PC with *Mrs. K. Siriwardena* for the respondents.

Cur. adv. vult.

May 10, 2002

SOMAWANSA, J.

In this partition action the 19th defendant-appellant filed his statement of claim on 05. 07. 1984. However, when the trial was taken up on 18. 03. 1988 and on 22. 04. 1988 the 19th defendant-appellant was absent and unrepresented. Thereafter, he filed two sets of petitions and affidavits, one dated 09. 05. 1988 which was filed before the judgment was pronounced and the other dated 04. 07. 1988 filed after the judgment was pronounced. It appears that by both sets of petitions and affidavits he was seeking to purge his default, in not appearing on the trial date and it was essentially an application under section 48 (4) of the Partition Act. The 19th defendant-appellant's application was inquired into on 02. 12. 1998 and on the same day the learned District Judge made order rejecting the said application. The 19th defendant-appellant has lodged this appeal from the said order.

The present inquiry relates to a preliminary objection taken up by the plaintiffs-respondents that the said order of the learned District Judge is not a judgment or a final order, but is an interlocutory order from which an appeal could be lodged only with the leave of the Court of Appeal first had and obtained. This objection is well-founded and in view of the Supreme Court decision in *Ranjit v. Kusumawathie and Others*,[1] this argument of counsel for the plaintiffs-respondents should succeed.

The Counsel for the 19th defendant-appellant neither in his oral submissions nor in his written submissions did contest the correctness of the position taken up in the preliminary objection raised by the plaintiffs-respondents. But, what he did argue was that a preliminary objection of this nature cannot be taken up by way of a motion as it is done in this case and that the application of the plaintiffs-respondents is premature, without any legal or lawful provision which cannot be referred to any rule.

One has to concede that the procedure adopted by the plaintiffs-respondents in this case cannot be referred to any procedure laid down either in the Civil Procedure Code or in the Supreme Court rules. At the same time, however, one has to concede the fact that the said procedure adopted by the plaintiffs-respondents is not prohibited in any way. In the case of *Seneviratne v. Abeykoon*[2] Tambiah, J. cited with approval a passage from the Code of Civil Procedure by Sarker, vol. 01, p. 842, where it is stated :

"Where a contingency happens which has not been anticipated by the framers of the Civil Procedure Code, and therefore no express provision has been made in that behalf, the Court has inherent power to adopt such procedure, if necessary to invent a procedure, as may do substantial justice and shorten needless litigation."

Again Middleton, J. in *Goonesekera* v. *Adirian*[3] states :

"I am not prepared to accede to the proposition that the Court has not any inherent authority to prevent any abuse of its process in cases where the legislature has not distinctly provided for such contingencies. At the same time I think, it must be established that an abuse has clearly occurred, which calls for such intervention."

Howard, CJ. in *Karunaratne* v. *Mohideen*[4] at 105 observed:

"It is the power and duty of the Court in cases where no specific rule exists, to act according to equity, justice and good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the legislature."

In *Leechman Co., Ltd. v. Rangalla Consolidated Ltd.*, Court considered the provisions contained in section 839 of the Civil Procedure Code and observed:

"Section 839 of the Civil Procedure Code merely saves the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of process of the Court. Where no provison exists it is the duty of the Judge and it lies within his inherent power to make such order as the justice of the case requires."

Section 839 of the Civil Procedure Code reads thus :

"Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

It appears that these authorities clearly indicate that this Court has the power and jurisdiction to entertain the motion by which the preliminary objection was raised and section 839 of the Civil Procedure Code make provision for conferring power and jurisidction to Court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of Court.

The question then arise as to whether if the preliminary objection raised by way of a motion, in that the 19th defendant-appellant has no right of direct appeal is considered at this stage will it cause any prejudice to the 19th defendant-appellant. I think the answer should be in the negative. For in any event, the 19th defendant-appellant cannot succeed in this appeal as he has failed to follow the correct procedure as provided by law and is now seeking to circumvent his own mistake by way of a technical objection.

It becomes relevant to consider at this point the provisions contained in section 755 (5) of the Civil Procedure Code which reads thus :

"(5) On receipt of the petition of appeal, the Registrar of the Court of Appeal shall forthwith number the petition and shall enter such number in the Register of Appeals and notify the parties concerned by registered post.

Provided that, when the Judge of the original Court has expressed an opinion that there is no right of appeal against, the Registrar shall submit the petition of appeal to the President of the Court of Appeal or any other Judge nominated by the President of the Court of Appeal who shall require the petition to be supported in open court by the petitioner or any Attorney on his behalf on a day to be fixed by such Judge, and the Court having heard the petitioner or his attorney, may, reject such petition or fix a date for the hearing of the petition, and order notice thereafter to be issued on the respondent or respondents.

Provided further, that, when a petition is rejected under this section the Court shall record the reasons for such rejection."

In the instant case there is no such opinion expressed by the Judge of the original Court that there is no right of appeal. As there is no opinion expressed one could only speculate as to why he did not express an opinion, when it is very clear that the order appealed against is an order made in respect of an application under section 48 (4) which is an interlocutory order from which there is no direct appeal. May be the learned District Judge due to inadvertence, negligence, unawareness or for any other reason failed to express an opinion. However, the lapse on the part of the learned District Judge does not prevent any other party to the action from bringing this fact to the notice of the Appellate Court as was done in the instant appeal. In any event, it is only the Appellate Court which has the jurisdiction to look into this matter.

The plaintiffs-respondents by way of a motion raised this preliminary objection that since the order appealed against is an interlocutory

order, to prefer an appeal against such an order the 19th defendant-appellant should do so with the leave of the Court of Appeal first had and obtained. The motion was filed on 15. 01. 2002 with notice to the 19th defendant-appellant, was supported on 25. 01. 2002 was inquired into and argued on 15. 02. 2002. Therefore, the 19th defendant-appellant cannot complain that he was not given an opportunity to support his petition of appeal or that he was not given a hearing.

Another matter that was contended by the counsel for the 19th defendant-appellant is that if at the stage of hearing of this appeal even if Court were to uphold the objections of the plaintiffs-respondents and the appeal fails still the 19th defendant-appellant could make an application to Court to exercise its revisionary jurisdiction. However, at this stage since the record is not available to the 19th defendant-appellant he is not in a position to make such an application and therefore would cause prejudice to the 19th defendant-appellant. I must concede that there are a number of decisions where the Court of Appeal exercised its revisionary jurisdiction in granting relief where there was no right of direct appeal. Be that as it may, I am inclined to take the view that inherent power of Court could be invoked only where provisions have not been made. But, where provision has been made and are provided in section 754 (2) of the Civil Procedure Code, inherent power of this Court cannot be invoked. I must also say that inherent powers cannot be invoked to disregard express statutory provisions. In *Gunarathna v. Thambinayagam*[6] it was held that "the right of appeal is a statutory right and must be expressly created and granted by statute". In any event, as the law now stands such a course is not permissible in view of Rule 3 (1) (*b*) and the other relevent rules of Court of Appeal (Appellate Procedure) Rules 1990 published in *Government Gazette Extraordinary* No. 645/4 of 15. 01. 1991 where the procedure for Revision Application is laid down.

The Court of Appeal (Appellate Procedure) Rules 1990, Rules 3 (1) (*a*), (*b*) and 3 (2) reads thus:

"3. (1) (*a*) Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, *ex mero motu* or at the instance of any party, dismiss such application.

(*b*) Every application by way of revision or *restitutio in integrum* under Article 138 of the Constitution shall be made in like manner together with copies of the relevant proceedings (including pleadings and documents produced), in the Court of first instance, tribunal or other institution to which such application relates.

(2) The petition and affidavit, except in the case of an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter. If such jurisdiction has previously been invoked the petition shall contain an averment disclosing relevant particulars of the previous application. Where any such averment as aforesaid is found to be false or incorrect the application may be dismissed."

It must also be noted that the 19th defendant-appellant cannot be heard to say that he has no other remedy. He could still follow the correct procedure.

For the foregoing reasons, I am inclined to hold with the plaintiffs-respondents and reject the objections raised by the 19th defendant-appellant. The appeal of the 19th defendant-appellant is rejected with costs.

DISSANAYAKE, J. – I agree.

Preliminary objection upheld – Appeal rejected.