

MOHAMED IQBAL AND ANOTHER
v.
MOHAMED SALLY AND ANOTHER

COURT OF APPEAL.

S. N. SILVA, J. P/CA.,

R. B. RANARAJA

C.A. 1343/37

D.C. KANDY NO. 11827

JANUARY 12, 1995.

Settlement – Amendment of Decree – S. 189 of the Civil Procedure Code – Applicability.

The Petitioners instituted action against the Respondents for a Declaration of Title and for the ejection of the Respondents from Lot 1A in Plan No. 2089. The parties came to a settlement whereby they agreed to – (i) accept the terms of settlement entered in an earlier action (ii) accept plan 2080 as correct (iii) have the Northern boundary of Lot 1A defined on the ground by 'X' Licensed Surveyor.

The District Judge visited the land and in the presence of the Judge, parties and their respective Counsel, the Surveyor demarcated the Northern boundary of Lot 1A on the ground. Decree was thereafter entered on 6.6.85. On 5.7.85, the Respondent sought to have the Decree set aside contending that it was not in terms of the Surveyor's Plan. After inquiry, the Respondent was directed to tender a fresh Decree, which was signed by the Judge on 18.2.86. Thereafter the Petitioners sought to have a draft Decree tendered by them to be substituted for the Decree entered on 18.2.86. After inquiry Court on 18.2.86, rejected the Decree entered on 18.2.86, and directed that Petitioners to tender a fresh draft Decree. The Draft decree tendered was accepted and signed on 2.1.87. The Defendants thereafter moved to amend that Decree. The Court on 20.10.87 rejected the Decree entered on 2.1.87.

Held:

- (1) S. 189 of the Civil Procedure Code is exhaustive of the causes for which a Decree may be amended.
- (2) This section cannot be invoked by Court for correcting mistakes of its own in law or otherwise.

- (3) A Judge cannot reconsider or vary his judgment after delivery except as provided for in S. 189.

Per Ranaraja J.

“This Power of Court under S. 189 is to be exercised entirely at the discretion of court, and the discretion should be exercised sparingly and in general to avoid a miscarriage of justice; if not the principle of the finality of a judgment and decree will have no meaning.”

- (4) In the present case, Neither party has alleged that there has been an error caused by an accidental slip or omission either on the part of their respective counsel or Court. Thus there was no question of amending the decree to bring it into conformity with the Terms of Settlement.

APPLICATION in Revision from the Order of the District Court of Kandy

Cases referred to:

1. *Rezan v. Ratnayake* 49 NLR 265
2. *Mapalathan v. Elayavan* – 41 NLR 115
3. *Dionis v. Arlis Appu* – 23 NLR 346
4. *Dharmadasa v. Meerayan* 50 NLR 197
5. *Thambipillai v. Muthucumaraswamy* 57 NLR 97
6. *Wanigasekera v. Kirihamy* 7 CLW 134
7. *Hinnihamy v. Carolis* 49 NLR 31
8. *Vivekasivenmany v. Ramasamy* 69 NLR 433

D. R. P. Gunatilake for Petitioner.

Faiz Musthapa P. C., with *G. L. Geethananda* for Respondents.

Cur adv vult.

February 10, 1995

RANARAJA J.

The Petitioners (plaintiff) and his grandmother instituted action against the Respondents (defendants) for a declaration of title to the land described in the schedule to the plaint and depicted in plan no: 2080 dated 30.10.69 prepared by K. G. Herath Licensed Surveyor, and for the ejectment of the respondents from lot 1A in that plan. The defendants filed answer praying for a dismissal of the plaintiff's

action. When the matter came up for trial on 20.11.84, the parties came to a settlement whereby they agreed.

(1) to accept the terms of settlement entered in an earlier action DC Kandy case no. 9118/L,

(2) to accept plan no. 2080 referred to as correct,

(3) to have the northern boundary of lot 1A in plan no. 2080 defined on the ground by R. C. D. de la Motte, Licensed Surveyor, in the presence of the District Judge.

The District Judge accordingly visited the land on 14.3.85. In the presence of the Judge, parties and their respective counsel, the surveyor demarcated the northern boundary of lot 1A on the ground, leaving access to the defendants for the user of their lavatory situated close to the boundary. The parties were directed to erect a fence along the boundary pointed out by the surveyor. Decree was entered on 6.6.85. On 5.7.85, the defendant filed papers in court seeking to have the decree amended, contending that it was not in terms of Surveyor de la Motte's plan. An inquiry was held into the defendant's application and the order thereon was delivered on 23.1.86. In that order the Learned District Judge has set out what transpired at the inspection held on 14.3.85 and directed the defendant to tender a fresh decree. The decree tendered by the defendant was then signed by the judge on 18.2.86. Thereupon, the plaintiff made an application to have a draft decree tendered by him to be substituted for the decree entered on 18.2.86. After hearing counsel for both parties, Court made order dated 18.9.86 "rejecting" the decree entered on 18.2.86. Court also directed the plaintiff to submit a fresh draft decree. The draft decree tendered by the plaintiff was accepted and signed by Court on 2.1.87. The defendants then filed papers to amend that decree. After both parties filed their written submissions, Court delivered order on 20.10.87 once again "rejecting" the decree entered on 2.1.87. All these orders were purportedly made under the provisions of section 189 of the Civil Procedure Code. This application is to have the order of 20.10.87 set aside.

Section 189 of the Civil Procedure Code permits Court on its own motion or on an application by any of the parties to an action;

(1) to correct any clerical or arithmetical mistake in any judgment or order,

(2) to correct any error arising in any judgment or order from any accidental slip or omission,

(3) to make any amendment which is necessary to bring a decree into conformity with the judgment.

Section 189 is exhaustive of the causes for which a decree may be amended. *Rezan v. Ratnayake* ⁽¹⁾. This section cannot be invoked by Court for the purpose of correcting mistakes of its own, in law or otherwise even though apparent on the face of the order. *Mapalathan v. Elayavan* ⁽²⁾ nor can a judge reconsider or vary his judgment after delivery of it in open court, except as provided for in that section. *Dionis v. Arlis Appu* ⁽³⁾. However, in a partition action, which proceeds on oral as well as documentary evidence, a failure to notice the reservation of a life interest in a deed has been considered to be an accidental slip or omission which permits the provisions of that section to be utilised to cure the defect in the judgment and decree. *Dharmadasa v. Meerayan* ⁽⁴⁾. Similarly where in an appeal preferred by contesting defendants in an action, the plaintiff's claim was dismissed by the Supreme Court which inadvertently omitted to make a formal order that a decree granting the defendant's counterclaim for delivery of possession of the property in dispute should be entered in addition to the decree for the dismissal of the plaintiff's claim, it was held that court had the power to amend the decree as it was an accidental omission. *Thambipillai v. Muthucumaraswamy* ⁽⁵⁾. The section cannot be utilised after judgment, for the purpose of granting a party relief which through his own inadvertence has omitted to claim at the trial *Wanigasekera v. Kirihamy* ⁽⁶⁾. But Court has the power to correct an error in an order made of consent between parties, which has been due to a slip on the part of Counsel in stating the terms of settlement

to Court. *Hinnihamy v. Carolis* ⁽⁷⁾. In any event, a District Judge cannot amend a decree which has been confirmed by an appellate Court. *Vivekasivenmany v. Ramasamy* ⁽⁸⁾.

Subsection (2) of section 189 requires reasonable notice of any proposed amendment to be given to the parties to the action or their respective Registered Attorneys.

The first two limbs of the section provide for the amendment of a judgment or order by the correction of any clerical or arithmetical error or a mistake arising from an accidental slip or omission. The third limb provides for the amendment of the decree to bring it in conformity with a judgment entered or a judgment amended in terms of the provisions of the first two limbs. This power of court is to be exercised entirely at the discretion of Court. Thus Court is not bound to allow each and every application for the amendment of a judgment, order or decree. The discretion should be exercised sparingly and in general, to avoid a miscarriage of justice. If not, the principle of finality of a judgment and decree will have no meaning.

In the case of a settlement entered into by parties to an action, the terms upon which the settlement is arrived at forms the basis of the decree. For that reason a duty is cast on the presiding Judge to ensure that the terms of settlement are clear and unambiguous. Once the terms are recorded, no amendment should be allowed except on the grounds stated in the first two limbs of the section. In the present case, neither party has alleged that there has been an error caused by an accidental slip or omission either on the part of their respective Counsel or Court. The decree entered on 2.1.87 incorporates all the terms that were agreed on by the parties in Court and at the inspection. Therefore, there was no question of amending the decree to bring it into conformity with the terms or settlement. In the circumstances, there was no justification for Court to "reject" that decree which was accepted and signed by Court. The order of the Learned District Judge is accordingly set aside.

We are mindful of the fact that several years have passed since the terms of settlement were entered. The ground situation no doubt would have changed. However, the petitioner will be entitled to have

the relevant boundary as shown in plan No: 6314/A prepared by Surveyor de La Motte demarcated on the ground.

The application is allowed with costs.

S. N. SILVA, J. – I agree .

Application allowed.
