

WIJERATNE AND ANOTHER
v
PUNCHI APPU AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A. 576/90 (F)
D.C. MATARA 7523/P
AUGUST 21, AND
SEPTEMBER 6, 2001

Partition Law, No. 21 of 1977 – Amendment of final decree to fall in line with amended interlocutory decree – Validity – Civil Procedure Code, section 189 – Laches – Does it apply when the error is by court ?

Held:

- (i) The final decree has been based on the original interlocutory decree and not on the amended interlocutory decree.

This has happened as a result of the mistake or error made by court.

The learned District Judge has used the discretion of the court correctly.

- (ii) A court whose act has caused injury to a suitor has an inherent power to make restitution. No man shall be put in jeopardy by a mistake or an error made by court.
- (iii) Delay on the part of the respondent in making the application can be excused.

APPEAL from the judgment of the District Court of Matara

Cases referred to:

1. *Mohamed Iqbal and another v Mohamed Sally and another* – (1995) 2 Sri LR 310 (distinguished)
2. *Sivapathalingam v Sivasubramaniam* – (1990) 1 Sri LR 378

Rohana Jayawardana for substituted 2nd defendant-respondent-appellant

Vidura Gunaratne for 4th defendant-respondent

23 August, 2002

DISSANAYAKE, J.

This is an appeal arising out of the order dated 30.03.1990 of the learned District Judge allowing the application made by the 4th defendant-petitioner-respondent, under section 189(1) of the Civil Procedure Code to amend the final Partition decree by directing that the partition of the property be effected according to the final scheme of partition as depicted in plan 1561 B and Report of Licensed Surveyor Wickremasuriya, instead of plan No. 1561 A of the same surveyor. In pursuance of this direction the learned District Judge had amended the final decree of the case in order to bring it in line with the amended judgement dated 19/10/1975 and the amended interlocutory decree entered by the then learned District Judge.

Learned counsel appearing for the substituted 2nd defendant-respondent-appellant's contention as reflected in his written submissions tendered was that the learned District Judge was in error when he allowed the application of the 4th defendant-petitioner-respondent for the following reasons:-

- (1) that the power of amendment of a decree under section 189 of the Civil Procedure Code is a discretionary remedy and must be sparingly used and the discretion must be used only in order to prevent a miscarriage of justice.
- (2) that the 4th defendant-petitioner-respondent was guilty of laches.

Learned Counsel for the substituted 2nd defendants-respondent cited the case of *Mohamed Iqbal and another v Mohamed Sally and another*¹ where Ranaraja, J. at page 314 has observed that the power of Court under section 189 is to be exercised entirely at the discretion of Court, and this discretion should be exercised sparingly and in order to avoid a miscarriage of justice, if not the principle of the finality of a judgment and decree contemplated by the provisions of the Partition Act would be rendered meaningless or nugatory.

The facts of *Mohamed Iqbal and another v Mohamed Sally and another* (*Supra*) are different to the facts of this case,

In that case, in terms of a consent judgment, Licensed Surveyor R.C.D. de la Motte, in the presence of the Judge, the parties and their respective counsel 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. 40

After decree was entered in terms of the settlement, on an application made by the defendant to amend the decree on the ground that it does not accord with surveyor de la Motte's plan, the District Judge after an inquiry held consequent to an inspection directed the defendant to tender a fresh decree which was signed by him. Subsequently on an application made by the plaintiff the District Judge rejected the decree that was entered and directed the plaintiff to submit a fresh draft which was accepted and signed by Court. It was held that neither party has alleged that there has been an error caused by an accidental slip or omission on the part of their respective counsel or Court. Thus it was held that there was no question of amending the decree to bring it into conformity with the terms of settlement. It was observed that Courts should exercise its discretion sparingly in such situations. 50

In the present case however after the interlocutory decree was entered on 14.03.1975 the learned District Judge made order to amend the interlocutory decree allotting 26/1152 shares to the original 2nd defendant and 216/1152 shares to the 4th defendant-petitioner-respondent and directed a commission be issued to the surveyor together with plan 1561 A, documents and the amended interlocutory decree. The amended interlocutory decree was signed by the learned District Judge. 60

Accordingly Licensed Surveyor Mervyn Wimalasuriya prepared plan No. 1361 B allotting *inter alia* Lot 3 to the 4th defendant-petitioner-respondent and Lot 2 to the original 2nd defendant.

However the final decree drafted by the attorney-at-law of the plaintiff has been based on the original interlocutory decree and not on the amended interlocutory decree. This has happened as a result of an error. 70

On an application made by the 4th defendant-petitioner-respondent the learned District Judge by his order dated 30.03.1990 rightly concluded that the final decree was not in conformity with the amended interlocutory decree on which plan 1561 B was prepared and parties allotted their respective shares which was being sought to be confirmed by the final decree. The learned District Judge had used the discretion of the Court correctly.

In considering the question of laches on the part of the 4th defendant-petitioner-respondent it has to be borne in mind that there had been no mistake or error on his part. The mistake or error in the final decree had been occasioned by a lapse on the part of the District Court in not checking whether the final decree was in conformity with the amended interlocutory decree before it was signed. There was no way in the 4th defendant-petitioner-respondent being aware of this mistake or lapse that has occurred on the part of the Court. 80

It is well to be borne in mind the principle that no man shall be put in jeopardy by a mistake or an error made by a Court.

It has been held in *Sivapathalingam v Sivasubramaniam*⁽²⁾ that a Court whose act has caused injury to a suitor has an inherent power to make restitution. 90

Therefore the delay on the part of the 4th defendant-petitioner-respondent in making the application can be excused.

Therefore I see no basis to interfere with the order of the learned District Judge.

The appeal of the substituted 2nd defendant-respondent-appellant is dismissed with costs.

SOMAWANSA, J. - I agree.

Appeal dismissed.