

1956

*Present : Gunasekara, J., and Pulle, J.*

H. W. AMARASURIYA ESTATES LTD.,  
Petitioner, and E. RATNAYAKE *et al.*, Respondents

*S. C. 627—In the matter of an application in revision in D. C. Kandy 4.572/P*

*Partition action—Interlocutory decree—Intervention of a party thereafter—Power of Supreme Court to interfere in revision—Partition Act No. 16 of 1951, ss. 15 (1), 17(2), 48—Civil Procedure Code, s. 753.*

After interlocutory decree was entered under the Partition Act No. 16 of 1951, the petitioner, a limited company, sought to intervene because the land described in the schedule to the plaint and in the interlocutory decree was different from, although adjacent to, the land depicted in the Plan prepared by the surveyor commissioned by the Court. The Company was not a party to the partition action and it was only after the decree had been entered that it became aware that the land depicted in the commissioner's Plan had been surveyed for the purpose of the action as that described in the schedule.

*Held, in revision*, that the interlocutory decree should be set aside and that the trial Court should be directed to add the petitioner as a party and proceed with the action.

**A**PPEAL from an order of the District Court, Kandy.

*H. W. Jayewardene, Q. C.*, with *E. S. Amerasinghe*, for Petitioner.

*D. S. Jayawickreme, Q. C.*, with *W. D. Gunasekera*, for Respondent.

*Cur. adv. vult.*

March 28, 1956. GUNASEKARA, J.—

This is an application for the revision of an interlocutory decree entered under the Partition Act, No. 16 of 1951. The land to which the decree relates is described in the following terms in the body of the decree :

“ All that allotment of land called Dehikanawalagawa hena *alias* Dehikanuwagawa hena of two acres two roods and fifteen perches situate in Kosgama in Pallispattu West of Pata Dumbara in the District of Kandy in the Central Province and depicted in Plan No. 2165 dated 1st February, 1955 marked “ X ” made by E. R. Claasz Licensed Surveyor and filed of record in this case, containing in extent 2A. 2R. 27P. and fully described and set out in the Schedule hereunder ” ;

and the Schedule, which is a reproduction of the schedule to the plaint where the land sought to be partitioned is described, reads as follows :

“ All that allotment of land called Dehikanewelagawa hena *alias* Dehikanuwagawa hena of two acres two roods and fifteen perches situate in Kosgama in Pallispattu West of Pata Dumbara in the District of Kandy in the Central Province and bounded by the North by land said to belong to Crown, on the East by a Road, on the South east by land described in Plan No. 76328 and on the South-West by lands described in Plans Nos. 62642 and 62641 and on the North-West by Huluganga, with everything thereon and Registered in E 366/117.”

The petitioner, a limited company, alleges that the piece of land described in the Schedule is a different one from that depicted in Plan No. 2165 made by Mr. Claasz, and that the latter corpus is a “ very small and;

remote part" of an estate of some 1135 acres of which the company is the sole owner. The company is not a party to the partition action and it alleges that it was only after the decree had been entered that it became aware that the land depicted in Plan No. 2165 had been surveyed for the purpose of the action as that described in the Schedule. It is also alleged in the petition that

"The said part is separated off from the main estate by a stream and the Petitioner had no reasonable opportunity or means of knowing, nor had the petitioner any notice, of the aforesaid survey".

Mr. Jayawickreme contended at one stage that in view of the provisions of section 48 of the Partition Act this court had no power to interfere with the decree in revision, but he later abandoned that contention and conceded that the court had that power. I do not think there can be any doubt that the powers of revision vested in this court by the Courts Ordinance and by section 753 of the Civil Procedure Code are in no way diminished by the provisions of section 48 of the Partition Act. If I may say so, I think that Mr. Jayawickreme was right in conceding that the court has the power to revise the decree in question. He maintained, however, that the present case was not one in which the exercise of that power would be warranted by the facts.

The company has submitted in support of its application an affidavit from a surveyor, Mr. J. T. David, dated the 23rd September, 1955. Mr. David states in this affidavit that he surveyed the land covered by the Plan No. 2165 mentioned in the decree and also compared that plan with a tracing from the Field Sheet made by the Surveyor-General. This survey and comparison have revealed, according to him, that the land depicted in Plan No. 2165 is identical with the land depicted in Title Plans Nos. 62641, 62642 and 62572 (which is claimed by the company); and that the land described in the schedule to the plaint (and in the schedule to the decree) is covered by Title Plan No. 76327 as it appears in the tracing; and also that the latter is a separate and distinct land, adjacent to the former. The plaintiff, who is the first respondent, states in a counter-affidavit "I deny the correctness of the facts stated in the affidavit by the petitioner and in the affidavit of Mr. J. T. David, Licensed Surveyor of Kandy". But for this denial, the correctness of the facts deposed to by Mr. David has not been challenged in these proceedings.

The plaint alleges that the land sought to be partitioned, which is described in the schedule, was at one time the property of one Alfred Payne whose title to it was a Crown grant; that by Deed No. 1505 of the 16th September, 1876, he sold it to Mohammado Meedin and Kader Saibo; and that by a series of deeds (the numbers and dates of which are quoted) Meedin's title too eventually devolved on Kader Saibo. It then traces the devolution of the title to the property from Kader Saibo to the three respondents; each of whom bought a one-third share, Ratnayake (the plaintiff) and Ekanayake (the 2nd defendant) on the 20th July, 1954, and Navaratne (the 1st defendant) on the 15th September, 1954.

The plaint was filed on the 29th September, 1954. A commission to survey the land was issued to Mr. Claasz on the 29th November and he made his return on the 3rd February, 1955, which was the returnable date. The two defendants filed a joint answer on the 31st March, admitting the averments in the plaint, and the case was set down for trial on the 11th May. The evidence taken at the trial, which was held on that day, consisted of that of the plaintiff-respondent, who produced a series of deeds by which Kader Saibo's title to the property described in the schedule to the plaint devolved on the plaintiff and the two defendants. The plaintiff declared in his evidence that he sought "to partition the land called Dehikanawelagawa-heña depicted in plan No. 2165 marked X and filed of record", that Kader Saibo was "the original owner of this land", and that Kader Saibo by a deed of 1904 (executed 25 years before the plaintiff was born) gifted it to Dawood Saibo. There is no evidence at all in proof of the assertion that the land dealt with by this deed (P1) was the same as that depicted in Plan No. 2165.

Neither the Crown grant nor the relevant title plan was produced or expressly mentioned in the oral evidence given by the plaintiff. The deed P1, however, recites the Crown grant and describes the property conveyed in the same terms as the schedule to the plaint, except that it also describes it as being depicted in Title Plan No. 76327. According to Mr. David, too, it is the land covered by this title plan, as it appears in the tracing from the Field Sheet made by the Surveyor-General, that corresponds to the land described in the schedule to the plaint. It seems curious that the reference to Title Plan No. 76327 is omitted from the description in the Schedule.

Mr. Claasz states in his report that "no title plan or plan of any kind was produced by either party to verify nos. mentioned in the commission", and that the boundaries were "pointed out by the plaintiff's party". The person or persons who pointed out the boundaries depicted in Mr. Claasz's Plan No. 2165 as those of the land described in the schedule to the plaint did not give evidence.

There is no evidence that can support a decree for the partition of the corpus depicted in Plan No. 2165 upon the footing that it is identical with that described in the schedules to the plaint and the decree, but there is, on the contrary, strong *prima facie* ground for the view that it is a different piece of land.

The interlocutory decree was entered on the 9th June, 1955, and a commission (returnable on the 30th June) was issued to Mr. Claasz on the next day to partition the land depicted in Plan No. 2165. He executed the commission on the 25th June and submitted his return on the 30th, and the district court fixed the consideration of the scheme of partition for the 25th August, 1955. In the meantime, on the 5th July the Registrar of Lands, Kandy, returned after registration a copy of the interlocutory decree that had been sent to him for that purpose on the 10th June. On the 6th July the proctor for the defendants filed a minute by which his clients consented to the acceptance of the scheme

of partition and moved that the scheme be confirmed. On the 18th July, the plaintiff's proctor submitted that the parties wished "to convey by deed their divided interests in the land partitioned" and moved "that the scheme be confirmed to enable the plaintiff to file Final Decree". He also moved that the case be called on that very day and stated that the defendant's proctor had taken notice for that day. The district judge directed that the matter should be mentioned on the 25th August. On the 25th August, the company's proctors moved that the company be allowed to intervene in the action, and consideration of the proposed scheme of partition was deferred pending a decision on this motion. The motion was later disallowed and the company made the present application for revision of the interlocutory decree.

It is contended by Mr. Jayawickreme that the advertisement of the action and of the survey, under section 15(4) and section 17(2) respectively of the Partition Act, should have enabled the company to intervene in the action before the interlocutory decree was entered on the 9th June, 1955. Section 15(4) requires the fiscal to cause a copy of the notice of institution of the action issued to him under 13(1) to be exhibited on the land to which the notice relates, and the contents of the notice to be orally proclaimed, after beat of tom-tom. Section 17(2) provides that the surveyor shall, at least fourteen days before the date fixed by him for commencing the survey, cause the fact that he will commence the survey on that date to be orally proclaimed, after beat of tom-tom, on the land to be surveyed. According to the surveyor's report, this proclamation was made on the 21st December, 1954 and the land depicted on Plan No. 2165 was surveyed on the 10th January, 1955. The land to which the notice of the institution of the action related, however, would be the land described in the schedule to the plaint. In the absence of evidence to prove that this land is identical with the land depicted in the plan it cannot be presumed that it was on the latter that the fiscal caused a copy of the notice of the action to be exhibited and its contents to be orally proclaimed.

I would set aside the interlocutory decree and direct the district court to add the petitioner as a party and proceed with the action. The plaintiff-responder must pay the petitioner his costs in the proceedings before this court.

PULLE, J.—I agree.

*Decree set aside.*