VICTOR AND ANOTHER
v.
CYRIL DE SILVA

COURT OF APPEAL
ISMAIL, J.,
WEERASURIYA, J.
C.A. 563/89
D.C. GALLE 9017/L
AUGUST 26, 1997.

Rei Vindicatio Action – Partition Ordinance 10 of 1863 – Party added subsequent to entering of Final Decree – Decree amended – Conclusive effect of S. 9 when decree is considered in a seperate action – Evaluation of evidence – S. 187 Civil Procedure Code – Art. 138 (1) Constitution.

The plaintiff-respondent instituted action praying for a declaration of title and for the ejectment of the defendants-appellants.

It was the position of the plaintiff-respondent that lot 6 was allotted to his mother in an earlier Partition case and that she was added as a party subsequent to the entering of the final decree, and the final decree was amended, allotting lot 6 to his mother, who had obtained rights prior to the Partition Action from the 7th defendant, who had originally been allotted Lot 6. The District Court held with the plaintiff.

On Appeal

Held:

(1) Failure to investigate title which could be a good ground for setting aside a decree on an appeal in the same action would not detract from the conclusive effect of S. 9 of the Partition Ordinance No. 10 of 1863 when the decree is being considered in a seperate action.

(2) On a parity of reasoning the fact that lack of jurisdiction to amend a final decree may be sufficient ground for a Appellate Court acting in the same case to set aside decree, does not detract from the conclusive effect of S. 9 when the decree is being considered in an another case.

(3) The question whether the District Judge acted in excess of jurisdiction in amending the Final Decree should have been canvassed by the parties affected by way of an appeal to the Supreme Court in the same action.

Per Weerasuriya, J.

> "The learned District Judge was in obvious error when she failed to evaluate the evidence, in terms of S. 187, Civil Procedure Code, the failure to comply with the imperative provisions of S. 187, has not substantially prejudiced the rights of the defendant-appellants or has not occasioned a failure of justice to the defendants-appellants, as it is evident on a close examination of the totality of the evidence that the learned District Judge is correct in pronouncing judgment in favour of the plaintiff-respondent".

APPEAL from judgment of the District Court of Galle.

Cases referred to:

1. *Sirinivasa Thero v. Sudassi Thero* – 63 NLR 31.
2. *Mohamedaley Adamjee v. Hadad Sadeen* – 58 NLR 217 (PC).

Faisz Musthapa, PC with *Hemasiri Withanachchi* for defendants-appellants.

M. S. M. Hassan with *Ms. S. Hassan* for plaintiff-respondent.

Cur. adv. vult.

September 29, 1997

WEERASURIYA, J.

The plaintiff-respondent filed action in the District Court of Galle against the defendants-appellants praying for a declaration of title to the land called lot 6 of Kumbalhelawatta alias Hambanagewatta morefully described in paragraph 2 of the plaint, for the ejectment of the defendants-appellants and damages.

The defendants-appellants filed answer denying plaintiff-respondent's title to the land and prayed for dismissal of the action with a declaration that the 2nd defendant-appellant is entitled to the land.

At the commencement of the trial on 21.08.84, two admissions were recorded, namely –

(*a*) that the corpus of this action is the land depicted in plan No. 1542 of 18.11.81 made by P. R. Ambawatta, licensed Surveyor; and

(*b*) that the corpus formed a portion of the land of the subject matter of the partition action bearing No. 31854 of the District Court of Galle.

At the trial which proceeded on 13 issues, the plaintiff-respondent testified that his mother Elgi Wijesekera was allotted lot 6 of the land called Kumbalhelawatta alias Hambanagewatta in the final decree in the partition action bearing No. 31854 of the District Court of Galle and she transferred the same to him on 30.01.66 by deed No. 490 marked 'පැ 2'. However, it was revealed that Elgi Wijesekera who was the 10th defendant in the aforesaid partition action was added as a party subsequent to the entering of the final decree on filing a petition and affidavit following her rights to the land obtained prior to the partition action from Singho Appu, the 7th defendant who had originally been allotted lot 6 of the aforesaid land. The final decree, petition and affidavit of Elgi Wijesekera and the order of the District Judge amending the final decree were produced marked 'පැ 1A', 'පැ 1B', 'පැ 1C' and 'පැ 1I', respectively.

Learned counsel for the defendants-appellants submitted that the District Judge had no jurisdiction to amend the final decree by allotting lot 6 of the aforesaid land to Elgi Wijesekera, 10th defendant, which was originally allotted to Singho Appu the 7th defendant. He contended that in the circumstances, that no rights would flow from the said decree as it was a nullity, being an act performed in excess of jurisdiction. He cited the case of *Sirinivasa Thero v. Sudassi Thero*[1] in support of his contention, where it was observed at page 33 that when a court makes an order without jurisdiction, it has inherent power to set it aside and it is not necessary to appeal from such an order which is a nullity.

It is to be observed that section 9 of the Partition Ordinance No. 10 of 1863, in terms of which the impugned final decree was entered provided that –

> *"the decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whatsoever, whatever right or title they have or claim to have in the same property ..... and shall be good and sufficient evidence of such partition and sale and of the title of parties to such shares or interests as have been awarded in severalty."*

However, in *Mohamedaley Adamjee v. Hadad Sadeen*[2] Privy Council held that –

"a decree entered under section 8 or section 9 of the Partition Ordinance is conclusive against all persons whomsoever and a person owning an interest in the land partitioned whose title even by fraudulent collusion between the parties had been concealed from the court in the partition proceedings is not entitled on that ground to have the decree set aside, his only remedy being an action for damages."

It was further held that –

"although a partition decree entered without any investigation of title does not have the conclusive effect provided by section 9 of the Partition Ordinance, a decree entered after a defective or inadequate investigation of title is conclusive as long as it has not been set aside on an appeal in the same action."

It is significant to note that failure to investigate the title which could be a good ground for setting aside a decree on an appeal in the same action, would not detract from the conclusive effect of section 9 of the Partition Ordinance, No. 10 of 1863 when the decree is being considered in a separate action.

Learned counsel for the defendants-appellants laid emphasis on the fact that final decree has been amended on the basis of the claim made by Elgi Wijesekera after it was entered. However, it was relevant to note that on the application of Elgi Wijesekera, the 7th defendant Singho Appu was noticed to appear in court, and on his failure to appear on notice being served, District Judge allowed the application (Vide 'එ 11'). It is to be noted that District Judge had sent a report to the Supreme Court explaining the steps taken to amend the decree presumably on a petition by the 7th defendant as evident from the document marked 'එ 1F'. The question whether the District Judge acted in excess of his jurisdiction in amending the final decree, should have been canvassed by the parties affected by way of an appeal to the Supreme Court in the same action. On a parity of reasoning the fact that lack of jurisdiction to amend a final decree may be sufficient ground for an Appellate Court, acting in the same case to set aside a decree, does not detract from the conclusive effect of section 9 of the Partition Ordinance, No. 10 of 1863, when the decree is being considered in another case. It is relevant to state therefore, that the defendant-appellant at this stage is debarred in law from assailing the conclusive nature of the partition decree marked 'එ 1A'.

However, the main submission of learned counsel for the defendants-appellants is that the learned District Judge has failed to evaluate the evidence in her judgment which only contains a narration of the evidence of the witnesses who have given evidence. Nevertheless, the learned District Judge has briefly referred to an item of evidence of the 1st defendant-appellant touching on the issue of prescription. This relates to an alleged complaint by the plaintiff-respondent against the 1st defendant-appellant for plucking coconut on which he was charged. Learned District Judge has stated that the assertion of the 1st defendant-appellant that he was discharged from proceedings has not been proved as he has failed to produce the case record or to give even the number of the case nor has he mentioned this in his answer. This observation of the learned District Judge is a manifest exercise by her of the test of probability in regard to the version of 1st defendant-appellant on the issue of prescription. Further, the learned District Judge has observed that she is proceeding to answer the issues, taking into consideration the evidence and submissions made. This pronouncement of the learned District Judge could be a clear indication of an awareness of her duty to deal with the evidence placed before her by the parties to the action.

The plaintiff-respondent has testified that his mother Elgi Wijesekera having being allotted lot 6 of the land called Kumbalhelawatta alias Hambanagewatta transferred the same to him on a deed marked 'පැ 2'. As against this evidence, there was no material placed by the defendants-appellants in regard to the title of Singho Appu, from whose wife and children, 2nd defendant-appellant is purported to have purchased their interests by deeds marked '1 වි 1' and '1 වි 2'. Thus, the defendants-appellants have failed to prove a valid paper title to this land.

Nevertheless, the 1st defendant-appellant maintained in his evidence, that he was in possession of this land for a period of 30 years which he modified later by stating that his mother who was the sister of Elgi Wijesekera was in possession of this land till her death in 1979. It was revealed that this land was used as a family burial ground from the year 1945 where the father, mother, sister named Banduwathie and brother named Sunny of the plaintiff-respondent were buried. Surveyor Ambawatta who surveyed this land on a commission has shown in his plan marked 'X', three tombs marked A, B and C which were the tombs of mother, sister and father respectively of the plaintiff-respondent.

On this uncontroverted testimony of the plaintiff-respondent, it would be clear that this land has been possessed by the plaintiff-respondent and his predecessors in title well beyond a period of 30 years.

It is apparent that the learned District Judge has not engaged in an exhaustive analysis of the evidence led at the trial. Nevertheless, on the basis of overwhelming evidence led on behalf of the plaintiff-respondent and the evidence of Piyasena Silva, who was called by the defendants-appellants, the conclusion is irresistible that a judgment for the plaintiff-respondent, as prayed for in the plaint is inevitable.

Article 138 (1) of the Constitution which deals with the jurisdiction of the Court of Appeal is on the following terms:

"138 (1) – The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any court of first instance . . .

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice".

It is evident on a close examination of the totality of the evidence that the District Judge is correct in pronouncing a judgment in favour of the plaintiff-respondent as prayed for in the plaint. However, the learned District Judge was in obvious error when she failed to evaluate the evidence in terms of section 187 of the Civil Procedure Code. The failure of the learned District Judge to comply with the imperative provisions of section 187 of the Civil Procedure Code has not substantially prejudiced the rights of the defendants-appellants, or has not occasioned a failure of justice to the defendants-appellants.

In the circumstances, we affirm the judgment and the decree of the learned District Judge and dismiss this appeal with costs.

ISMAIL, J. – I agree.

Appeal dismissed.