PIYASENA PERERA

v.

MARGRET PERERA AND TWO OTHERS

COURT OF APPEAL
H. A. G. DE SILVA, J. AND G. P. S. DE SILVA, J.
C.A. APPLICATION No. 1596/82 – D. C. COLOMBO 13820/P.
NOVEMBER 7, 1983.

Partition Law No. 21 of 1977 – Finality attached to partition decree under section 48 (1) – Revision and restitutio-in-integrum–In what circumstances is the claimant entitled to revision.

In an action for partition the District Court entered interlocutory decree for the partition of the field in suit. The petitioner moved in revision against this order on the ground that he had no notice either of the action or of the preliminary survey of the land and that as a result if final decree is entered, he will lose a portion of his land and suffer irreparable damages.

Held–

The finality attached to an interlocutory decree of partition under section 48 (1) of the Partition Law, No. 21 of 1977, does not preclude an appeal court from interfering with such decree by way of revision or *restitutio in integrum* where a miscarriage of justice has occurred. In this case the corpus to be partitioned had not been sufficiently identified either by means of the stated boundaries or by extent and the land of the petitioner appeared to be included in the corpus. Therefore there has been a miscarriage of justice.

Case referred to

(1) *R. A. Somawathie* v. *Soma Madawella nee Delwatte et al – S. C. 24/82 ; C. A. Application No. 399/77 ; D. C. Kurunegala 3909/P of 29.6.83.*

APPLICATION for *restitutio-in-integrum* and revision from an order of the District Court, Colombo.

G. G. Mendis for petitioner.
Respondents absent and unrepresented.

Cur. adv. vult.

January 13, 1984

H. A. G. DE SILVA, J.

This is an application for *restitutio-in-integrum* and/or revision in respect of a partition case in which after trial interlocutory decree was entered for a partition of the field in suit.

The plaintiff-respondents filed this partition action for the partition of a field called Nagahadeniya Kumbura and Owita of about two perches of paddy sowing extent (vide Plan 'A'). There were no points of contest in this action. After trial, interlocutory decree was entered for the partition of the field (vide interlocutory decree 'B').

Preliminary Plan No. 2820 dated 7th of September, 1979 ('X') which was produced at the trial depicted the field sought to be partitioned as 15.05 perches of sowing extent. To the south of the said field was the land called Kahatagahawatte Millagahawatta owned by the petitioner. This land is depicted in the Plan No. 1675/66 A-C dated 10th November, 1932 (vide 'C'). According to the petitioner, through preliminary Plan 'X' the plaintiffs have sought to include a portion of Kahatagahawatta Millagahawatte owned by the petitioner which is to the south of the said field and as a result of this encroachment on the petitioner's land, the field sought to be partitioned has been enlarged from 2 perches of paddy sowing extent to 15.25 perches (vide 'X').

The petitioner avers that he has had no notice of this action or any notice of the preliminary survey of the land and that the said preliminary plan has been made according to the fraudulent instructions given to the Commissioner by the plaintiffs. The petitioner fears that if the said preliminary plan is used in the final partition the petitioner will lose a portion of his land and in consequence suffer irreparable damages.

A perusal of the plaint filed by the plaintiffs (1st and 2nd respondents to this application) in the partition action shows that according to the schedule to the plaint, the field sought to be partitioned is Nugagahadeniya Kumbura and owita containing about 2 perches of paddy sowing extent. On the south it is said to be bounded by the land belonging to one Simon de Alwis Perera and Marthenis Perera Weerasinghe. Whether these persons were the predecessors-in-title of the petitioner is not known. Plan 'X' does not show that the field in suit is bounded on the south by Kahatagahawatta Millagahawatte said to be owned by the petitioner, though Plan 'C' made in 1932 depicts the land called Kahatagahawatta Millagahawatta in extent 1 acre-0 rood-11.6 perches bounded on the north by Nagaha Kumbura.

The survey report states that the boundaries in the schedule do not exist now except for Nagahadeniya on the north. It further states that the extent referred to in the schedule is 2 perches which measure he is now unaware of, hence it was not possible for him to identify the land surveyed with that in the schedule. It is also stated that the boundaries of the entire land were pointed out by the plaintiff, and there is nothing to indicate that the petitioner was present at the survey.

The plaintiffs-respondents though noticed have not thought fit to file their objections and traverse the statements of fact made in the petition.

While Plan "X" depicts lots A & B as 15.25 perches in extent, according to the schedule to the plaint the field sought to be partitioned is 2 perches in paddy sowing extent. This is one of the reasons why the surveyor has reported that he is unable to identify the land with that in the schedule to the plaint.

Interlocutory decree "B" entered in the partition case shows that allotments of shares in the field sought to be partitioned are out of lots A & B of the land depicted as Naghadeniya Kumbura and Owita in Plan "X".

Further the learned trial Judge has failed to address his mind to the apparent discrepancy between the land described in the schedule to the plaint and the land surveyed and depicted as Lots A & B in Plan 'X', especially in the light of the statement made by the surveyor in his report that he is unable to identify the land as that described in the schedule to the plaint.

It therefore appears that there has not been a sufficient identification of the corpus as the land depicted in Plan 'X' either by means of the stated boundaries or by extent.

The next question to be decided is whether in view of the finality attached to the interlocutory and final decrees of partition by section 48 (1) of the Partition Law, No. 21 of 1977, this Court could interfere by revision or *restitutio-in-integrum* with such a decree.

Section 48 (1) enacts that–

"Save as provided in sub-section 5 of this section, the interlocutory decree entered under section 36 shall, subject to

the decision on any appeal which may be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of sub-section 4 of this section, be good and sufficient evidence of the title of any person as to any right, share and interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have or claim to have, to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the Court or the fact that all persons concerned are not parties to the partition action, and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree. . . ."

The Supreme Court in the unreported case of *R. A. Somawathie v. Soma Madawella nee Delwatta et-al* (1) has, after a comprehensive review of all the existing authorities on the relevant provisions in the Partition Act, No. 16 of 1951, the Administration of Justice (Amendment) Law, No. 25 of 1975, and the current Partition Law, No. 21 of 1977 held that "the powers of revision and *restitutio-in-integrum* have survived all the legislation that have been enacted up to date. These are extraordinary powers and will be exercised only in a fit case to avert a miscarriage of justice. The immunity given to partition decrees from being assailed on the ground of omissions and defects of procedure as now broadly defined, or the failure to make 'persons concerned' parties to the action should not be interpreted as a licence to flout the provisions of the Partition Law. The Court will not hesitate to use its revisionary power to give relief where a miscarriage of justice has occurred".

Considering the conclusions that I have arrived at, on the facts of this case, i.e. that the corpus to be partitioned has not been sufficiently identified as the land depicted in Plan 'X' either by stated boundaries or by extent, I feel there has been a miscarriage of justice in that the land of the petitioner appears now to be included in the corpus. I therefore set aside the interlocutory decree and the proceedings had up to the time of entering such decree and order a re-trial of this case. The applicant will bear his own costs of this application.

G. P. S. DE SILVA, J.—I agree.

Re-trial ordered.