PERERA AND OTHERS

v.

ADLINE AND OTHERS

COURT OF APPEAL
JAYASINGHE. J.
JAYAWICKREMA. J.
CA 491/96(REV)
DC MT. LAVANIA 39/93/P
15TH OCTOBER 1999
16TH NOVEMBER 1999
01ST MARCH 2000
24TH APRIL 2000

Partition Law 21 of 1977 - S.48, S.48(1), S.49 Amended by Act No. 32 of 1987 - S.16(3), 20(1), 29(3), 20(1)(b), Refusal to add Party - Case filed claiming compensation under S.49 - Is he estopped from challenging Interlocutory Decree.

Held :

(1) According to S.48(5) and S.48(1) it is clear that the only remedy available to a person who was not a party to a partition action, is to file a separate action to recover damages from any party to the action, if he says that his land has been partitioned.

(2) The above provisions state that "the amount of damages shall be a charge on any share of the land or any money allotted in such action" makes it clear that a party will not be prejudiced by the mere fact of not being added as a party - S.49(1) prevents such prejudice.

Per Jayawickrema, J.

> "Although in an appropriate case this Court has jurisdiction to act in Revision and *restitutio-in-integrum*, but where a party has deliberately not shown due diligence even after he was notified by the Surveyor to appear in Court and fails to apply to be added as a party, this Court will not exercise its jurisdiction in his favour."
>
> (2) It is clear that the Petitioners have accepted the finality of the Judgment and the Interlocutory Decree in this action.

APPLICATION in Revision and/or Restitutio-in-integrum from the Order of the District Court of Mt. Lavania.

W. Dayaratne with *Ms. R. Jayawardane* for Petitioners.

M.A.Q.M. Ghazzali with *E.O. Palihapitiya* for Plaintiff - Respondents.

C.A. Hettihewa for 1-6 Respondents.

Cur. adv. vult.

May 25, 2000.

JAYAWICKREMA, J.

This is an application to revise the order of the learned District Judge dated 24. 07. 1996 wherein he has refused an application to add the Petitioners as parties to the partition action.

It is admitted that the Petitioners were not parties to the partition action.

The learned Counsel for the Plaintiff - Respondent raised a preliminary objection, in that as the Petitioners have filed two cases, viz. 1313/M and 1314/M in the District Court of Mount Lavinia, under Section 49 of the Partition Act claiming monitory compensation for the Petitioner and her children on the basis that their interest have been extinguished or otherwise prejudiced by the said interlocutory decree tantamount to holding out or causing or permitting the Plaintiff - Respondent to believe that the Petitioner has accepted the finality of the interlocutory decree and to act upon that belief. He further contended that the Petitioner is now estopped from denying that he had accepted the finality of the interlocutory decree and proceeded to take steps to recover from the Plaintiff - Respondent any advantage of a compensation that may arise from the finality of the interlocutory decree. The learned Counsel further submitted that once a person exercises the right given under Section 49 of the Partition Act, he cannot thereafter reprobate, and seek to set aside the decree upon which he has exercised such a right.

The learned Counsel for the Petitioners submitted that though the Section 49 states that parties are entitled to claim damages it does not give any prescriptive period within which the action for damages could be filed. Therefore the parties are guided by the Prescription Ordinance, where in Section 9 an action for damages should be filed within a period of two years and therefore they instituted the above two actions in the District Court through abundance of caution that they would loose their said rights for damages if they loose this present application before this Court as to make an application for Revision and Restitutio-in-integrum is not conferred to a person or even to a party in a partition action under the Partition Act. The learned Counsel contended that the mere fact that the Petitioners instituted the above two actions does not in any manner amounts to an admission by them that all their rights have been extinguished by the interlocutory decree entered in this case.

According to Section 48(5) of the Partition Act the interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by Section 48(1) as against a person who, "**not having been a party**" to the partition action, claims any such right, title or interest to or any land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree **if, but only if, he proves that the decree has been entered by a Court without competent jurisdiction.** According to the Provisions of the Partition Act, a partition decree could not be challenged even on the grounds of fraud or collusion.

When one considers the above provisions it is clear that the only remedy a person who was not a party to a partition action is by way of a separate action to recover damages from any party to the action under a Section 49(1) of the Partition Act.

According to the provisions in Section 49(2) of the Partition Act, where an action for damages is instituted and is registered as a *lis pendens* and if any damages were awarded, the amount of such damages shall be a charge on any share of the land or any money allotted in such partition action to the Defendant or each of the Defendants in the action for damages and such charge shall rank next in priority to the charge referred to in Section 34(2) and the charge referred to in section 63, and such charge shall be enforceable against such party and any person deriving a right, title or interest therein or thereto from such party, not being a transferee for value without notice of the right title or interest of such Plaintiff.

When one considers the above provisions of law it is abundantly clear that the only remedy that a person who is not a party to a partition action is an action for damages under Section 49(1) of the Partition Act. The above provisions which states that "the amount of damages shall be a charge on any share of the land or any money allotted in such partition action" makes it clear that a party will not be prejudiced by the mere fact of not being added as a party to a partition action. The purpose of Section 49(1) is to prevent such prejudice.

As submitted by the learned Counsel for the Petitioner, although in an appropriate case this Court has jurisdiction to act in revision and *restitutio-in-integrum*, where a party has deliberately not shown due diligence even after he has been notified by the Surveyor to appear in Court and fails to apply that he be added as a party, this Court will not exercise its jurisdiction in his favour.

The learned Counsel for the Petitioners in his written submissions contended that the Surveyor failed to give notice as required by Section 16(3) of the Partition Amendment Act No. 32/1987 and therefore the learned Trial Judge on 19. 10. 1994 has directed the Surveyor to submit proof of

the said service of notice on 06. 12. 94. He further submitted that the purported notice marked as P9 is not a notice in compliance of Section 16(3) of the Partition Act. Learned Counsel further submitted that the case came up for trial even without the Gramasevake's report been produced in Court in violation of the provisions of Section 20 of the Partition Act.

It is to be noted that on the day the Surveyor surveyed this land, the 1st Petitioner Maha Wedage Vijitha Sudarika Perera, the mother of the 2nd, 3rd and 4th Petitioners, presented herself before the Surveyor and gave her address to the Surveyor as a new claimant. The Surveyor states in his report that Lot B(2) which is part of the Corpus has become a part of the adjacent land of which the new claimant (1st Petitioner) is the owner.

On a perusal of the Journal Entries No. 11 and 16 dated 19. 10. 1994 and 02. 01. 1995 respectively, we find that the Surveyor has personally given notice to the 1st Petitioner M.V. Kamal Vijitha Sundari Perera under Section 16(3) of the Partition Act. According to Journal Entry No. 18 dated 10. 02. 1995, Journal Entries No. 26 and No. 27 dated 05. 06. 1995, and 13. 06. 1995 notices have been served on the Gramasevaka, of 532 B, Godigamuwa South, and he has filed his report.

The 1st Petitioner made an application to the District Court after the judgment in the case was delivered that she may be added as a party to the Partition Action. The 1st Petitioner giving evidence in the District Court regarding this application admitted that she made her claim before the Surveyor and that she received notice of this action and to appear in Court. Her evidence as is follows: "මිනින්දෝරු මහතා මෙම ඉඩම මනින්කොට මට අයිතිවාසිකම් තිබෙනවා කියා මම ඉදිරිපත් වුනා. ඊටපසු මට නොතිසියක් ලැබුණා උසාවියට එන්න කියා. නමුත් මට උසාවියට එන්න බැරිවුනා."

Although the learned Counsel for the Petitioner submitted that the Petitioners did not receive notice in compliance of

Section 16(3) of the Partition Act, the 1st Petitioner herself admitted that she received notice of the action.

According to Section 20(3) of the Partition Act any person receiving notice under sub Section (1) of this Section shall not be added as a party to the action, unless he applies by a motion in writing to be added on or before the date specified in the notice.

In the instant case, the Petitioners' names were disclosed in the 1st to 8th Defendants' statement of claim and the 1st Petitioner was noticed under Section 16(3) of the Partition Act.

According to Section 20(1) of the Partition Act, the Court shall order notice of Partition Action be sent by registered post:

(a) to every claimant (not being a party to the action) who as mentioned in the report of Surveyor under sub section (1) of the Section 18, and

(b) to every person disclosed under paragraph (c) of sub Section (1) of Section 19 by a defendant in the action.

According to Section 20(1)(b) a Defendant who discloses any person referred to in paragraph (b) of sub Section (1) of this Section, shall, unless the Court otherwise orders, file in Court the notice to be sent under that sub section to that person.

In the instant case, the Defendants who disclosed the names of the Petitioners did not raise any issue on that basis and went along with the Plaintiff and participated in the trial and judgment was delivered accordingly.

When one take into consideration the above facts and law it is abundantly clear that the Petitioners have accepted the finality of the judgment and the interlocutory decree in this action.

Hence the preliminary objection of the learned Counsel for the Plaintiff - Respondent, that the Petitioners are now estopped from denying the validity of the interlocutory decree is upheld.

This application for revision is dismissed with taxed costs.

JAYASINGHE, J. - I agree.

Preliminary objection upheld.

Petitioners estopped from denying the validity of the Interlocutory Decree.