

**SENARATNE AND ANOTHER
VS
WIJELATHA**

COURT OF APPEAL.
SOMAWANSA, J. (P/CA), AND
BASNAYAKE, J.
CA 701/2004 (REV.).
DC PANADURA 783/P.
FEBRUARY, 8, 2005.

*Civil Procedure Code, sections 146, 753-Issues-Disallowed-Partition action-
Sections 18(2), 19,23(1), 48(1) - Plan depicting a larger land – No leave to
appeal application-Revisory jurisdiction invoked - Maintainability ?*

The defendant-petitioners sought to vacate the orders made by the District Judge disallowing certain issues, and recording of an admission. The issues were rejected on the basis that once parties admit the corpus, no issue could be allowed disputing the corpus, the other issues were rejected as they did not arise from pleadings.

The defendants moved in revision.

HELD:

- (i) The preliminary plan contained 6.25 perches more than the area described in the plaint. The Surveyor does not explain the disparity.
- (2) Though the parties have agreed with regard to the land referred to in the preliminary plan as the land to be partitioned it was incumbent upon the trial Judge to question the Surveyor with regard to the extra 6.25 perches added, when it was brought to his notice, and re— issue the Commission to survey the land as referred to in the plaint.
- (3) Revisionary powers could be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated only where a strong case is made out amounting to a positive miscarriage of justice.

APPLICATION in revision from an order of the District Court of Panadura.

Cases referred to :

1. *Bininda vs. Seditis Singho* 64 NLR 48
2. *Sopaya Silva vs. Magilin Silva* (1989) 2 Sri LR 105
3. *Brampy Appuhamy vs. Manis Appu*-60 NLR 337
4. *Athukorale vs. Samyanathan* 41 NLR 165
5. *Rustom vs. Hapangama* (1978/79) Sri LR. 225
6. *Thilagatnam vs. Edirisinghe* (1982) 1 Sri LR 56
7. *Iynul Kareeza vs. Jayasinghe* (1986) 1 Car 109

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8. *Hotel Galaxy (Pvt.) Ltd. vs. Mercantile Hotels Management Ltd (1987) Sri LR 5*
 9. *Jonita vs. Abeysekera - Sri Kantha Law Reports Vol. IV-2*
 10. *Wljesinghe vs. Thamararatnam - Sri Kantha Law Reports Vol. IV-2*
 11. *Gnanapanditham vs. Balanayagam (1998) Sri LR 391*
 12. *Vanik Incorporation Ltd. vs. Jayasekera (1997) 2 Sri LR 365*

C. Hewamanage for 2nd and 3rd respondents-petitioners.

Thisath Wljegunawardane with Sandhaya de Silva for 1st defendant-respondent.

Plaintiff-respondents absent and unrepresented.

Cur. adv. vult.

29th September, 2005.

ERIC BASNAYAKE, J.

The 2nd and 3rd defendant petitioners (herein after referred to as 2nd and 3rd defendants) filed this application seeking to vacate the orders made by the learned District Judge Panadura on 09.01.2004. By that order the learned District Judge overruled an objection raised by the counsel for the 2nd and 3rd respondents on the recording of the 2nd admission and also disallowed issues 14, 15, 16, 17, 22, 30 and 32.

The 2nd admission is with regard to the corpus (as shown in plan No. 1289A of 21.01.1999 drawn by D. A. Wljesuriya, Licensed Surveyor). The 2nd defendant filed a statement of claim on 20.03.2000 and an amended statement of claim on 10.03.2003 and another amended statement of claim on 27.11.2003. The 3rd defendant filed his statement of claim on 15.10.2000 and an amended statement of claim on 10.03.2001. In all these statements of claim the 2nd and 3rd defendants admitted the corpus as shown in the preliminary plan 1289A and also claimed 5/20 and 1/20 shares respectively. The learned District Judge said that the defendants, having admitted the corpus, cannot be heard to say that they deny it.

The disputed issues are as follows :

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14. Was the land surveyed substantially larger than the land sought to be partitioned ?
 15. Was a *lis pendens* registered in respect of the larger land ?
 16. Should the plaintiff file an amended plaint and register a *lis pendens* in respect of the larger land ?
 17. Should lot 1 of Plan No. 720 be excluded ?
 22. Could the deed No. 365 get the benefit of prior registration, when it is not registered in the correct folio ?
 30. Did the 1st defendant deny that he was entitled to 1/2 by deed No. 365 ?
 32. Could the 2nd and 3rd defendants claim lot 1 in plan No. 720 by way of prescription ?

The learned District Judge rejected issues 14 to 17 on the basis that once parties admit the corpus, no issues could be allowed disputing the corpus. The rest of the issues were disallowed as they did not arise from pleadings.

The 1st defendant respondent (1st defendant) filed objections to the present application and prayed for a dismissal on the ground that (a) the defendants having admitted the corpus cannot be allowed to deny it. (b) Failure to explain the reason for not exercising the right of appeal. (c) Not showing exceptional circumstances to entitle them to invoke revisionary jurisdiction. (d) Laches.

The plaintiff filed this partition action to partition a land of 30.75 perches as shown in plan No. 2202 of 27.11.1939 drawn by A. S. Fernando Licensed Surveyor. *Lis pendens* was registered for 30.75 perches of land. Commission was issued to the Court Commissioner to survey the land described in the schedule to the plaint in extent 30.75 perches. Anyhow the preliminary plan contained an extent of 37 perches of land which is 6.25 perches more and about 20% larger than the area described in the plaint. The surveyor claims that the land surveyed is the same as that described in the schedule

to the plaint. The surveyor does not explain the disparity. It is irregular for a surveyor, when preparing a preliminary plan to survey and include in the corpus any land other than that which is referred to in the plaint in the absence of an additional commission issued under section 23(1) of the Partition Act. *Bininda and Sediris Singho*¹⁾ etc.

The case record contained a motion dated 28.11.2003 filed on behalf of the plaintiff moving to re—issue the commission to the surveyor to survey 30.75 perches of land which was not adhered to. In *Sopaya Silva vs. Magilin Silva*² S. N. Silva J. (as he then was) finds no fault in the *lis pendens* when registered as described in the schedule to the plaint but in the preliminary plan. S. N. Silva J. (as he then was) said “If the land surveyed is substantially different from the land as described in the schedule to the plaint the court has to decide whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land as surveyed”.

Referring to *Bramphy Appuhamy vs. Monis Appuhamy*³ where a land substantially smaller than the land described in the plaint was surveyed Silva J. said “the reasons underlying the decision of the Supreme Court that is the finality and conclusiveness attaching to the interlocutory and final decrees in terms of section 48(1) apply with even greater force to a situation where larger land is surveyed”. Silva J. having held that the District Judge erred in proceeding with the action to partition the substantially larger land, suggested the following courses of action after hearing the parties, namely :

- (i) to re—issue the commission with instructions to survey the land as described in the plaint. The Surveyor could have been examined orally as provided in section 18(2) to consider the feasibility of this course of action ;
- (ii) to permit the plaintiff to continue the action to partition the larger land as depicted in the preliminary survey. This course of action involves the amendment of the plaint and the taking of other consequential steps including the registration of a fresh *lis pendens*.
- (iii) to permit any of the defendants to seek a partition of the larger land as depicted in the preliminary survey. This course of action involves an amendment of the statement of claims of that defendant and the taking of such other steps as may be necessary in terms of section 19 (2).

The plaint, the deeds and the *lis pendens* describe only an extent of 30.75 perches of land. The preliminary plan contained an extent of 6.25 perches more which is more than 1/5th of the extent of the land described in the schedule to the plaint. Although the parties have agreed with regard to the land referred to in the preliminary plan as the land to be partitioned, it was incumbent upon the District Judge to question the surveyor with regard to the extra 6.25 perches added, at least when it was brought to his notice, and re-issue the commission to survey the land as referred to in the plaint. This was the desire of the plaintiff too as disclosed in a motion. The learned Judge was too hasty in taking the case for trial without considering the preliminary steps which are very vital in partition actions due to the finality attached to it.

Now I shall deal with the revisionary powers of this court. Section 753 of the Civil Procedure is as follows :

753.—The Court of Appeal may of its own motion or on any application made call for and examine the record of any case, whether already tried or pending trial, in any court, for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed thereon or as to the regularity of the proceedings of such court.... and may upon revision of the case brought before it pass any judgment or make any order thereon, as the interests of justice may require.

The powers of the Appeal Court with regard to revision is well accepted in a large number of cases. These powers are wide enough to give it the right to revise any order made by an original court whether an appeal has been taken against it or not. *Atukorala vs Samynathan* ⁽⁴⁾ However such powers would be exercised only in exceptional circumstances which depend on the facts of each case, *Rustom vs. Hapangama* ⁽⁵⁾ *Thilagatnam v. Edirisinghe* ⁽⁶⁾ *Iynul Kareeza v. Jaysinghe* ⁽⁷⁾ *Hotel Galazy Pvt. Ltd. v. Mercantile Hotels Management Ltd.* ⁽⁸⁾ *Jonita v. Abeysekera* ⁽⁹⁾ Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shock the conscience of the court. *Wijesinghe vs. Thamararatnam* ⁽¹⁰⁾ The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case and having regard to the very special and exceptional circumstances of the case. *Gnanapanditham vs. Balanayagam.* ⁽¹¹⁾ These powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only where a strong case is made out amounting to a positive miscarriage of justice—*Vanik Incorporation Ltd. vs. Jayasekera* ¹²

I am of the view that this is a fitting case to exercise revisionary jurisdiction.

Due to the aforesaid reasons I allow this application and set aside the order made by the learned District Judge on 09.01.2004. I direct that a commission be issued to the surveyor to resurvey the land as described in the schedule to the plaint without any additional charge and to commence the proceedings afresh from the stage of the return to the commission by the surveyor. I make no order as to costs of this application.

SOMAWANSA J. (P/CA) — I agree.

Application allowed.
