WIMALAWATHIE
V
JAYAWARDENE

COURT OF APPEAL.
WIJERATNE, J.
DC. MATUGAMA 335/P.
DECEMBER 5, 2003.

Partition Law, – Sections 32 and 48(4) – Lis pendens covered a lesser extent than the land ordered to be partitioned – Answers to issues contradictory – Application to amend decree to fall in line with the determinations made by court – Does it fall within section 48(4)? – Injustice – Inherent powers of court – Act of court – Causing injury to a suitor – Remedy .

The 25th defendant-appellant filed an application in the District Court complaining that the *lis pendens* covered only an extent of 4 acres and the corpus ordered to be partitioned is in excess of an extent of 20.8 perches and prayed that the excess be excluded in her favour. The application was rejected by court.

On appeal, acting in revision:

Held:

(1) The trial judge had held that the land constituted only of Lots A1, A2, B to L in plan "X" and that Lots M1 and M2 do not form part of the corpus, but had ordered that the land in plan "X" which included Lots M1 and M2 be partitioned.

(2) Although the 25th defendant-appellant did not appeal from the judgment he had every right to expect the interlocutary decree to include only Lots consisting the corpus as determined by the trial judge.

Per Wijayaratne, J.,

" The Partition Act does not contain any specific provision dealing with such a situation, yet, section 48 provides that in a given situation the original court itself could amend the decree, this provision in principle accepts the rule that notwithstanding the finality of the decree court should be empowered to repair any mistake or injustice that could result in injury to a party."

Per Wijayaratne, J.,

" Though the application did not fall within the specific grounds or instances enumerated in section. 48 (4), the application is to remedy a situation resulting in injustice to the appellant ..... it is a grave injustice to let several Lots not determined as parts of the corpus to be included in the final plan resulting in failure of justice and injury to the appellant"

(2) A court whose act has caused injury to a suitor has an inherent power to make restitution. This power is exercizable by a court of original jurisdiction as well as by the Supreme Court.

APPEAL from an order of the District Court of Matugama

Cases referred to:

(1) *Gunasena* v *Bandarathilaka* – 2002 1 Sri LR 292

(2) *Sivapathalingam* v *Sivasubramaniam* –1990 1 Sri LR 378

S. Gunasekera for 25th defendant-appellant.

Manohara R. de Silva for plaintiff-defendant.

Cur.adv.vult.

March 15, 2004

WIJAYARATNE, J.

This is an appeal from the order of the learned District Judge of Matugama dated 23.05.1996 dismissing the application of the 25th defendant, The application of the 25th defendant-appellant was on

the basis that the *lis pendens* registered covered only an extent of four acres of land and the corpus of this action ordered to be partitioned is in excess of an extent of twenty point eight perches. This defendant-appellant by his application dated 28.01.1994 prayed that such extent in excess of the land covered by the *lis pendens* be excluded in favour of her. She further objected to the approval of the final plan of partition contained in plan No. 711 dated 07.04.1995 prepared by G.Adikaram Licensed Surveyor. The learned District judge after inquiry by his order dated 23.05.1996 dismissed the application of the appellant, including his objections to the final plan and confirmed the scheme of partition in the said plan No. 711.

Aggrieved by such order the 25th defendant-appellant preferred this appeal, which was on 07.10.1996 rejected but restored to the list of pending appeals by subsequent order dated 26.09.2003 of the Supreme Court in case No. 1818/99. Accordingly the matter was argued on 05.12.2003 and the parties made further submissions in writing.

To appreciate the matter in issue in its correct perspective, it will be relevant to examine the history of the case proceedings. The plaintiff sought to partition the land called Diyaporella Kumbura & Owita morefully described in the schedule to the plaint. The preliminary survey depicted the land as lots A1, A2, B to M1 and M2 in plan No. 544 dated 21.07.1978 prepared by N. Kularatne, Licensed Surveyor, which plan was marked X later in the trial. The 18 to 20, 25 to 31 defendants filed statement of claim, setting out title to undivided rights in the corpus without any reference or mention as to what constituted the corpus. However, at the commencement of the trial plaintiff suggested point of contest on the footing that corpus consists of Lots A1, A2, B,C,D,E,F,G,H,I,J,K, and L in plan No. 544 aforesaid. On behalf of 18 to 20, 25 to 31 defendants (which group included the present 25th defendant-appellant) raised points of contest whether Lots A1,A2 to L, M1 & M2 in plan No. 544 constituted the corpus or else did only Lot A1,A2,B to L constitute the corpus.

The plaintiff giving evidence specifically stated that lots M1 and M2 do not constitute the corpus. The 25th defendant-appellant, contesting the identity of the corpus as well as the devolution of title set out by the plaintiff testified at length. It is significant to note that the 25th defendant, now claiming the exclusion of 20.8 perches as in excess of the extent of land covered by the *lis pendens* did not utter a word about what lots in preliminary plan 544 marked X, constituted the corpus nor was there any evidence on the inclusion of Lots M1 and M2 or otherwise, which Lots the plaintiff moved to exclude. At the conclusion of the trial the learned Judge in his judgment answered the point one of the contest in the affirmative holding that the corpus consists of lots A1,A2, B to L in plan X. However, in answer to the point of contest No.5 which suggested the corpus consisted of lots A1,A2,B to L (or excluding lots M1 and M2) the learned trial Judge, answered in the negative; that too after answering the point of contest No.4 (suggested Lots M1 and M2 too were to be included in the corpus) in the negative. Then declared that the land depicted in plan X be partitioned according to the rights of parties shown in the plaintiffs pedigree. The learned District Judge having answered point of contest No. 1 in the affirmative and point of contest No. 4 in the negative could not have rationally answered point of contest No. 5 in the negative. The answers on record are contradictory and without any rational basis and the learned District Judge who held that land depicted in Plan 544 marked X consisted only of Lots A1, A2, B to L has concluded that Lots M1 and M2 do not form part of the land to be partitioned. Then he could not have ordered that the land depicted in plan 544 marked X which included lots M1 and M2 be partitioned. The failure on the part of the learned District Judge to specify the lots depicted in plan X to be partitioned has resulted in Lots M1 and M2 (as in plan X) being included in the corpus.

The 25th defendant who has by subsequent applications made to court was not successful in having the attention of the court drawn to this fact. In fact it was due to the failure of the 25th defendant-appellant to prosecute this appeal, that the matter could not have been determined before the final partition is done.

However, upon the findings of the learned trial Judge himself the land to be partitioned should consist only of Lots A1, A2, B to L in

plan 544 marked X as held in answer to points of contest No 1 and 4. Accordingly the order confirming the final partition plan 711 dated 07.04.1995, which included lots M1 and M2, could not have been rightly made. The question whether the 25th defendant-appellant who was not allotted any rights could lawfully have objected to the final partition is irrelevant to the extent of lots he claimed and decided by court not to be parts of corpus being included in the final partition. It is pertinent to note that the learned District Judge who inquired into the subsequent applications of the 25th defendant-appellant have failed to appreciate this aspect of the matter of complaint before refusing his applications, considering only one aspect of the application only.

The matter of inclusion of lots M1 and M2 in the corpus as averred by the 25th defendant (though a party contestant) on the ground that it is prejudicial to his interests, and definitely not in terms of the judgment. Although the 25th defendant-appellant did not appeal from the judgment of the learned trial Judge, he had every right to expect Interlocutory decree to include only these lots consisting the corpus as determined by the trial Judge. However the Partition Act does not contain any specific provisions dealing with such a situation, yet section 48 provides that in given situations the original court itself could amend the decree. This provision in principle accepts the rule that notwithstanding the finality of the decree, court should be empowered to repair any mistake or injustice that would result in injury to a party. In the instant case the application of the 25th defendant-appellant is to the effect of amending the decree in line with the determination made by the trial judge, though it did not fall within the specific grounds of instances enumerated in subsection 4 of section 48 of the Partition Act. However, the application is to remedy a situation resulting in injustice, prejudice and injury to the appellant even according to the judgment of the trial judge, which resulted in mistake of fact.

Though this court observes that the judgment is not appealed from, still it is a grave injustice to let several lots not determined as parts of the corpus to be included in the final partition resulting in failure of justice and injury to the appellant.

In the case of *Gunasena* v *Bandarathilake* (1) it was held,

> "The Court of Appeal had inherent power to set aside the judgment dated 25.05.1998 and to repair the injury caused to the plaintiff by its own mistake, notwithstanding the fact that the said judgment had passed the decree of court. This could not have been done otherwise than by writing a fresh judgment".

Per Wijetunga, J.

"The authorities ..... clearly indicate that a court has inherent power to repair an injury caused to a party by its own mistake. Once it is recognized that a court would not allow a party to suffer by reason of its own mistake, it must follow that corrective action should be taken as expeditiously as possible, within the framework of the law, to remedy the injury caused thereby. The modalities are best left to such court, and would depend on the nature of the error.

It has also been held in, *Sivaparthlingam* v *Sivasubramaniam*(2) that, a court whose act has caused injury to a suitor has an inherent power to make restitution. This power is excisable, by a court of original jurisdiction as well as by a superior court.

Accordingly this court exercising its inherent powers and acting in revision amends the judgment and interlocutory decree entered thereon, that lots A1, A2 and B to L only, as determined in answer to points of contest Nos. 1 and 4 be partitioned according to the rights determined by the learned trial judge.

Observing that the failure of the 25th defendant-appellant to have the judgment and decree amended in appeal preferred in time, has resulted in the case proceeding to the stages of entering of final partition and final decree, this court rules that the 25th defendant-appellant should bear the costs of the execution of commission for final partition.

In the result this court allows the appeal of the 25th defendant-appellant, sets aside and vacates the order of the learned District Judge dated 23.05.96 confirming the final partition plan and to enter final decree, amend the judgment and the interlocutory decree as aforesaid and direct the reissue of commission under section 32 of the Partition Act on the amended interlocutory decree.