Dissanayake
v.
Elisinahamy

COURT OF APPEAL.
SOZA, J. AND ABDUL CADER, J.
C.A. APPLICATION NO. 128/79—D.C. HAMBANTOTA 174/P.
APRIL 2, 1979.

Partition Act (Cap. 69), sections 48(1), 49—Application by way of revision and/or restitutio-in-integrum to set aside judgment in partition action—Disclosure of parties—In what circumstances do these remedies lie.

Judgment was delivered in a partition action on the basis that one of the co-owners had died intestate leaving a husband and five children. Interlocutory decree had not been entered. The petitioner then filed papers in the Court of Appeal by way of revision and/or *restitutio-in-integrum* stating that the said co-owner had six children and that the 6th child who had not been disclosed had died intestate leaving her husband the present petitioner and two minor children. The judgment was sought to be set aside on this ground.

Held

(i) Section 48(1) of the Partition Act had not taken away the right of the Court of Appeal to set aside an interlocutory or even a final decree in a partition action by way of revision and/or *restitutio-in-integrum*. However the Court did not have the right to do so in revision in circumstances such as the present.

(ii) Relief by way of *restitutio-in-integrum* could also not be granted inasmuch as the petitioner had not been a party to the action. The petitioner's remedy was under section 49 of the Partition Act. The fact that the claimants were minors would not alter the situation.

(iii) Although interlocutory decree had not yet been entered this was only a ministerial act and the fact that it had not been entered therefore would make no difference to this application.

Cases referred to

(1) *Petisingho v. Ratnaweera, (1959) 62 N.L.R. 572.*
(2) *Noris v. Charles, (1961) 63 N.L.R. 501.*
(3) *Odiris Appuhamy v. Caroline Nona, (1964) 66 N.L.R. 241.*
(4) *Rasah v. Thambipillai, (1965) 68 N.L.R. 145 ; 69 C.L.W. 57.*
(5) *Nonnohamy v. Odiris Appu,. (1965) 68 N.L.R. 385.*
(6) *Perera v. Wijewickrema, (1912) 15 N.L.R. 411.*
(7) *Perera v. Simeon Appuhamy, (1923) 2 Times Law Reports 119.*
(8) *Pablis v. Euginahamy, (1948) 50 N.L.R. 346.*
(9) *Mariam Beebee v. Seyed Mohamed, (1965) 68 N.L.R. 36 ; 69 C.L.W. 34.*
(10) *Leisahamy v. Davithsingho, (1970) 79 C.L.W. 109.*
(11) *Ukku v. Sidoris, (1957) 59 N.L.R. 90.*

APPLICATION to revise an order of the District Court, Hambantota and/or for *restitutio-in-integrum.*

J. R. M. Perera, for the petitioner.
J. W. Subasinghe, for the respondent.

Cur. adv. vult.

April 11, 1979.

ABDUL CADER, J.

Plantiff filed action P/174 for partition. He disclosed Somawathie Alahapperuma as one of the co-owners and stated that she died intestate leaving behind her husband and five children. Judgment was delivered allotting shares on that basis. From journal entries supplied to us, it appears to us that interlocutory decree had not been entered. But this makes no difference for the reason that interlocutory decree is only a ministerial act, *Petisingho v. Ratnaweera* (1).

Petitioner has filed these papers by way of revision and/or *restitutio-in-integrum,* stating that Somawathie Alahapperuma had not five children, but six children, the undisclosed child being Nelie Indrani Abeyasiriwardena, and she died intestate leaving her husband, the petitioner, and two minor children. The petitioner has moved that judgment be set aside and a fresh trial be ordered. I proceed to consider this petition on the basis that the fact stated that Nelie Indrani Abeyasiriwardena was a legitimate child of Somawathie Alahapperuma is true.

The Supreme Court has consistently decided that the right of the Court of Appeal to set aside an interlocutory decree or even a final decree by way of revision and/or *restitutio-in-integrum* has not been taken away by section 48 (1) of the Partition Act. In *Noris v. Charles* (2) Sinnatamby, J. stated as follows :—

> " The legislature at the same time realised that persons may be adversely affected by the conclusive effect given to both the interlocutory and the final decree and by section 49 re-enacted the provisions of the proviso to section 9 of the earlier Ordinance which gave such persons the right to bring an action for damages. In the case of persons who are not parties to the action, however, sub-section 3 provides, inter alia, that the fact that the lis pendens had not been properly registered would deprive the decree of its final and conclusive effect. That is all that sub-section 3 provides. A person who was not a party to the partition action is not bound by the interlocutory decree if lis pendens had not been properly registered. This does not mean that he is entitled to intervene and have the interlocutory decree set aside. His position would be much the same as a person who is not a party to a vindicatory action. He is unaffected by the decree and is entitled to assert his rights as against the holder of the decree in any steps which are sought to be taken under it. "

In *Odiris Appuhamy v. Caroline Nona* (3) Basnayake, C.J. analysed the three subsections of section 48 of Partition Act and stated as follows :—

" The three subsections taken collectively indicate that notwithstanding—

(*a*) any omission or defect of procedure, or
(*b*) in the proof of title adduced before the court, or
(c) the fact that all persons concerned are not parties to the partition action—

the decrees are final and conclusive against all persons whomsoever except against a person who has not been a party to the partition action and claims a title to the land independently of the decree. Such a person must assert his claim in a separate action and can only succeed if—

(*a*) he proves that the decree had been entered by a court without competent jurisdiction, or
(*b*) that the partition action has not been duly registered as a lis pendens.

The present claim is one to be added as a party to the partition action and does not fall within the ambit of that provision. The District Judge has no power to set aside his own decree."

In the Divisional Bench case of *Rasah v. Thambipillai* (4) Sansoni, J. stated as follows :—

> "Section 70 (1) provides that the Court may at any time before interlocutory decree is entered add as a party to the action—
>
> (*a*) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or
>
> (*b*) any person who, claiming an interest in the land, applies to be added as a party to the action.
>
> The effect of this provision is that no intervention can be permitted at any stage after interlocutory decree has been entered."

He went on further to state :—

> "The terms of the relevant sub-sections show that whether a decree has been entered in a court of competent jurisdiction or not, and whether the action has been duly registered as lis pendens or not, the only effect of any omission or defect in these respect is to deprive the decree of its final and conclusive effect as against a stranger to the action claiming an interest independently of the decree. He is not bound by it and is free to attack it as being incorrect where it defines the rights of the parties.
>
> There is nothing in section 48 or any other section of the Act to support the argument that a decree which has either of the two flaws mentioned in section 48 (3) is invalid. On the contrary, the provisions in section 48 (1) that the decree 'shall be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him,' is deliberately left unaffected. The decree is still to be treated as being in force, and effective, though it is not final and conclusive against the particular persons just mentioned."

In the case of *Nonnohamy v. Odiris Appu* (5) a Divisional Bench by a majority refused to set aside the decree entered in that case. It is interesting to note that G. P. A. Silva, J. who wrote a dissenting judgment in *Rasah v. Thambipillai* to the effect that where it is proved that lis pendens has not been duly registered, the decree should be set aside and intervention permitted agreed that the appeal should be dismissed for the reason that it had

been established that lis pendens has been duly registered. Therefore, this court does not have a right to set aside the judgment/ interlocutory decree by way of revision in the circumstances pleaded by the petitioner.

Getting on to the plea for relief by way of *restitutio-in-integrum*, in *Perera v. Wijewickrema* (6) Pereira, J. said " From what Voet says earlier (4.1.3) it appears to me that when restitution is sought in respect of a legal proceeding, the applicant should be somebody who already has had direct connection with the proceeding. " In the same case, Ennis, J. stated :—

> " It appears clear that such an application is not granted in Ceylon if any other remedy is available. In this case the appplicants set up fraud and collusion against the administratrix and her assignee. On these grounds an action is available against the administratrix and the assignee. Moreover, restitution of the case will only have the effect of putting the parties in the position they were in before judgment was given, and the applicants here were not parties in the case. "

In this case section 49 grants relief to the petitioner. Secondly, since the petitioner was not a party to the action, setting aside the interlocutory decree would not make him a party in the case, as he was not a party at the time judgment was delivered. In *Perera v. Simeon Appuhamy* (7) Ennis, J. stated :—

> " It (this application) is made by a person who is not a party to the proceedings in the Court below, and it is extremely doubtful whether the remedy of *restitutio-in-integrum* can be availed of by such a person. "

All the decisions cited to us are cases where the parties were before Court on whom summons was not served (8), or steps for substitution had not been taken when a party died (9), or where a guardian has not been appointed in terms of section 493 (1) or a settlement has been affected without the leave of Court in terms of section 500 C.P.C. (10), or a judgment had been entered against a person of unsound mind without the appointment of a manager (11). It is clear that these are cases where a party was already a defendant in the action and legal requirements in terms of the C.P.C. had not been complied with. But where, as in this case, the petitioner was not before Court at any stage of the proceedings before judgment, *restitutio-in-integrum* will not lie.

Counsel for the petitioner pressed before us the fact that some of the claimants are minors. No exception had been made in respect of minors in section 48 (1). Even where the Court lacked jurisdiction or there was a want of due registration of lis pendens, it has been held that except for the fact that the decree would not bind the party affected, it was not possible to set aside an interlocutory decree. The position in this case is far worse.

The application is, therefore, dismissed. In all the circumstances of this case, we do not order costs.

SOZA, J.—I agree.

Application dismissed.