GUNASEKERA
VS.
CHITRA DE SILVA AND ANOTHER

COURT OF APPEAL.
SOMAWANSA, J. (P/CA).
WIMALACHANDRA, J.
CA 1358/2004.
REV. D. C. GALLE 14855/P.
JUNE 10, 2005.

Partition Law, Section 48(4),2 of 1977 - Intervention after interlocutory decree-No leave to appeal filed - Revision - Does it lie ? Misleading Court-Exceptional circumstances - Can the interlocutory decree be set aside by a third party ?

The petitioner respondent was allowed to intervene after the judgment / interlocutory decree and all proceeding were set aside. The plaintiff - respondent - petitioner sought to revise and set aside the said order. It was contended that, as the petitioner has not filed a leave to appeal application against the injunction order, the application in revision should be dismissed in limine.

HELD:

Per Somawansa, J. (P/CA)

"I am not at all impressed with the aforesaid preliminary objection for the reason that the impugned order is palpably erroneous and made without jurisdiction"

Held further:

(1) Where an alternative remedy is available and if a party fails and or neglects to exercise such remedy due to the parties own conduct and or negligence court will not exercise the extraordinary powers of Revision. However, when the party

is able to show exceptional circumstances, Court will not hesitate to exercise such jurisdiction.

(2) The District Court has no jurisdiction to set aside its own interlocutory decree at the instance of a person who is not a party to the partition proceedings. The order permitting intervention is bad in law, erroneous and made without jurisdiction. The order setting aside the interlocutory decree is a blatant disregard of Section 48 of the Partition Law and patently outside the jurisdiction of Court.

"It would suffice to say that being aware that the order of the trial judge is patently outside his jurisdiction and palpably wrong this court cannot permit the impugned order to stand, the preliminary objection taken by the respondent could not be made use of to shield or protect such a palpable wrong order."

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

Cases referred to :

1. *Janitha* vs. *Abeysekera*, Sri Lanka Law Reports Vol. IV page 30
2. *Vanik Enterprises* Ltd., vs. *Jayasekera* (1997) 2 Sri LR 365
3. *Rustom* vs. *Hapangama* & Co. (1971/79/80) 1 Sri LR 352
4. *Somaratne* vs. *Madawala* (1993) 2 Sri LR 15
5. *Heendeniya Jayaratne* vs. *Premadasa*, SC 20/2003 - SM 18.02.2004
6. *Umma* vs. (2000) Zubari and another 3 Sri LR 169 (distinguished)

A. Wanniarachchi for plaintiff-respondent-petitioner.

Gamini Marapana, PC with *Navin Marapana* and *G. Ranasinghe* for petitioner-petitioner.

Cur. adv. vult.

December 9, 2006.

ANDREW SOMAWANSA, J. (P/CA)

This revisionary application emanates from the order of the learned Additional District Judge of Galle dated 13.05.2004 allowing the application of the petitioner-respondent to intervene in the action and setting aside the proceedings, judgment and the interlocutory decree already entered and declaring the same null and void. The plaintiff-respondent-petitioner (hereinafter called the petitioner) is seeking to revise and set aside the aforesaid order dated 13.05.2004 and for an order dismissing and/or rejecting the petitioner-respondent's (hereinafter called the respondent) petition dated 22.01.2004. The petitioner also prayed for and obtained an interim order staying further proceeding in the original court which has been extended from time to time.

When this application was taken up for argument both counsel agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

In the statement of objections filed by the respondent as well as in his written submissions several preliminary objections were taken to the maintainability of this application. The said preliminary objection could be summarized in the following manner, in that the petitioner has not availed himself of the proper remedy available to him inasmuch as he has not filed a leave to appeal application against the impugned order within the 14 days time period stipulated by law and has not given a satisfactory explanation for his lapse. Further in trying to explain his lapse he has tried to mislead this Court and thus his conduct clearly disentitles him to the relief prayed for by him. That he has also suppressed the motion referred to in journal entry 18 dated 21.05.2004 apply for a certified copy of the entire case record and the said motion

has not been tendered to Court in contravention of mandatory provisions contained in Rule 3 of the Court of Appeal (Appellate Procedure) Rules 1990. However I must say I am not at all impressed with the aforesaid preliminary objections taken by counsel for the respondent for the reason that the impugned order of the learned Additional District Judge is palpably erroneous and made without jurisdiction. While conceding that where an alternative remedy is available and if a party fails or neglects to exercise such remedy due to the parties own conduct and or negligence this Court will not exercise the extraordinary powers of revision. However there is an exception to the aforesaid rule in that when the petitioner is able to show the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction this Court will not hesitate to exercise such jurisdiction.

In the case of *Janita* vs. *Abeysekera*[1] it was held :

"Court of Appeal is empowered with revisionary jurisdiction in exceptional circumstances even though alternatives remedies are provided"

Again in the case of *Vanik Incorporation Ltd.* vs. *Jayasekera* :

"Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."

Also in the case of *Rustom* vs. *Hapangama* :

"The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that

these powers will be exercised if there is an alternative remedy available, only if the existence of special circumstances are urged necessitating the indulgence of this court to exercise its powers in revision".

I would say the petitioner in the instant application has in fact brought to the notice of Court that special circumstances exists which would warrant this Court to exercise its powers of revision in that the order challenged is manifestly erroneous which go beyond the error or defect or irregularity.

The relevant facts are on 30.07.2002 the petitioner commenced proceedings under partition law as amended for the partition of a land. The respondent was not a party to the said proceeding and in fact there was no reference to the respondent in the pedigree set out by the petitioner. On 30.03.2003 interlocutory decree was entered in accordance with the judgment pronounced upon the undisputed evidence of the petitioner. Thereafter commission for a final partition plan was issued returnable on 22.01.2004. On 22.01.2004 the respondent who was not a party to the aforesaid proceedings made an application seeking to intervene in the action and to set aside the interlocutory decree already entered and to have a fresh trial. The petitioner objected to the said application on the basis that the District Court has no jurisdiction to set aside its own interlocutory decree at the instance of a person who is not a party to the partition proceedings. Parties agreed to resolve this matter by way written submissions and the learned Additional District Judge having considered the written submissions so tendered by his order dated 13.05.2004 allowed the respondent's application to intervene in the action, set aside all proceeding had and orders made and permitted the respondent to file a statement of claim. This order made by the learned Additional District

Judge is clearly erroneous and made without any jurisdiction when the learned Additional District Judge was bound by the decision of the Supreme Court in the case of *Somawathi* vs. *Madawela*[4] and the Supreme Court decision in *Heendeniya Jayaratne* vs. *Premadasa* and has further erroneously followed the Court of Appeal judgement in *Umma* vs. *Zubair and Another.* [6]

In the case of *Somawathi vs. Madawela (supra)* a Divisional Bench of the Supreme Court consisting of Sharvananda J, Wanasundera, J. Wimalaratne, J. Ratwatte, J and Soza J having considered the authorities in this respect held that the District Court has no power to set aside an interlocutory decree at the request of a person who is not a party to the partition proceedings.

Per Soza, J at page 32 :

"I might add that the District Judge had no power to allow intervention after the entry of interlocutory decree. This can be done only by a Superior Court acting in revision."

In *Heendeniya vs. Premadasa (supra)* a Bench consisting of S. N. Silva C. J. and Weerasuriya, J. held :

It is significant that Section 48(1) of the Partition Law gives final and conclusive effect to the interlocutory decree, subject to the decision on any appeal which may be preferred therefrom and subsection (4) as referred to earlier. Having regard to the stringent provisions of Section 48 of the Partition Law which has as their object, the finality of the interlocutory decree, it is obvious that the learned District Judge had acted in blatant disregard of the provisions of Section 48.

On a consideration of the above material, it would be manifest that the District Court has no jurisdiction to entertain the application of the petitioner-respondent-respondents to seek the relief they prayed for and the application was misconceived."

Thus it could be seen that the Supreme Court in no uncertain terms have clearly laid down the principle that the interlocutory decree cannot be set aside at the application made by a third party or a person who is not a party to the proceedings in the District Court and any such act setting aside the interlocutory decree is a blatant disregard of the provisions of Section 48 of the Partition Law as amended and patently outside the jurisdiction of the District Court.

It would be useful here to refer to Section 48 of the Partition Law which reads as follows :

"48(1) Save as provided in subsection (5) of this section, the interlocutory decree entered under Section 26 and the final decree of partition 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 subsection (4) of this Section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title of 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."

It is to be seen that the learned Additional District Judge has set aside the interlocutory decree in the instant action following the Court of Appeal decision in *Umma vs. Zubair (supra)* which was based on the principle that any interlocutory decree entered without service of summons and a due registration of a lispendens is a nullity. While I have no bone to pick on this proposition of law that decision cannot and will not be an authority for the proposition of law that a third party who is not a party defendant can make an application to the District Court to set aside the interlocutory decree and that decision could be clearly distinguished and is not applicable to the facts and circumstances of this case. The learned Additional District Judge has erred in law in following that case and ignoring the decision of the Divisional Bench of the Supreme Court in Somawathi's case.

In passing, I might refer to the fact that the petitioner in paragraph II of his petition explains as to why he could not file a leave to appeal application. It is contended by counsel for the respondent that in trying to explain why the petitioner did not file a leave to appeal application he has tried to mislead this Court. I do not wish to determine the veracity of these two statements but it would suffice to say that being aware that the order of the learned Additional District Judge is patently outside his jurisdiction and palpably wrong this Court cannot permit the impugned order to stand. The order of the learned Additional District Judge being *ex facie* wrong has to be quashed and the preliminary objections taken by the respondent should not be made use of to shield or protect such palpable wrong order. As the objection of non-compliance with the Court of Appeal (Appellate Procedure) Rules of 1990, it is to be seen that document marked X filed along with the petition is a certified copy of the pages 1 to 175 of the original case record. I would say all necessary documents material to this application have been tendered.

For the foregoing reasons, my considered view is that the impugned order of the learned Additional District Judge cannot be permitted to stand. Accordingly exercising the extraordinary powers vested in the Court, I would revise and set aside the order of the learned Additional District Judge dated 13.05.2004 and also dismiss the application of the respondent tendered to the original Court dated 22.01.2004. The petitioner will be entitled to costs of these proceeding fixed at Rs. 20,000.

WIMALACHANDRA, J.– I agree

Application allowed