KORALAGE
V.
MARIKKAR MOHAMED & OTHERS

COURT OF APPEAL
S. B GOONEWARDENE J & VIKNARAJAH J.
C.A. NO. 1199/85
D.C. COLOMBO 11168/P
JUNE 14, 16 & 20, 1988.

Partition — Revision — Intervention by way of application for revision — Entry of interlocutory decree — Notices, proclamation and publication — Sections 15 and 48 of Partition Act — Rule 46 of the Supreme Court Rules.

This partition action was instituted on 21.2.66 and judgment was delivered on 31.10.79 and interlocutory decree was ordered to be entered. The petitioner (not a party to the action) moved the Court of Appeal in revision alleging non-compliance with S. 15 which stipulates the exhibition of notices, publication of the action and oral proclamation, and entry of judgment on a plan which did not comply with the requirements of the Partition Act.

Held:

(1) The Appeal Court's revisionary powers remain unaffected by legislation stipulating finality and conclusiveness to decrees under the law relating to partition. Yet the Court will intervene in revision only if there is fundamental vice and to avert a miscarriage of justice.

(2) In the case before Court the statutory requirements as to publication and exhibition of notices and proclamation had all been complied with and the surveyor had duly and properly executed the Commissions to survey and furnished his reports through the first of these reports the petitioner had failed to produce.

(3) The petitioner's application and claim based on prescription were made with collateral motives to counter a tenancy suit pending against him.

(4) Judgment had been delivered. Entry of interlocutory decree is a ministerial act

(5) The petitioner himself had failed to comply with the mandatory provisions of Rule 46 of the Supreme Court Rules in that he had not furnished a copy of the surveyor's report to the first plan and no schedule of the land as claimed by him had been incorporated into his petition or affidavit.

Cases referred to:

1. *Petisingho v. Ratnaweera* — 62 NLR 372
2. *Dissanayake v. Elisahamy* — (1978-79) — 2 SRI LR 119
3. *Mariam Beebee v. Seyed Mohamed* — (1965) 68 NLR 36
4. *R. A. Somawathie v. Madawela and Others* — S.C. No. 24/72 — D.C. Kurunegala 3903/P—Minutes of 29.6.82(5 Judges)
5. *Navaratnasingham v. Arumugam* — (1980) — 2 SRI LR 1 (Affirmed by S.C Appeal No: 6/81)

APPLICATION in revision in respect of judgment of D.C. COLOMBO.

Dr. Colvin R. de Silva with *N. W. Seneviratne, P.B. Weerasinghe de Silva* and *Miss Chamantha Weerakoon* for Intervenient—Petitioner.

A. C. Gooneratne, Q.C., with *R. C. Gooneratne* for 1st Respondent (Substituted-Plaintiff)

Dr. H. W Jayawardene, Q.C., with *M. S. A. Hassan, Keerthika Hashim* and *Harsha Abeysekera* for 2nd Respondent (1st Defendant) and 4th Respondent (3rd Respondent).

Faiz Musthapha, P.C., with *H. Vithanachchi* for 3rd Respondent (2nd Defendant)

Cur. adv. vult.

August 04, 1988

VIKNARAJAH, J

This is an application by the 'Intervenient Petitioner' in Revision and/or Restitutio in Integrum filed on 21st October 1985 in respect of a Partition Action No. 11168/P instituted in the District Court of Colombo on 21st February 1966 and

in which case judgment was delivered by the District Court on 31.10.79. The Court ordered entering of the Interlocutory decree in terms of the said judgment.

The petitioner who calls himself the Intervenient Petitioner was neither a party to the partition action in the District Court nor did he make any application to intervene in the District Court.

The Petition of the Petitioner filed on 21st October 1985 is supported by an affidavit of the petitioner dated 25th July 1985.

The relief claimed by the petitioner inter alia is

(1) that the judgment in the Partition case entered on 31.10.79 be vacated and set aside.

(2) that it be ordered that this petitioner's name be added as Party Defendant and the case be sent back to the District Court for hearing afresh after addition as aforesaid.

At the outset I should state that learned Counsel appearing for the petitioner stated to Court that he is not pursuing his application for Restitutio in Integrum.

The original plaint in the partition case was filed in the District Court on 21st February 1966 for partition of the land and premises formerly bearing assessment No. 138 and presently No. 142/1 situated in Greenlands Road in Timbirigasyaya described in schedule B to the plaint in extent A1-RO-P36. 25 which is a portion of the land described in Schedule A to the plaint. The land described in Schedule A is in extent A1—R2—P27.

In para 3 of this plaint it is averred that Mohamed Cassim (who was the owner of land described in Schedule A) died on or about 13th April 1925 leaving a Last Will No. 4569 dated 9th November 1911 and attested by Arthur William Alwis of Colombo, Notary Public and a Codicil thereto bearing No. 6043 dated 22nd October 1918 also attested by the same Notary which was admitted to Probate in testamentary proceedings No. 2294/T of the District Court of Colombo.

In para 4 of this plaint it is averred as follows:—

> "The said Ismail Lebbe Marikar Abeisha Umma by deed No. 793 dated 13th January 1935 conveyed a divided and defined portion on the North West in extent thirty decimal point seven five perches to Hajeena Salie and the said divided portion did not form part of the corpus in this action".

It will be seen from both these averments in paras 3 and 4 there is no mention as to how Abeisha Umma referred to in para 4 became entitled to the land. Certain facts have been omitted. In order to supply this deficiency an amended plaint was filed on 27.6.68. The amended plaint bears the date of the original plaint viz 21.02.1966.

On the original plaint Commission was issued to Surveyor G. A. H. Philipiah who executed his commission and submitted Preliminary Plan No. 2240 dated 16th March 1967 together with his field notes and his report. The preliminary plan along with the field notes has been filed in this application marked 'B'. The report of the Surveyor has not been filed in this application.

According to the Preliminary Plan the corpus has been described as lots Y (roadway) and Z in extent 1A—OR—P37.9.

On 30.4.1968 on a motion filed by Proctor for plaintiff a fresh commission was issued to the same Surveyor to survey the entire land as described in Schedule A to the plaint. The Commissioner duly executed this Commission and submitted his plan No. 3113 dated 20th October 1968 along with his report and field notes. The plan and field notes has been produced marked 'D' and the Surveyor's report has been produced marked D1.

On 22.08.1974 plaintiff filed a second amended plaint and in this plaint sought to partition the entire land described in the Schedule A, which is depicted as A1, A2, A3 and A4 in the plan No. 3113 of 20th October 1968. Fresh *lis pendens* was registered and trial proceeded.

After trial judgment was delivered that the corpus for partition should be lots Z and Y (roadway) in preliminary plan No. 2240

which correspond to lot A4 and the portion of A3 which is adjacent to Lot A4 (Lot A3 is the roadway). This is the corpus which was described in Schedule B, to the original plaint and interlocutory decree was ordered to be entered in terms of the judgment.

The petitioner is seeking to revise this judgment on the ground that (a) no notice as contemplated by 15 (1) or 15 (2) of the Partition Law was ever to the petitioner's knowledge published as required and (b) that neither exhibition nor oral proclamation as contemplated by section 15 (3) was ever done.

The petitioner further pleads in para 12 (b) of the petition that "as in 1956 he was in absolute control and possession ut dominus of the land described more fully in the **Schedule hereto** and the house now bearing assessment No. 142/1 Isipathana Mawatha and collected the rents and produce therefrom".

Although in the petition and affidavit the petitioner speaks of a schedule giving the metes and bounds of the portion where he is claiming he has a right, there is no schedule to the petition. Thus there is nothing in the petition as to which portion the petitioner is claiming. However learned Counsel for petitioner stated that the petitioner is claiming rights in a portion of the land described in Schedule B to the original plaint which is depicted in preliminary plan No. 2440 and that the petitioner is not interested in the added portion in the north, by the subsequent plan No. 3113. In any event there is no specific averment as to what extent of land the petitioner is claiming. The petitioner also claims that he has prescribed to the said portion of land which has not been described by metes and bounds.

Learned Counsel for petitioner submitted that the judgment in this case is null and void because there had been no proper plan in terms of the Partition Act before Court to proceed to trial. He submitted that after the amended plaint filed in 1974 there has been no fresh commission issued to survey the entire land and the Surveyor when he submitted his plan No. 3113 had not surveyed the entire land as required by the Partition Law.

Learned Counsel for 2nd and 4th defendant-respondents raised a preliminary objection that the petitioner cannot have and maintain his application as the judgment and decree in case No. 11168/P of the District Court of Colombo is final and conclusive against all persons in terms of section 48 of the Partition Law No. 21 of 1977 and the petitioner is bound by it. Under section 48 (7) the provisions of this section shall apply to all interlocutory and final decrees entered in partition actions instituted under the provisions of the Partition Act No. 16 of 1951.

Section 48(1) provides as follows:—

> "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 there from, 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 or 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."

Section 48 (5) provides as follows:—

> "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 subsection (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the 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".

It was submitted on behalf of the petitioner that as no interlocutory decree has been entered in this case before us section 48 does not apply to judgment.

The Court when it delivered judgment ordered that interlocutory decree be entered accordingly. The entering of the decree is a purely ministerial act and the interlocutory decree when entered relates back to the date of judgment. See *Petisingho v. Ratnaweera* (1) and *Dissanayake v. Elisahamy* (2). Thus section 48 of the Partition Law applies to judgments also.

In the case of *Mariam Beebee v. Seyed Mohamed* (3) Sansoni C. J. delivering the majority decision of the Divisional Bench that heard this case said as follows at page 38.

> "The power of revision is an extraordinary power which is quite independant of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors sometimes committed by this Court itself in order to avoid miscarriage of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not I conceive, made any changes in this respect, and the power can still be exercised in respect of any order or decree of a lower Court".

In **Mariam Beebee's** case the facts were that interlocutory Decree for partition was entered when one of the defendants, to whom a share was allotted was dead and the Court being unaware of such death no steps were taken under section 82 to substitute any person to represent his estate. In these circumstances the Supreme Court held that the interlocutory decree was a nullity and set aside the decree in revision.

This case was cited with approval by the Supreme Court in the unreported case of *R. A. Somawathie vs. Madawela and Others* S.C. No. 24/82 D.C. Kurunegala 3903/P—Minutes of 29.6.83 (5 Judges) (4). In this case the same question as in the last case was

considered viz can the Court of Appeal interfere by way of revision in view of the conclusive and final effect attached to partition decrees. When this case was decided the present Partition Law was in force.

Soza J delivering the judgment of the Court stated as follows:—

> "But although the Act stipulated that decrees under the Partition Act are final and conclusive even where all persons concerned were not parties to the action or there was any omission or defect of procedure or in the proof of title, the Supreme Court continued in the exercise of its powers of revision and restitutio in integrum to set aside partition decrees when it found that the proceedings were tainted by what has been called fundamental vice".

Soza J further stated as follows:—

> "Accordingly the use by the legislature in successive enactments of a form of words substantially similar to the form of words in section 48 (1) of the repealed Partition Act No. 16 of 1951, supports the assumption that the legislature intended to leave unaffected the powers of revision and restitutio in integrum vested now in the Court of Appeal in conformity with the construction adopted by Sansoni C.J. in *Mariam Beebee v Seyed Mohamed*."

> "The Revisionary power of the Court set out in *Mariam Beebee v Seyed Mohamed* therefore remains applicable even after the enactment of the Administration of Justice (Amendment) Law No. 25 of 1975 and the Partition Law No. 21 of 1977. The powers of revision and restitutio in integrum have survived all the legislation that has been enacted upto date. There are extraordinary powers and will be exercised only in a fit case to avert a miscarriage of justice".

The facts of the case before the Supreme Court were

(1) There was no proper compliance with section 12 (1) of the Partition Act No. 16 of 1951 which was operative at the time this

case was filed. Under this provision it was imperative that a Proctor should file a declaration under his hand certifying that all such entries on the register maintained under the Registration of Documents Ordinance have been personally inspected by him after the registration of lis pendens, and giving the names and addresses of every person found upon such inspection to be a necessary party to an action under section 5 of the Act. The declaration failed to disclose the name of Madawela the name of the petitioner whose deed had been registered.

(2) In the surveyor's report attached to plan depicting the corpus the name of Madawela was disclosed but no notice was issued to him as required by section 22 (1) (a) of the Partition Act.

On the facts of this case Soza J stated "Indeed the facts of this case cry aloud for the intervention of this Court to prevent what otherwise would be a miscarriage of justice".

Even in this case the Supreme Court did not set aside all the proceedings but only excluded the particular lot in which Madawela was concerned from the interlocutory decree.

Thus the Court of Appeal has the power to exercise the extra-ordinary jurisdiction by way of revision in respect of judgments and decrees entered in partition cases provided that the Court is satisfied that there is a fundamental vice in the proceeding which culminated in the judgment or interlocutory decree and if the Court did not interfere there would be a miscarriage of justice.

The next question to be considered is whether in the case before us there is a taint of fundamental vice in the proceedings and whether it is a fit case where this Court should interfere.

The petitioner in his affidavit states that in the year 1956 although still very young he was a riding boy at the Selvaratnam Stables and was in absolute control and possession ut dominus of the land and house now bearing No. 142/1, Isipathana Mawatha. In his affidavit the petitioner states in the schedule the description of this land which he claims is given but there is no schedule either in the petition or affidavit. Petitioner states that

he kept and stabled a race horse and several Arab ponies in a room in the said premises No. 142/1. He further states that since the year 1956 he has possessed the land and premises aforesaid undisturbed and uninterruptedly and by a title adverse to and independent of all others and has acquired a valid title thereto by prescription. He has annexed to the affidavit another affidavit from one Albert. According to Albert's affidavit in late 1956 he went to reside in a room at 142/1 Isipathana Mawatha, Colombo and was living there from 1956 to 1969. According to Albert the petitioner was in possession of premises No. 142/1 and the surrounding land from 1956 to 1969 as owner. In 1969 Albert after getting married shifted to his parent's house in Timbirigasyaya.

The petitioner in his affidavit avers

(a) that no notice as contemplated by section 15 (1) and 15 (2) of the Partition Law was ever to his knowledge exhibited as required.

(b) that neither exhibition nor oral proclamation as contemplated by section 15 (3) was ever done.

When this partition action was instituted in 1966 the Partition Act No. 16 of 1951 (Cap 69) was in operation. Section 15 (1), (2) and section (3) of the Partition Law correspond to section 15 (1), (2) and (4) of the Partition Act.

According to the journal entries of the Partition case No. 11168/P under J.E. No. (6) dated 16.9.66 it is stated that "papers under section 12 filed, check and issue for 7.12.66".

These are the requisite notices which have to be sent to Fiscal to be served on the Grama Sevaka for exhibition on the land.

According to J.E. (10) stated 7.12.66

(1) "Notice of institution served on G.S. and affixed on land".

(3) Proof of publication in the Times of Ceylon filed.

I have perused the original record in the Partition case and I find the Fiscal had made a return to Court dated 24th November 1966 in which the Process Server has reported that he served the notice by "beating tom-tom and by affixing a duplicate to the front door of the said building bearing number 142/1 Greenland Road Colombo thereof on 18th November 1966".

There is also a further report that he served this notice on the Grama Sevaka, Timbirigasyaya by affixing duplicates to the Notice Board of the Grama Sevaka, Timbirigasyaya on 18th November 1968.

These notices are the required notices for institution of a Partition Action and which have to be exhibited on the land and proclaimed by beat of tom-tom under the Partition Act, so that persons who have any interest in the land can intervene.

Notice of action was also published in the Times of Ceylon and the newspaper has been filed of record.

The notice was affixed on the front door of 142/1 Greenland Road which is the land described in Schedule B of the original plaint and depicted in Preliminary Plan No. 2240 dated 30.11.66 marked 'B' and filed in the proceedings. The plan is marked Y in the partition case. According to learned Counsel for petitioner it is a portion of this land the petitioner claims that he has prescribed to and which he claims he was in possession of during this time. The petition of course does not describe the land he claimed by metes and bounds.

Nowhere in the petition or affidavit does the petitioner even attempt to explain as to why he did not intervene despite all this publication and exhibition on the land. He does not even state as to when he first became aware of this Partition Action, nor does he explain the delay in making this application to this Court almost six years after judgment was delivered. Petitioner makes a bare assertion that 'no notice of whatever kind or nature' was given to him and that there was no publication.

The petitioner's claim that there was no notice of action or publication as required by section 15 (1), (2) and 15 (4) of the Partition Act is without any merit and unfounded.

The next complaint of learned Counsel for the petitioner is that the judgment is void and of no force or effect in law because the judgment is based on the plan No. 3113 dated 31st July 1968 which is not a due and proper plan under the Partition Act.

It was submitted on behalf of the petitioner that according to the field notes filed by the surveyor he has not surveyed lot A4 shown in the plan although according to what is depicted on the plan 3113 the entire land is purported to have been surveyed and that this plan No. 3113 was prepared in 1968 but the amended plaint was filed in 1974 on which the parties went to trial. Counsel's further submission was that under the Partition Act a fresh commission should have been issued on the Amended Plaint.

It would appear that on the original plaint filed on 21st February 1966 the land sought to be partitioned was the land described in Schedule B in extent A1. R1. P36.25. On this plaint a commission was issued to the surveyor to survey the land as required by the Partition Act. On this commission the Surveyor after surveying the land submitted the plan No. 2240 which shows lot Z in extent 1A. RO. P23.6 as the corpus to be partitioned and lot Y in extent OA. OR. P 14.3 as the roadway both aggregating to A1. RO. P37.9, together with his report.

In these proceedings the plan has been filed marked B together with field notes but the report of the suveyor has not been filed although reference was made to the report in the petition and affidavit. This is a very relevant document for the petitioner's case but the petitioner has chosen not to furnish a copy of the said report. According to the said report (which I have perused from the original record) there has been an oral proclamation of the date on which this survey is to take place, and if the petitioner had any right or title to a portion of this land he would have been present at the survey and made a claim. The petitioner was not present at the survey nor did anybody make any claim on his behalf. According to the report of the surveyor the survey was done on 30th November 1966 and notice of the survey was fixed on this land on 22nd November 1966.

On the application of the plaintiff a second commission was issued to survey the entire land described in Schedule A to the plaint. The same surveyor executed this Commission and submitted plan No. 3113 dated 20th October 1968 together with the field notes and report. Copy of the said plan No. 3113 is filed in these proceedings marked 'D' together with the field notes. Copy of the report of the surveyor has been produced marked D1.

Submission of Counsel for petitioner is that on perusing the field notes attached to plan No. 3113 the field notes do not relate to A4 in the plan. Lot A4 corresponds to lot Z in the first preliminary plan No. 2240. He further submitted that the entire land has not been surveyed as depicted in plan 3113, but only lots A1 and A2 have been surveyed. He further submitted that judgment in this case was based on the second plan No. 3113 which is not a survey of the entire land and therefore the judgment is void.

On perusing the judgment which has been produced marked G it would appear that both plans with the report were produced in this case. The trial Judge in the very first page of his judgment refers to plan No. 2240 marked Y and the report marked Y1. He also refers to the survey plan 3113 marked X and the report marked X1. Thus it is not correct to say that trial proceeded only on the second survey plan. It was also submitted that plan No. 2626A referred to in plans 2240 and 3113 has not been produced at the trial. Even that too is not correct because plan No. 2626 A was produced at the trial marked 1D1.

The surveyor has not shown in the field notes attached to plan No. 3113 the lot A4 because in the earlier plan No. 2240 that same lot is shown as Lot Z and the field notes to plan No. 2240 showed that that lot has been surveyed. Both plans 2240 and 3113 have been made use of at the trial.

According to the judgment of the learned District Judge the corpus for the partition action has been restricted to the land shown in plan No. 2240 which was the land described in Schedule B to the original plaint. The portions added after the

original preliminary survey plan No. 2260 have been excluded from the corpus.

In any event the submission of the learned Counsel for petitioner is in respect of the entire land referred to in the amended plaint filed in 1974 but this is purely of academic interest because the corpus to be partitioned is restricted to Lot Z in plan No. 2240 which is lot A4 in plan 3113 which is described in Schedule B to the original plaint filed in 1966. In fact the petitioner claims an interest in lot Z in plan No. 2240 and is not interested in any other lots. The submission of learned Counsel for petitioner that the judgment is null and void as there is no due and proper plan cannot be upheld. The procedure set out in the Partition Act has been followed in the partition action and there is no cause for complaint.

The petitioner's father was a monthly lessee of the 4th respondent of the land the subject matter of the said Partition Action No. P/11168 and the 4th respondent has filed plaint on 7th May 1980 in the District Court of Colombo in case No. ZL/3435 to have him ejected. A copy of the plaint marked M was filed with the petitioner's application. The petitioner's father died and the petitioner was substituted as substituted defendant. The petitioner as substituted defendant filed his answer on 7th November 1984 in the same case No. ZL/3435 claiming title to this land. It was after having filed this answer that the petitioner filed this petition in Revision in October 1985 to set aside the judgment in the partition case. As the petitioner was a monthly lessee the petitioner was not made a defendant.

I hold that the petitioner had every opportunity to intervene before judgment but did not do so although notice of institution of the partition action was given as required by the Partition Act and was published in the newspaper. The petitioner did not even prefer a claim before the Surveyor when he went for the preliminary survey.

The judgment entered in this case is final and conclusive and there is no ground on which this judgment can be assailed. The proceedings and judgment are not tainted with any fundamental

vice and there is no reason whatsoever which would warrant this Court to interfere. The petitioner's application therefore fails.

I have so far been dealing with the merits of the application made by the petitioner.

The petitioner has not complied with Rule 46 of the Supreme Court Rules 1978 in that the petitioner has not annexed to his petition a copy of the surveyor's report to the preliminary plan No. 2240 although reference is made in the petition to such report.

Rule 46 reads thus:

> "Every application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition and affidavit in support of the averments set out in the petition and shall be accompanied by originals of documents material to the case of duly certified copies thereof in the form of exhibits. Application by way of revision or restitutio in integrum under Article 138 of the Constitution shall be made in like manner and be accompanied by two sets of copies of proceedings in the Court of First Instance, tribunal or other institution".

Compliance with this rule is a mandatory requirement vide *Navaratnasingham v. Arumugam* (5). This was affirmed in the same case in the *Supreme Court in S.C. Appeal No. 6/81.*

The copy of the surveyor's report to the plan No. 2240 is a document material to the case. The surveyor's report to the second plan No. 3113 has been filed which in turn refers to the first report. Further the petition and affidavit refers to a schedule of the land which the petitioner claims he has prescribed to but there is no schedule either in the petition or affidavit.

In view of these material defects in the application made by the petitioner, I hold that the petitioner cannot maintain this application apart from the merits of his application.

I dismiss the petitioner's application with costs.

S. B. GOONEWARDENE, J. — I agree

Application dismissed