DHARMARATANA THERO

v.

SIYADORIS AND OTHERS

COURT OF APPEAL.
G. P. S. DE SILVA, J. AND JAYALATH, J.
C. A. APPLICATION No. 222/78.
D. C. MATARA 21234.
FEBRUARY 15 AND MARCH 5 AND 8, 1985.

Partition action – Defendant claiming that corpus was part of a larger land – Larger land surveyed on Commission – Belated application to register lis pendens – Section 19(2) (a) and (b) of Partition Law No. 21 of 1977.

The plaintiff filed this suit in 1950 seeking a partition of the land called Udakumbura. This land was surveyed on a Commission. The 62nd defendant taking up the position that the corpus sought to be partitioned was a portion of a larger land called Halgahakumbura got the larger land surveyed in 1953 and again in 1966. There were 275 parties in the case and it eventually came up for trial on 11.1.1978 on which date the 62nd defendant moved to be allowed to register the lis pendens in respect of the larger land. This was objected to by all the parties. The Court by its order refused the application. After an unsuccessful earlier attempt to obtain leave to appeal from this order, the 62nd defendant moved the Court of Appeal in revision.

Held –

(1) It is on the motion of the party defendant interested in having the larger land partitioned that the duty of the Court arises to specify in terms of section 19 (2) (*b*) of the Partition Law No. 21 of 1977 the party by whom and the date on or before which the application for the registration of the action as a lis pendens in respect of the larger land should be filed. The petitioner filed his amended statement in May 1956 and his present application made on 11.1.1978 when the case was for trial was belated.

(2) The petitioner could still participate in the trial. He could pursue his claim in his statement of claim for interests in Udakumbura or in the alternative seek a dismissal of the action on the basis that the plaintiff was seeking to partition only a portion of a larger land.

Case referred to :

(1) *De Silva v. De Silva 3 CWR 318.*

APPLICATION for Revision of the Order of the District Court of Matara.

Kithsiri P. Gunaratne with *Miss S. M. Senaratne* for petitioner (62nd defendant).

P. A. D. Samarasekera, P.C. with *Kanchana Abhayapala* for respondents.

Cur. adv. vult.

May 31, 1985.

G. P. S. DE SILVA, J.

The plaintiff filed this action as far back as 1950 to partition the land called Udakumbura, 2 A. 3 R. 37 P. in extent. This land was shown in Plan No. 235 dated 22.11.51 made by Licensed Surveyor, Ernest, and also shown in the subsequent Plan No. 1314 of 16.1.65 made by S. Wickremasooriya, Licensed Surveyor. The petitioner in the present application for revision was the 62nd defendant in the partition action and it was his position that Udakumbura which the plaintiff sought to partition was only a portion of the larger land called Halgahawela in extent 29 A. 3 R. 06 P. and which forms lot 8 in F.V.P. 37. At the instance of the petitioner, Plan No. 832 dated 21.1.53 was prepared by Surveyor H. S. Dias showing the larger land called Halgahawela. On an application made by the petitioner the aforesaid Plan 235 depicting Udakumbura was superimposed on the said Plan 832. Since the Surveyor H. S. Dias died, the petitioner moved for a commission to another Surveyor and Plan No. 343 was prepared by Surveyor Wimalasuriya in 1966 depicting the larger land Halgahawela.

Although the action was instituted in 1950, the case was ultimately taken up for trial only on 11th January, 1978. On that date an application was made on behalf of the petitioner that he be allowed to register the lis pendens in respect of the larger land, namely Halgahawela. This application was objected to by all the other parties. It may be noted that there were no less than 275 parties to the action. After hearing the submissions made on behalf of the parties, the District Judge refused the application made on behalf of the petitioner mainly on the ground that it was a hopelessly belated application which, if allowed, would mean that the entire proceedings would have to commence afresh. The District Judge has in the course of his order observed that this action has already taken 28 years and if the petitioner's application is allowed it will take another 50 years to conclude the trial. It is this order which the petitioner now seeks to set aside by way of revision.

Mr. Gunaratne, Counsel for the petitioner strenuously contended that the District Judge was in serious error when he refused the application to register the lis pendens in respect of the larger land which had been surveyed twice on commissions issued by court. Counsel urged that the court was fully aware of the petitioner's

position in the case and that the petitioner had complied with all the steps required of him under section 19 (2) (*a*) of the Partition Law No. 21 of 1977. Mr. Gunaratne urged that while the petitioner had done all that he had to do when he sought to make the larger land the subject matter of the action, it was the court that failed to carry out the imperative duty imposed upon it under section 19 (2) (*b*) of the Partition Law No. 21 of 1977.

Section 19 (2) (*b*) reads thus :–

> "Where any defendant seeks to have a larger land made the subject matter of the action as provided in paragraph (*a*) of this sub-section, the court shall specify the party to the action by whom and the date on or before which an application for the registration of the action as a lis pendens affecting such larger land shall be filed in court, and the estimated costs of survey of such larger land as determined by court shall be deposited in court".

It would appear that on a literal reading of the section, the duty is cast on the court to specify the party by whom an application for the registration of the action as a lis pendens in respect of the larger land has to be filed. But the relevant question is, at what point of time does such duty arise ? It seems to me that the duty of the court arises only upon the party defendant interested in having the larger land partitioned moving the court to make the appropriate order in terms of the section. This is a matter which would normally come up in the course of the motion roll and it was surely the duty of the Attorney-at-law representing the petitioner to have invited the court to make the required order. How else is the court to be made aware of the need to make an order in terms of section 19 (2) (*b*) ? The interpretation contended for on behalf of the petitioner would place an undue burden on the Court.

It is relevant to note that the amended statement of claim wherein the petitioner averred that the corpus sought to be partitioned was only a portion of a larger land, was filed as far back as May 1956. The petitioner waited till 11th of January, 1978, which was the date fixed for the trial of the action, to make his application to register the lis pendens in respect of the larger land. As submitted by Mr. Samarasekera, Counsel for the plaintiff-respondent, it takes very many years before a partition action, where there are as many as 275 parties, reaches the stage of trial. This was an action filed way back in

1950. In the circumstances, no court acting fairly and reasonably could have allowed the petitioner's application which was opposed by all the other parties to the action.

As an alternative submission, Mr. Gunaratne urged that it was the duty of the plaintiff to have moved the court for an order in terms of section 19 (2) (*b*) of the Partition Law No. 21 of 1977, since the burden is on the plaintiff and not on a party defendant to prosecute the action. I find this submission unacceptable. It is the petitioner alone who sought to bring in the larger land as the corpus of the action. Just as much as it was the petitioner who moved for a commission to survey the larger land and got the necessary plans prepared, it was also his duty to have invited the court to make the orders in terms of section 19 (2) (*b*) and got the lis pendens registered in respect of the larger land. This he failed to do until the date of trial. As observed by Shaw, J. In *De Silva v. De Silva* (1) "In a partition suit, however, all the parties are in a sense plaintiffs . . . . . ".

Moreover, as submitted by Mr. Samarasekera, the order of the District Judge did not preclude the petitioner from participating at the trial. The ruling of the court was that the larger land cannot form the corpus of the action because of the failure to register the lis pendens. On the other hand, the petitioner in paragraph 8 of his amended statement dated 4th May, 1956 claimed rights in the corpus (Udakumbura). Thus it was open to the petitioner to have participated at the trial and proved his rights or in the alternative he could have sought a dismissal of the action on the basis that the plaintiff was seeking to partition only a portion of the land. Indeed this is clear from the terms of paragraph (1) of the prayer to his amended statement of claim where the reliefs are prayed for in the alternative. Counsel stated that both the interlocutory decree and the final decree were entered in 1978. The petitioner had earlier made an application for leave to appeal which was refused by this court.

On a consideration of all these matters set out above, I am satisfied that this is not a fit case for the exercise of the extraordinary powers of revision vested in this court. The application for revision is accordingly dismissed. In all the circumstances, I make no order as to costs.

JAYALATH, J. – I agree.

Appeal dismissed.