CAROLINE NONA AND OTHERS

VS

PEDRICK SINGHO AND OTHERS

COURT OF APPEAL.

SOMAWANSA, J, (P/CA) AND

WIMALACHANDRA, J.

CA 603/2004.

DC HORANA 1799/P.

MARCH 21, 24, 2005.

Partition Law, No. 21 of 1977 - Final decree entered - Revisionary powers invoked - Miscarriage of Justice - Judgment palpably wrong?– Is intervention by way of revision permitted?–Laches - Can delay be excused if judgment is manifestly erroneous? - Court of Appeal (Appellate Procedure) Rules 1990- Non compliance - Is it fatal ?

The 1st defendant – petitioner sought to set aside that part of the interlocutory order granting the house and the toilet to the 2nd defendant and the order

made in the final decree that Rs.178,000 shall be paid as compensation by the 1st defendant to the 2nd defendant as the said house and toilet had been included in the lot allotted to the 1st defendant. The application made to the original Court was dismissed on the ground that it was a belated application.

The defendant – respondents contended that revision does not lie as there are no exceptional circumstances urged and there is delay and violation of the Court of Appeal (Appellate Procedure) Rules.

HELD:

(1) Without an iota of evidence that the house and toilet belong to the 2nd defendant, the District Judge had granted the house and toilet to the 2nd defendant despite the fact that the plaintiff, the only person who gave evidence without any ambiguity had said that the 2nd defendant's house was no longer in existence and the 1st defendant has constructed a house.

(2) The decision of the District Judge amounts to a miscarriage of justice. Granting the house/toilet to the 2nd defendant is wrong ex-facie. Those are exceptional circumstances, for the court to exercise revisionary jurisdiction having regard to the facts and circumstances of the case.

(3) If the impugned order or part of the judgment is manifestly erroneous and is likely to cause grave injustice, the court should not reject the application on the ground of delay alone.

Per Wimalachandra, J.

"In my view if this court is unable to understand the order sought to be revised in the absence of the relevant documents, it is only then the failure to observe the Rules and the failure to file the relevant documents will amount to a fatal irregularity which would result in the dismissal of petition."

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

Cases referred to :

1. *Rustom vs. Hapangama and Co.* 1978-79 Sri LR 225
2. *Soysa vs. Silva 2000* 2 Sri LR 235
3. *Biso Menike vs. Cyril de Alwis* 1982 1 Sri LR 368
4. *Kiriwanthe vs. Navaratne* 1990 2 Sri LR 393

Champaka Ladduwahetty for 1st defendant - petitioner,

Ifthikar Hushain for 2nd defendant–respondent.

Cur. adv. vult.

October 28, 2005.

WIMALACHANDRA, J.

This is an application in revision filed by the 1st defendant–petitioner (1st defendant) from the judgment and the interlocutory decree of the learned

District Judge of Horana entered on 01.06.2001 in the partition action bearing No. 1799/P.

By this application the 1st defendant seeks to set side that part of the interlocutory order entered in the partition action granting the house and the toilet to the 2nd defendant and the order made in the final decree that Rs.178,000 shall be paid as compensation by the 1st defendant to the 2nd defendant as the said house and toilet had been included in the lot allotted to the 1st defendant. The Learned District Judge refused to grant the relief prayed for by the 1st defendant. The Learned Judge in his order observed that the 1st defendant had made a belated application to amend the judgment and the interlocutory decree nearly one year after the interlocutory decree had been entered. The reason given by the 1st defendant for the delay was that she had been ill. However the 1st defendant had failed to produce a medical certificate to establish that she had been ill and had been unable to give the necessary instructions to her lawyer.

When the partition action had come up for trial on 28.05.2001 only the plaintiff and the 2nd defendant had been present in Court and they had been represented by counsel. Apparently, as there was no dispute as to the *corpus*, the pedigree and the improvements, only the plaintiff had given evidence. As regards the improvements apart from the plantation the plaintiff had stated that the 2nd defendant was in possession of a house and toilet and that the said house was no longer in existence in the land to be partitioned.

The plaintiff said : (at page 5 of proceedings dated 28.05.2001)

"ගෙයක් සහ වැසිකිලියක් දෙවන විත්තිකරු බුක්ති විඳිනවා කියා කිබෙනවා. ඒ ගේ දැන් පොළොවේ නැහැ."

The District Judge in his judgment had granted the house and toilet to the 2nd defendant despite the fact that the plaintiff, the only person who gave evidence at the trial without any ambiguity, had said that the 2nd defendant's house was no longer in existence. Besides, the 2nd defendant's counsel on 18.06.1999 had submitted to Court that the 1st defendant had demolished the house in question and thereafter commenced constructing a house towards the end of the land.

Moreover, the learned counsel for the 1st defendant had drawn attention to the preliminary survey report marked 'P3 (a).' It is to be observed that the only house and the toilet on the land to be partitioned had been claimed by the 1st defendant before the surveyor and no one else. Even at the trial the 2nd defendant had not made a claim to the aforesaid house and toilet despite the 2nd defendant's presence at the trial and also represented by a lawyer.

In the circumstances, it seems to me that the District Judge, without any evidence and acting arbitrally, had granted the house and toilet to the 2nd defendant. After the final partition the said house and toilet had been

included in the lot allotted to the 1st defendant and the 1st defendant had been called upon to pay a sum of Rs. 193,583 to the 2nd defendant, which included the value of the house amounting to Rs.178,000. The 1st defendant invokes the revisionary jurisdiction of this Court to remedy this situation.

In these circumstances, without an iota of evidence that the said house and toilet belongs to the 2nd defendant, the learned Judge had granted the said house and toilet to the 2nd defendant. In the circumstances, in my view the decision of the District Judge amounts to a miscarriage of justice and that part of the judgment granting the house and toilet to the 2nd defendant is wrong *ex--facie*. This Court possesses the power to set aside in revision an erroneous decision of the District Court which amounts to a miscarriage of justice in an appropriate case even though an appeal against such decision has been available to the petitioner and he has not resorted to that remedy. It was held in the case of *Rustom vs. Hapangama and Co.*[1] that "the powers by way of revision conferred on the Appellate Court are very wide and can be exercised whether an appeal has been taken against an order of the original Court or not. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are is dependant on the facts of each case."

In this situation, exceptional circumstances do exist for this Court to exercise its revisionary jurisdiction having regard to the facts and circumstances of this case. It is my view that non - interference by this

Court will cause a denial of justice and irremediable harm to the 1st defendant.

It was held in the case of *Soysa vs. Silva*[2] that the power given to a superior Court by way of revision is wide enough to give it the right to revise any order made by an original Court. Its object is the due administration of justice and correction of errors sometimes committed by the Court itself, in order to avoid miscarriage of justice.

The next question to be decided is whether the 1st defendant is guilty of laches. The judgment and the interlocutory decree of the aforesaid partition action had been entered on 01.06.2002. The 1st defendant had made the application to the District Court to amend the judgment and the interlocutory decree on 17.07.2003 when the final plan No.1401 marked 'P6' had come up for consideration on 28.01.2004 with regard to the scheme of partition proposed by the surveyor. The 1st defendant made an application to the Court to amend the interlocutory decree and the judgment and sought that the portion of the interlocutory decree entered in this case granting the house to the 2nd defendant be set aside. The learned counsel for the 1st defendant submitted that this appllication in revision was filed on 04.03.2004. and the 1st defendant had sought to amend the interlocutory decree dated 01.06.2001 after a lapse of two years and ten months.

The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. If the impugned order or that

part of the judgment is manifestly erroneous and is likely to cause grave injustice, the Court should not reject the application on the ground of delay alone.

In the case of *Biso Menike Vs. Cyril de Alwis*[3] *Sharvananda,* J. (as then he was) at 379 observed :

> "When the Court has examined the record and is satisfied the order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically."

In the instant case the learned Judge has completely disregarded the evidence adduced at the trial with regard to the ownership of the said house and toilet and held that the house should belong to the 2nd defendant. This finding of the District judge is manifestly erroneous and has deprived the 1st defendant or his right to the said house. in the circumstances it appears that the 1st defendant has made out a strong case amounting to a positive miscarriage of justice. In this situation, in my view, despite the

fact that there is a delay on the part of the 1st defendant in making this application , as the order challenged discloses a miscarriage of justice which shocks the conscience of Court since it had deprived the 1st defendant of some right, justice of the case requires the use of the discretion of this Court to excuse her delay in coming to court.

It now remains to consider the preliminary objection raised by the learned counsel for the 2nd defendant with regard to the non compliance with Rule 3 (1) of the Court of Appeal Rules. The learned counsel submitted that the 1st defendant had failed to comply with Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules 1990 in failing to annex certified copies of the application made to the District Court seeking to amend the interlocutory decree entered in this action. The aforesaid Rule 3(1) is similar to Rule 46 of the Supreme Court Rules.

The rules of procedure have been devised with the sole object of eliminating delay and facilitating due administration of justice. On an examination of the decisions made by the Appellate Courts, it appears that the Superior Courts have time and again emphasized the mandatory nature of the observance of the Appellate Court Rules. it seems to me that the observance of the Rules is necessary to understand the order sought to be revised and to place it in its proper context. In my view, if this Court is unable to understand the order sought to be revised in the absence of the relevant documents, it is only then the failure to observe the Rules and the failure to file the relevant documents will amount to a fatal irregularity which would result in the dismissal of the petition.

In the case of *Kiriwanthe vs. Navaratne*[4] Mark Fernando, J. held that the weight of authority thus favours the view that while these rules (Appeal Procedure Rules) must be complied with, the law does not require automatic dismissal of the application or appeal of the party in default. The consequence of non - compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation, therefore, in the context of the object of the particular rule.

At the trial the parties have settled their disputes and had led the evidence of the plaintiff who was the only witness who gave evidence. The plaintiff in giving evidence had said that the house that was in the possession of the 2nd defendant is no longer on the ground. At page 5 of the proceedings dated 28.05.2001 the plaintiff who is the father of the 2nd defendant had said ;

"ගෙයක් සහ වැසිකිලියක් 2 වන විත්තිකරු භුක්ති විඳිනවා කියා තිබෙනවා. ඒ ගේ දැන් පොළවේ නැත"

The preliminary plan and the report of the surveyor were marked P2 and P2(a) respectively. It is to be seen that the only house on the land was claimed by the 1st defendant - petitioner and no one else. However, notwithstanding the evidence given at the trial the only house on the land was given to the 2nd defendant. The learned Judge has failed to consider the evidence given by the only witness, the plaintiff who said that the 2nd

defendant's house is no longer in existence. In the circumstances, I am of the view that the granting of the house to the 2nd defendant is an error on the face of the record which amounts to a miscarriage of justice which is an exceptional circumstance which warrants the exercise of the revisionary powers of this Court. In this application in revision, though the petitioner has not made available to Court a copy of the application made to the District Court by which she sought the amendment of the interlocutory decree, the copies of all the relevant documents are before this Court to understand the impugned order. The proceedings of the trial was produced marked "P4". The copies of the final partition plan and the judgment were produced marked P5, P6, and P6A respectively. The submissions made by the counsel at the inquiry were filed marked "P7". In my view these documents are sufficient to understand the order sought to be revised.

The preliminary objection raised by the respondent is overruled and acting in revision we set aside that part of the interlocutory decree entered in this case allotting the said house and the toilet to the 2nd defendant and we also set aside that part of the final decree granting compensation of Rs.178,000 being the value of the said house, to the 2nd defendant - respondent.

We make no order as to the costs of this inquiry.

ANDREW SOMAWANSA, J. (P/CA) – *I agree.*

Application allowed.