

**REV INDUREWE DHAMMANANDA**

**v.**

**PIYATISSA AND ANOTHER**

COURT OF APPEAL  
JAYASINGHE, J.  
UDALAGAMA, J.  
C.A. 218/2000  
D.C. MATUGAMA 2678/P  
FEBRUARY 02, 2000  
JANUARY 15, 2001

*Partition Law - S.5, S.44, S.48(4) - Exclusion - Non compliance of provisions of S.5 - Right of a Party having a right to notice - intervention by Revision - Finality of an Interlocutory Decree - Miscarriage of justice.*

**Held :**

- (i) The Commissioner by his Report which was not disputed by the Plaintiff has in no uncertain terms brought to the Notice of Court and to the Plaintiff that lots 1, 2, 3, 5, 8 and 6 do not form part of the corpus.
- (ii) In spite of the said Report the Plaintiff either by design or inadvertence failed to act under S.5
- (iii) The Court too ignored the Surveyor's Report and allowed portions that fell outside the corpus to be included without even notice to interested parties as provided by S.5.
- (iv) No effort was made to issue notice on the necessary parties.
- (v) On the bare statement of the Plaintiff lots 2, 3, 5 had been included despite the clear finding of the surveyor.

*Per Udalagama, J.*

"It is settled law that the revisionary powers of the Court of Appeal is unaffected even under the Partition Law, the provisions of S.48 notwithstanding - the power of revision and *restitutio in integrum* of the Court of Appeal have survived legislation that has been enacted up to date.

**APPLICATION** in Revision from the Judgment of the District Court of Matugama.

**Cases referred to :**

1. *Somawathie v. Madawala* - 1985 - 2 SLR 15
2. *Manam Bee Bee v. Seyad Mohamed*

S. C. B. Walgampaya for Petitioner.

H. Witnachchi with Vijith Singh for Plaintiff Respondent.

*Cur. adv. vult.*

February 22, 2001.

**UDALAGAMA, J.**

Section 5 of the Partition Law provides, inter alia, that a plaintiff shall include all persons who, whether in actual possession or not, to his knowledge are entitled or claim to be entitled to any right, share, interest and improvement and subject to the limitations stated therein even persons claiming interest in a mortgage shall be included as a party.

Section 48(3) of the Partition Law, however, provides that an interlocutory decree entered in a partition action shall have a final and conclusive effect as declared by section 48(1) notwithstanding the provisions of even section 44 of the Evidence Ordinance unless the decree was so entered by a court without competent jurisdiction.

The matter for decision by this court in the instant case is whether an obvious non-compliance of the provisions of section 5 aforesaid would shut out the rights of a party having a right to notice when in fact no notice of the action was given and whether such party could intervene by way of revision to prevent a miscarriage of justice.

It is settled law that the revisionary powers of the Court of Appeal is unaffected even under the partition Law, the provisions of section 48 notwithstanding. The powers of revision and *restitutio in integrum* of the Court of Appeal have survived legislation that has been enacted upto date. As stated by Soza

*J. in Somawathie v. Madawala*<sup>(1)</sup>, with Sharvananda J., Wanasundera J., Wimalaratne J., and Ratwatte J. agreeing, an important question regarding the finality of an interlocutory decree and the powers of revision exercisable by the Court of Appeal was dealt with in that case and one matter for decision in *Somawathie v. Madawela* (*supra*) related to the possession of a portion of land claimed by one Madawela to be outside the corpus but which portion in fact had been included as forming part of the corpus to be partitioned without notice to Madawela. The latter's claim to intervene was rejected by the District Judge. In appeal the Court of Appeal ordered a trial *de novo*. Against that order the appellant in the aforesaid case preferred an appeal to the Supreme Court whereby the plaintiff - appellant contended that the partition decree was final and conclusive notwithstanding any omission or defect in procedure even if the persons concerned were not parties. Thus one of the matters to be decided by the Supreme Court was whether in view of the conclusive and final effect attending to partition decrees, whether the Court of Appeal can intervene by way of revision.

Soza J. in the course of his judgment in the aforesaid case of *Somawathie v. Madawela*, *inter alia*, held as follows:-

"While section 48 of the Partition Law enacts that the interlocutory decree entered shall be subject to the decision of any appeal which may be preferred therefrom, be final and conclusive for all purposes against all persons whomsoever, I am of the opinion that it does not affect the extra-ordinary jurisdiction exercised by way of revision or *restitutio in integrum*"

Justice Soza in the course of his judgment also referred to a similar view expressed by Sansoni, C. J. in the case of *Mariam bee bee v. Seyad Mohamed*<sup>(2)</sup> which is directly relevant to the matter before this court, where it was held that the power of revision is an extra-ordinary power which is quite independent of and distinct from the appellate jurisdiction of this court. Its object is due administration of justice and the correction of errors

sometimes committed by court itself in order to avoid miscarriage of justice.

In the instant case, it is manifestly clear the Surveyor to whom the Commission was issued by court by his report to plan No. 661 dated 22. 04. 96, in paragraph 12 in no uncertain terms brought to the notice of court and to the plaintiff that lots (1), (2), (3), (5) and (8) do not form part of the corpus. In spite of the said report the plaintiff either by design or inadvertence failed to act under section 5 of the Partition Law. It is unfortunate that even the court which is duty bound to investigate title in a partition action appeared to have not only ignored the Surveyor's report but even allowed portions that fell outside the corpus to be included without even notice to interested parties as provided for by section 5 aforesaid. The plaintiff in the original court has significantly not disputed the report of the Surveyor.

In all the attendant circumstances of this case, I am inclined to the view, that inspite of the Surveyor's report detailing the areas to be excluded no effort was made to issue notice on the necessary parties and at the trial when the contents of the report of the Surveyor was considered the same received scant attention. Besides the report of the Surveyor without doubt became very relevant to the investigation of title. This, I hold is a glaring lapse which taints the entire proceedings and transcend the bounds of procedural errors. In accordance with the evidence of the plaintiff lot (1) depicted in the plan had been exempted from the partition and on the bare statement of the plaintiff lots (2) (3) (5) and (8) had been included despite the clear finding of the Surveyor who said that the said lots formed part of a separate adjoining land. In the absence of cogent evidence of prescriptive possession of the lots (2) (3) (5) and (8) which lots the Surveyor categorically stated formed part of the adjoining land and there been no steps taken under the provisions of section 5 of the Partition Law and, however, as setting aside all proceedings would be too sweeping and may cause unnecessary hardship, inconvenience and delay, I would in the circumstances, to meet the ends of justice direct that the interlocutory decree

entered be amended to also exclude lots (2) (3) (5) and (8) depicted in plan No. 661 dated 22. 04. 96 made by K. D. L. Wijenayake, Licensed Surveyor, and filed of record in D. C. Matugama case No. 2878/P.

After the interlocutory decree is amended, the action can proceed in accordance with the law.

Subject to this variation the appeal is dismissed. No costs.

**JAYASINGHE, J.** - I agree.

*Appeal dismissed.*

*Interlocutory decree amended*