RANASINGHE AND ANOTHER
VS.
GUNASEKERA AND ANOTHER

COURT OF APPEAL.
SOMAWANSA., J. (P/CA).
WIMALACHANDRA. J.
CA 329/02.
DC HOMAGAMA 3304/P.
MARCH 8, 16, 2004.
OCTOBER 31, 2005.
DECEMBER 2, 2005.

Partition Law 21 of 1997 sections 48 (3), 49, 69 - Partition Act, 16 of 1951 sections 48(3) compared - No rights at the time of interlocutory decree - Is Restitutio available ?– Addition of parties - when? Lis pendens - Improper registration or non registration -Its effect on the finality of the partition decree-Change in the law - Resulting effect?

The petitioners sought to set aside the interlocutory decree and the final decree and further sought an order to permit them to enter the partition case. The petitioners however did not have rights at the time of the entering of the interlocutory decree and they were not parties to the action. The petitioners also contend that the lis *pendens* is not registered in the correct folio.

HELD :

(1) Only persons who have rights or who are claming an interest in the land can apply to be added as parties; however once judgment is delivered no party can be added. The petitioners in any event have acquired their rights after the judgment was delivered.

(2) Relief by way of Restitutio in integrum could not be granted as the petitioner had not been a party to the action.

Furthermore, there cannot be restitution as the petitioners could not be restored rights which they did not have at the time the judgment was entered.

(3) The effect of non registration or improper registration of a lis pendens on the finality of the interlocutory decree and the final decree under 48(3) of the Partition Act No. 16 of 1951 is no more in the Partition Law section No. 21 of 1977. The provisions in section 48(3) of the Partition Act states that the non registration or improper registration of a *lis pendens* is a ground of assailing the final and conclusive character of a partition action has been removed and is not available in the Partition Law No. 21 of 1977.

(4) The resulting effect of the charge in the law is that non registration or improper registration of the lis *pendens* is no more a ground of challenge to the conclusive effect of the partition decree.

(5) Petitioners are not without a remedy section 49(1)

APPLICATION for Revision and or Restitutio in integrum.

Cases referred to :

1. *Perera vs Wijewickrema* at 15 NLR 411
2. *Dissanayake vs Elsinahamy* 1978 - 79 -2 Sri LR 118
3. *Perera vs Simion Appuhamy* 15 NLR 411
4. Noris vs Charles
5. *Minchinahamy vs Muniweera* 52 NLR 409

Ranjan Suwandaratne with Mahinda Nanayakkara and Neomal Senathilaka for *petitioners Nihal Jayamanne PC with Ms. Noorani Amerasinghe* for 1st plaintiff - respondent and defendant respondent.

Cur.adv.vult.

May, 19 2006

WIMALACHANDRA J.

This an application in Revision and *Restitutio in Integrum* filed by the petitioners seeking the following main relief :

(a) to set aside the interlocutory decree and the final decree entered in the District Court of Homagama Case No.3304/P.

(b) to permit the petitioners to enter into the said partition action No.3304/P to establish their interest to the corpus of the said partition action.

The plaintiff -respondent (plaintiff) instituted the above mentioned partition action bearing No.3304/P against the defendant - respondent on 27.05.1996 to partition the land called Dugodellawatte alias Millagahawatte which is in extent of 1 Rood and 10.5 perches together bearing assessment No.168.

After trial the judgment was delivered on 23.22.1999 holding that the plaintiff and the defendant are entitled to 1/2 share each. Thereafter the interlocutory decree was entered on 14.01.2000 and on 20.07.2000 the final decree was entered. The petitioners state that the plaintiff - respondent and the defendant -respondent had acted in collusion and obtained the aforesaid property for themselves. The petitioners claim ownership to the aforesaid property by deed No.13220 dated 17.09.1999. Accordingly, it is seen that the interlocutory decree, which was entered on 23.02.1999. Therefore it is very clear that the petitioners did not have any rights to the property at the time the interlocutory decree was entered. It is common ground that the petitioners were not parties to the aforesaid partition action.

The petitioners have sought to set aside the interlocutory decree and the final decree entered in this partition action No. 3304/P and

also sought permission to intervene in the said partition action to establish their interest to the corpus. However they have not sought to have the judgment set aside. In terms of section 69 of the Partition Law a person can be added as a party to the action only before the judgment is delivered.

Section 69(1) reads as follows :-

> **"The Court may at any time before judgment is delivered in a partition action add as a party to the action, on such terms as to payment or prepayment of costs as the court may order -**
>
> **(a) any person who, in the opinion of the Court, should be, or should have been, made party to the action, or**
>
> **(b) any person who, claiming an interest in the land, applies to be added as a party to the action."**

Therefore, it can be seen that a person can be added as a party only before the judgment is delivered and not afterwards. Besides, only persons who have rights or who are claiming an interest in the land can apply to be added as parties to the action. However once the Judgment is delivered no party can be addred. In the instant case, the petitioners on their own admission, had no interest in the land at the time the judgment was delivered. Accordingly a party who claims to have acquired rights after the judgment is delivered cannot be added as a party.

The petitioners were not parties to the partition action in the District Court. They cannot be considered as aggrieved parties as there was no decision made against them in the partition action. Therefore the petitioners are not aggrieved parties to the judgment which would disentitle them to raise a contest against the judgment.

The petitioners, in this application, are seeking an order to set aside the interlocutory decree and the final decree of the said partition action No.3304/P of the District Court of Homagama. The petitioners are also seeking an order permitting them to be added as parties to the said partition action to establish their rights. However the petitioners have no right to ask for the relief to set aside the interlocutory decree which did not affect them as they did not have any right, title or interest in the land to be partitioned at the time the interlocutory decree was entered in the said partition action. I agree with the submissions made by the learned President's Counsel for the respondents that the interlocutory decree cannot be set aside to accommodate a party who had no rights in the corpus at the time the judgment and the interlocutory decree were entered. If the petitioners had no rights in the land at the time the judgment and the interlocutory decree were entered, there cannot be restitution as the petitioners could not be restored rights which they did not have at the time the judgment was entered. In the case of *Perera et. al. Vs. Wijewickrama* et al[1] it was held that the remedy of *restitutio in integrum* is not open to persons who were not parties to the legal proceeding they sought to open up. Perera, J. delivered the judgment said, (at page 413).

> **"I am of the Opinion that the remedy of restitutio in integrum can only be availed of by one who is actually a party to the contract or legal proceeding in respect of which restitution is desired".**

In the case of *Dissanayake Vs. Elisinahamy*[2] it was held that relief by way of restitutio -in-integrum could not be granted as the petitioner had not been a party to the action. The petitioner's remedy was under section 49 of the Partition Act. Abdul Cader. J. who delivered the judgment made the following observation at page 122 ;

Getting on to the Plea for relief by way of *restitutio-in-integrum*, in *Perera v. Wijewickrama*[3] (Supra) Pereira, J. said "From what Voet says earlier (4.1.3) it appears to me that when restitution is sought in respect of a legal proceeding , the applicant should be somebody who already has had direct connection with the proceeding". In the same case, Ennis, J. stated :-

> **"it appears clear that such an application is not granted in Ceylon if any other remedy is available. In this case the applicants set up fraud and collusion against the administratrix and her assignee. Moreover, restitution of the case will only have the effect of putting the parties in the position they were in before judgment was given, and the applicants here were not parties in the case."**

In this case section 49 grants relief to the petitioner, Secondly, since the petitioner was not a party to the action, setting aside the interlocutory decree would not make him a party in the case, as he was not a party at the time judgment was delivered. In *Perera, v. Simeon Appuhamy Ennis, J.* said :-

> **"It (this application) is made by a person who is not a party to the proceedings in the Court, below, and it is extremely doubtful whether the remedy of restitutio-in-integrum can be availed of by such a person."**

All the decisions cited to us are cases where the parties were before Court on whom summons was not served or steps for substitution had not been taken when a party died or where a guardian has been appointed in terms of section 493 (1) or a settlement has been affected without the leave of Court in terms of section 500 C. P. C. or a judgment had been entered

against a person of unsound mind without the appointment of a manager. It is clear that these are cases where a party was already a defendant in the action and legal requirement in terms of the C. P.C had not been complied with. But where, as in this case, the petitioner was not before Court at any stage of the proceedings before judgment, restitutio - in-integrum will not lie."

In the present case before us, the petitioners were not parties to the partition action and they were not entitled to be parties as they had no interest in the land at the time the interlocutory decree was entered.

The only question that remains to be decided is the issue raised by the learned counsel for the petitioners, that the *lis pendens* of the partition action is not registered in the correct folio. Improper registration or non registration of a *lis penders* and its effect on the finality of the partition decree are found in the repealed section 48(3) of the Partition Act No.16 of 1951. It reads as follows :

> **"(3) 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 section (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 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 or that the partition action had not been duly registered under the Registration of Documents Ordinance as a *lis pendens* affecting such land."**

The new section 48(3) of the Partition Law No.21 of 1977 reads thus :

"The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decree.

Even under section 48(3) of the Partition Act of 1951 despite the fact that the *lis pendens* has not been duly registered, a person who was not a party to the partition action cannot intervene after the interlocutory decree had been entered. In the case of *Noris Vs. Charles*[4] it was held that where a partition action had not been duly registered as a *lis pendens*, a person who was not a party to the proceeding could not intervene after the interlocutory decree was entered, but that such person, notwithstanding the interlocutory decree, was entitled to establish his rights in a vindicatory action or in a subsequent partition action.

The effect of registration or improper registration of a *lis penders* on the finality of the interlocutory decree and the final decree under the provisions of section 48(3) of the Partition Act No.16 of 1951 is no more in the Partition Law No.21 of 1977. The provisions in section 48(3) of the Partition Act that the non registration or improper registration of a lis pendens is a ground of assailing the final and conclusive character of a partition decree has been removed and is not available in the Partititon Law No.21 of 1977. The resulting effect of the change in the law is that non registration or improper registration of the lis pendens is no more a ground of challenge to the conclusive effect of the partition decree.

In any event the petitioners are not without a remedy. Section 49(1) of the Partition Law provides that,

"Any person, not being a party to a partition action, whose rights to the land to which the action

related have been extinguished or who is otherwise prejudiced by the interlocutory decree entered in the action, may, by separate action not less than five years from the date of the final decree recover damages from any party to the action by whose act, whether of commission or omission, such damage may have accrued and where the whole or any part of such damages cannot be recovered from any such party, recover such damages or part thereof from any other person who has benefited by any such act of such party. Any person who has benefited by such act may be made a defendant in such separate action and shall, if damages were awarded in that action, be bound by the award to the extent of such benefit as may be determined by the court, to be that derived by him from such act."

It was held in the case of *Menchinahamy vs. Muniweera*[5] that the remedy by way of *restitutio-in-integrum* is given only under very exceptional circumstances. It is only a party to a contract or legal proceedings who can ask for this relief. The remedy must be sought forthwith with the utmost prompitude. It is not available if the applicant has any other remedy open to him. In the instant application the petitioners have failed to explain the delay to the satisfaction of this Court.

For these reasons, I am of the view that the application of the petitioners should be dismissed. Accordingly I proceed to dismiss this application with costs.

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

Application dimissed.