Mariam Beebee V. Seyed Mohamed

36/1965

Present: Sansoni, C. J., T. S. Fernando, J., Abeyesundere, J., Sri Skanda Rajah, J., and G. P. A. Silva, J.

MARIAM BEEBEE, Petitioner, and SEYED MOHAMED, Respondent

S. C. 94/63—Application in Revision in D. C. Kandy, 5014/P

Partition action—Interlocutory decree—Allotment of a share to a party who is dead—Power of Supreme Court to set aside the decree in revision—Scope of revisional power of Supreme Court—Partition Act (Cap. 69), ss. 48 (1), 68, 82.

Section 48 (1) of the Partition Act does not preclude the Supreme Court from exercising its power of revision in an appropriate case in respect of an interlocutory or final decree entered in a partition action. The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of the Supreme Court.

A partition decree which allots a share to a party, but which is entered without knowledge of the death of that party, is a nullity. It is open to another party to the action to move the Supreme Court in revision to set aside that decree (even though it may have been affirmed in appeal) and to remit the case to the lower Court in order that proper steps may be taken in the action.

An appeal filed by the 8th defendant against the interlocutory decree entered in a partition action abated because of failure to comply with certain essential provisions of the law. Pending that appeal, the 8th defendant came to know that the 7th defendant, who was allotted a share in the interlocutory decree, had died prior to the date of the decree. She thereupon filed papers in revision to have all the proceedings held after the death of the 7th defendant set aside. The fact of the 7th defendant's death was either not

known by any of the parties or not disclosed to the Court before the interlocutory decree was entered, and no steps had been taken under section 82 of the Partition Act to substitute any person to represent the deceased's estate.

Held (ABEYESUNDERE, J., dissenting), that the application in revision should be granted and that all the proceedings had in the partition action since the death of the 7th defendant should be set aside. The case should therefore be remitted to the District Court for proper proceedings to be taken.

APPLICATION to revise a decree entered by the District Court, Kandy.

T. B. Dissanayake, with *K. Charavanamuttu,* for the 8th Defendant-Petitioner.

M. S. M. Nazeem, with *M. T. H. Sivardeen,* for Plaintiff-Respondent.

N. E. Weerasooria (Jr.), with *R. D. G. de Silva,* for the 11th-17th Defendants-Respondents.

Cur. adv. vult.

November 17, 1965. **SANSONI, C.J.**—

This application for revision arises in the following circumstances. Among the defendants to this partition action filed under the Partition Act, Cap. 69, were the 7th defendant and the 8th defendant-petitioner. The trial was held on 23rd November 1961, but the 7th defendant had died on 28th November, 1960. None of the parties seem to have been aware of his death ; if they were, they did not disclose that fact to the Court. Consequently no steps were taken under section 82 to substitute any person to represent his estate. An interlocutory decree was entered, and a share was allotted to the 7th defendant. An appeal was filed against that decree by the 8th defendant. Pending that appeal, the 8th defendant seems to have become aware of the 7th defendant's death and she thereupon filed papers to have all the proceedings

held in this action, after the death of the 7th defendant, set aside. The appeal abated because of failure to comply with certain essential provisions of the law. We are left with the application in revision.

Two questions arise for decision on the arguments that we have heard. The first is whether an application in revision lies from an interlocutory decree entered in a partition action. The second is whether, if such application lies, this is a fit case for the exercise of the power.

On the first question, there are numerous decisions which have held that this Court can revise a decree entered in a partition action. They are well known and it is not necessary to mention them. But the objection has been taken that, in view of the terms of section 48 (1) of the Act, no such application in revision lies in respect of an interlocutory or final decree.

Section 48 (1) reads :—" Save as provided in subsection (3) 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 therefrom, 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 decrees relate 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. In this subsection ' encumbrance ' means any mortgage, lease, usufruct, servitude, fideicommissum, life interest, trust, or any interest whatsoever howsoever rising except a constructive or charitable trust, a lease at will or for a period not exceeding one month, and the rights of a proprietor of a nindagama."

This view is based, on the argument that the presence of the words " subject to the decision on any appeal " excludes the power of this Court to make an order in revision. Another possible view is that those words merely draw attention to the well-known principle that all orders of lower Courts which are appealable are subject to the order of the appeal Court where an appeal has been taken: and when the appeal Court by its decision deals judicially with the matter, that decision displaces the order of the lower Court, which is deemed to have merged in the decree on appeal.

I prefer the latter view which seems to me to be entirely in accordance with the practice that has hitherto prevailed. It cannot be doubted that this Court has always exercised its power of revision in partition cases, even at a time when section 9 of the Partition Ordinance No. 10 of 1963, provided that the decree for partition or sale " shall be good and conclusive against all persons whomsoever", and section 19 of the Ordinance provided that " all decisions and orders of any Court made under the authority of this Ordinance shall be subject to an appeal to the Supreme Court". Although there was no clause in section 9 such as that which is said to make the exercise of the power of revision inapplicable, it was never doubted that any decree of a lower Court was always " subject to the decision on any appeal". The power of revision is an extraordinary power which is quite independent 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 miscarriages 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 change in this respect, and the power can still be exercised in respect of any order or decree of a lower Court. I do not think that the insertion of the words I have quoted from section 48 (1) made any difference. The phrase is entirely tautologous. Section 68, which provides for appeals against any order or decree entered in any partition action, must necessarily be given effect to, and would naturally affect the finality of any interlocutory or final decree. It was

not necessary, in order to give efficacy to this section, to insert the words in question. This seems to be an illustration of the observation that " a Parliamentary enactment (like Parliamentary eloquence) is capable of saying the same thing twice over "—per Viscount Simon in *Hill v. William Hill (Park Lane) Ltd.* [1 (1949) A. C. at 546.] Recently Diplock L. J. commented on the same subject when he said that " economy of language is not invariably the badge of parliamentary draftsmanship ", see *Letang v. Cooper* [(1963) 1 Q. B, at 247.].

On the second question, it is clear that a partition decree which allotted a share to a party, but which was entered after the death of that party, is a nullity. It is open to another party to the action to ask this Court in revision to set aside that decree (even though it may have been affirmed in appeal) and to remit the case to the lower Court in order that proper steps may be taken in the action—see *Chelliah v. Tamber* [1 (1904) 5 Tamb. Rep. 52]; *Menchinahamy v. Muniweera* [(1950) 52 N. L. R. 409] ; *Somapala v. Sirimanne* [. 3 (1954) 51 C. L. W. 31.]. One reason is, I think, that a partition action has always been recognised as having a special character, in that every party has the double capacity of plaintiff and defendant. Though in theory it is merely a proceeding by one or more admitted co-owners against the remaining co-owners, to obtain relief from the inconvenience of undivided possession, in practice it often involves a contest as to title—see *Lucihamy v. Hamidu* [. 4 (1923) 26 N. L. R 41.]. Another reason, I think, is that a decree which gives one co-owner a share of the common property takes away the right of the other co-owners to that share. Thus it is a decree which is both in favour of and against each co-owner. That is why all the co-owners should be made parties. It is on this principle also that it has been said that in a partition action each party is as much a plaintiff as he is a defendant— see *Ramanathan Chettiar v. Veerappa Chettiar* [5 (1955) 68 Madras L. W. 832.] But if a party to the action was dead, and his estate was not represented at the time the adjudication as to title was made, his estate will not be bound by any decree entered thereafter. Hence it is essential that such a decree should be set aside.

I would therefore set aside all the proceedings had in this action since the death of the 7th defendant, and remit the case to the District Court for proper proceedings to be taken. The 8th defendant-petitioner is entitled to the costs of this application against the plaintiff and 11th-17th defendants who opposed this application.

T. S. FERNANDO, J.—I agree.

SRI SKANDA RAJAH, J.—I agree.

G. P. A. SILVA, J.—I agree.

ABEYESUNDERE, J.—Under section 68 of the Partition Act an appeal lies to the Supreme Court against a decree entered under that Act. In view of the said section 68, it would be unnecessary to provide in any other section referring to a decree that such decree is subject to the decision on any appeal that may be preferred therefrom, but if it is so provided in such other section, it would be in order that the subjection of such decree to the decision of the Supreme Court may be expressly limited to the decision made on an appeal from such decree. The effect of such limitation would be that the revisional powers of the Supreme Court under the Courts Ordinance and the Civil Procedure Code cannot be exercised in respect of such decree.

The subjection of an interlocutory decree under the said Act to the decision of the Supreme Court is expressly limited by section 48(1) of the said Act to the decision made on an appeal. The limitation expressly provided in the said section 48 (1) by the legislature would be rendered nugatory if, by invoking the provisions in the Courts Ordinance and the Civil Procedure Code in regard to the revisional powers of the Supreme Court, an interlocutory decree under the said Act is also made subject to the decision of the Supreme Court on revision. The occurrence of the words " subject to the decision on any appeal which may be preferred therefrom " in the said section 48 (1) should not be held to be due to tautology if those words can be reasonably interpreted to serve a particular purpose. I have indicated such purpose above.

It was possible for the Supreme Court to exercise the powers of revision in respect of a decree under the repealed Partition Ordinance as in section 9 of that Ordinance there was no provision by which the subjection of the decree to the decision of the Supreme Court was expressly limited to the decision made on an appeal from the decree. The said section 9 did not contain the words " subject to the decision on any appeal which may be preferred therefrom ".

For the aforesaid reasons I am of the view that the revisional powers of the Supreme Court cannot be exercised in respect of an interlocutory decree under the Partition Act. I therefore reject the petition for revision in the present case.

Application allowed.