IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRILANKA

CA 1330/96 F

DC Galle 7445/P

THAWALAMA GAMAGE BABY NONA,
BANGALAWATTA,
MABOTUWANA,
WANDURAMBA
4TH DEFENDANT APPELLANT
VS
MABOTUWANA WITHANAGE JOHN, MABOTWANA PLAINTFF-RESPONDENT AND OTHERS

Before; A W A Salam, J

Counsel : Athula Perera with Priyantha Ananda for 3rd defendant-respondent and N R M Daluwatta PC with Mala Maitipe for 4th plaintiff-respondent.

Argued On: 12.07.2011

Written Submissions tendered on: 27.10.2011

Decided: 24.04.2012

A W Abdus Salam, J

This is an action to partition the land depicted in preliminary plan No 374 dated 01.09.1983 made by Gamini Nihal Amarasingha, Licensed Surveyor produced marked as "X" at the trial.

Exclusions were sought by 3rd and 4th defendants in their statements of claim of Lots C and B respectively, depicted in plan "X" based on the premise that they did not form part of the corpus.

When the matter was taken up for trial on 30.5.1986, the parties agreed to have the said lots B and C excluded from the corpus. Thereafter the plaintiff and the 2nd defendant gave evidence at the trial and concluded their cases. Accordingly, judgment was delivered on the same day, thus confining the partition action to lots A and B depicted in plan X. In the judgment, undivided shares were allotted to the plaintiff and the 1st defendant in the proportion of 79:70. The interlocutory decree entered was registered at the land registry under Volume H 60/202.

Subsequently, the plaintiff filed a motion on 4.7.1988 and moved that the proceedings dated 30.5.1988 be expunged, the interlocutory decree entered on the same day be vacated and the case be set down for trial afresh.

The district judge having considered the motion on 9.1.1989 (nearly 2 1/2 years after the interlocutory decree) vacated the judgment and interlocutory decree dated 30.5.1986. The 3rd defendant thereafter amended the statement of claim and took out a

commission to show the lots to be excluded by way of a superimposition of the title plan, on plan X.

Finally, the district judge who succeeded the judge who vacated the judgment and interlocutory decree embarked upon a fresh investigation of title and entered judgment and interlocutory decree identifying the corpus as lots A1, B and D in the preliminary plan (as superimposed) and allotted shares to the plaintiff, 1st defendant and 2nd defendant in the proportion of 16:2:20 shares respectively and kept 2 shares unallotted.

Later, the 4th defendant filed a petition supported by an affidavit moving that the order vacating the judgment and interlocutory decree entered initially be set aside and the judgment and interlocutory decree entered for the second time be vacated on the ground that court had no jurisdiction to vacate its own judgment and in any event the 4th defendant had no notice of the application made by the plaintiff to have the proceedings expunged and judgment and interlocutory decree vacated. The learned district judge by order dated 2.10.1996 refused the application of the 4th defendant based on premise that the initial judgment and interlocutory decree had been vacated after notice of motion filed by the plaintiff given to the Attorney-At-Law of the 4th defendant by registered post. This appeal has been preferred by the 4th defendant-appellant to have the said order of the learned district judge set aside.

As has been rightly contended by the learned president's counsel on behalf of the 4th defendant-appellant, two matters arise for consideration. The basic question is whether the court had jurisdiction to vacate its own judgment, and if not, whether the vacation of its own judgment is ultra vires.

This being a partition action the elementary question of law that needs to be focused at the outset is the conclusive effect and finality attached to a judgment and interlocutory decree entered under section 26 of the Partition Law, No 21 of 1977 as amended.

In terms of section 48(5) of the Partition Law the interlocutory decree entered, shall not have the final and conclusive effect conferred on it by section 48 (1) as against a person who, not having been a party to the partition action, claims any right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree, if, he proves that the decree has been entered by a court without competent jurisdiction. As such the plaintiff- appellant does not fall under the category of persons enumerated under subsection 5 of section 48 nor does the court comes under the category of being devoid of competent jurisdiction.

In terms of Section 48 (4) of the Partition Law a party to a partition suit not served with summons, or a minor or a person of unsound mind, not represented by a guardian ad litem, or a party who has duly filed his statement of claim and registered his address, fails to

appear at the trial, and in consequence thereof the right, title or interest of such party in the subject-matter of the action has been extinguished or otherwise prejudiced such party may, on or before the date fixed for the consideration of the scheme of partition under section 35 or at any time not later than 30 days after the return of the commission for the sale under section 42 is received by court, apply to the court for special leave to establish the right, title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered. The plaintiff-appellant without doubt does not fall into any other category of persons mentioned in section 48 (4) either.

Quite significantly, no appeal has been preferred under section 48 (1)against the original judgment and ID. Remarkably, the plaintiff-respondent has not filed his motion under the provisions of section 48 (4) of the partition law but on the footing that the terms of settlement to exclude lots B and C had been mistakenly entered into. Taking into consideration the inordinate delay in filing the motion of the plaintiff-respondent, it is abundantly clear that the plaintiff-respondent and the 1st defendant-respondent have incontestably conceded the finality and conclusiveness of the interlocutory decree.

In this respect, it is useful to apply the principle Expressio unius est exclusion alterius (the express mention of one thing excludes others). In other words this principle means that items not on the list are assumed not to be covered by the Statute. The same principle is also expressed in a different manner with sound

reasoning and logic by the expression inclusio unius est exclusio alterius which means that inclusion of one is the exclusion of another.

The principles of law relating to interpretation of Statutes referred to above are demonstrative of the position that the plaintiff-respondent's motion falls totally outside the purview of section 48(4) and (5) of the Partition Law. In the circumstances, the relief sought by the plaintiff-respondent in the motion could not have been granted by the learned district judge. Hence, not only the impugned order has been made without jurisdiction but all such other steps taken after the impugned order are of no avail or force in law.

The importance of adhering to the terms of settlement has been emphasized in the case of Sinna Veloo Vs. M/S Lipton Ltd 1963-66 NLR 214 where Herath J. held that once the terms of settlement entered upon and recorded by court, a party cannot resile from the settlement even though the decree has not yet been entered.

The general principle of law does not permit an appellate court to interfere lightly with a settlement entered into by the parties and notified to court. The rationale behind this has been expressed by West J. in the case of Balprasad vs Dhamidhar Sakhram which is printed as a footnote to the case of Shirekulidima's Pa's Hedga vs Blya 1886 10 Bombay 435. The said foot note is referred to by Nagalingam,J in Perera vs Perera 50 NLR 81. For easy reference the said foot note is reproduced below..

"The admission of a power to vary the requirements of a decree once passed would introduce uncertainty and confusion. No one's rights would at any stage be so established that they could be depended on and the court would be overwhelmed with applications for the modification on equitable principles of orders made on a full consideration of the cases which they are meant to terminate. It is obvious that such a state of things would not be far removed from a state of judicial chaos".

In the case of Gunasekara Vs Leelawathie Sri Kantha Law Report Vol 5 Page 86, it was held that a compromise decree is but with the command of a judge superseded it. It can therefore be set aside on any of the grounds, such as fraud, mistake, misrepresentation etc., on which a contract may be set aside. The plaintiff-respondent has not sought to prove any such ingredients to avoid the terms of settlement.

The next question that arises for consideration is whether the 4th defendant-appellant has been notified of the motion filed by the plaintiff-respondent seeking the vacation of the judgment and interlocutory decree. A perusal of the motion (2nd page) indicates that there are three attorneys-at-law on record who are entitled to receive notice of the motion. According to the endorsement made against the names of the said attorneys that law only one registered articles receipt number has been mentioned. That is the registered article receipt No 1681. As has been submitted by the learned President's counsel, it is practically impossible to deliver a notice enclosed in one envelope to three different attorneys-at-law.

It is a matter of record that the learned district judge on 9.1.1989 (page 116 of the brief) has not taken the trouble to verify as to whether all those who are affected/whose rights are prejudiced by the motion have received notice. Had this been properly done, the 4th defendant-appellant may not have had to invoke the appellate jurisdiction of this court to espouse his cause.

The 4th defendant-appellant is attacking the impugned order inter alia on the failure to serve notice of the motion on him as the court had no jurisdiction to act on such a motion, even if it was entitled to vacate the judgment and ID. It is trite law that where the want of jurisdiction is patent, objection to jurisdiction may be taken at any time. In such a case it is in fact the duty of the Court itself ex mero motu to raise the point even if the parties fail to do-so.

In *Farquharson v. Morgan* 1[70 Law Time 152 at 153] Halsbury L.C. said, " It has long since been held that where the objection to the jurisdiction of an inferior court appears upon the face of the record, it is immaterial how the matter is brought before the Superior Court, for the Superior Court must interfere to protect the prerogative of the Crown by prohibiting the inferior court from exceeding its jurisdiction. In the same case, Lopes L.J. said, " The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings is explained by Lord Denman (6 N. & M. 176) to be for the sake of the public, because 'the case might be a precedent if allowed to stand without impeachment and I would add for myself, because it is a want of jurisdiction which the court is informed by

the proceedings before it, and which the judge should have observed, and a point which he should himself have taken. " --- " re-quoted from W. Robison Fernando Vs Henrietta Fernando, 74 NLR 57

In Ittapana v. Hemawathie *1981 1 Sri L. R. 476, it* was held by the Supreme Court held that the failure to serve summons is one which goes to the root of the jurisdiction of the court which means that if the defendant is not served with summons or **otherwise notified of the proceedings against him**, the judgment entered in such circumstances is a nullity and the persons affected by the proceedings can apply to have the proceedings set aside ex debito justitiae. See also Sithy Maleeha v. Nihal Ignatius Perera and Others 1994 3 SLR 270 (Emphasis is mine)

In the instant case the 4th defendant-appellant has taken up the position that he was not served with notice of the proceedings which culminated in the judgment and interlocutory decree having been set aside and a fresh judgment and interlocutory decree substituted in that place.

In the attendant circumstances, I am of the opinion that it is the duty of this court to set aside the impugned order and expunge all subsequent proceedings taken by the learned district judge so as to give effect to the first judgment and the interlocutory decree that followed.

As the plaintiff-respondent has failed to give notice to the appellant of the motion which in actual fact had led to the present appeal, the appellant is entitled to recover costs of this appeal from the plaintiff-respondent fixed at Rs. 25000/-.

Judge of the Court of Appeal

Kwk/-