IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Kegalla Vithanalage Noel Perera
No. 151, "Manju",
Ragamawatte, Thalagolla Road,
Ragama.

CA 1171/99(F)

D.C. Matugama Case No. 2378/P

Plaintiff

Vs.

1. Margret Perera K.W.
   "Anandasiri", Latpandura,
   Baduraliya.

2. Ananda Perera
3. Malini Perera
4. Siri Perera
5. Chandra Perera
   All of "Suramya", Abey Mawatha
6. Padma Kanti
7. Chitrananda Dharmabandu
8. Daya Lalani Dharmabandu
9. Nimal Padma Dharmabandu
10. Lalitha Vijani Dharmabandu
11. Ganawimala Dharmabandu
    All of Kandawatte,
    Lathpandura.
12. Pradeshiya Sabha, Agalawatta.

Defendants

AND NOW

Kegalla Vithanalage Noel Perera
No. 151, "Manju",

Ragamawatte, Thalagolla Road,
Ragama.

Plaintiff – Appellants

Vs.

1. Margret Perera K.W.
   "Anandasiri", Latpandura,
   Baduraliya.

2. Ananda Perera
3. Malini Perera
4. Siri Perera
5. Chandra Perera
   All of "Suramya", Abey
   Mawatha
6. Padma Kanti
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10. Lalitha Vijani Dharmabandu
11. Ganawimala Dharmabandu
    All of Kandawatte,
    Lathpandura.
12. Pradeshiya Sabha, Agalawatta.

Defendant – Respondents

BEFORE: **M.M.A. GAFFOOR J**

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: **Thishya Weragoda with Niluka Dissanayake for the Plaintiff – Appellant**

Chatura Galhena with Manoja Gunawardena for the 6th – 11th Defendant – Respondents
Rohana Deshapriya for the 2nd 3rd and 5th Defendant – Respondents

ARGUED ON: **02.05.2017**

WRITTEN SUBMISSIONS – **6th – 11th Defendant – Respondent, 2nd 3rd and 5th Defendant – Respondents – 29.06.2017**

Plaintiff – Appellant – 14.07.2017

DECIDED ON: **02.02.2018**

S. DEVIKA DE LIVERA TENNEKOON J

The Plaintiff – Appellant (hereinafter referred to as the Appellant) instituted action in the District Court of Matugama by Plaint dated 25.09.1992 against the 1st – 11th Defendant – Respondents (hereinafter referred to as the Respondents) to partition the land morefully described in the Plaint. Thereafter, the 12th Defendant – Respondent was added for the purpose of getting an interim relief preventing road development within the scheduled property.

The Appellant pleaded *inter alia* that the Appellant and the 1st – 5th Defendant – Respondents (hereinafter referred to as the 1st – 5th Respondents) were siblings and that they were each entitled to a 2/24th share of each land as described in the schedule to the plaint.

Thereafter, the 6th – 11th Defendant – Respondents filed a statement of claim dated 11.09.1994 and claimed their rights according to the plan and the report bearing No. 277 dated 28.07.1993 prepared by B.A.P. Jayasooriya Licensed Surveyor. The 1st – 5th Respondents did not file a statement of claim.

The matter then proceeded to trial without contest between the parties and the Appellant gave evidenced which was not subject to cross examination by any of the Respondents and the Appellant closed his case by marking in evidence documents "X", "X1", "P1" – "P7".

The learned District Court Judge accepted the pedigree as averred in the Plaint dated 25.09.1992 and delivered judgment dated 02.22.1996 ordering the partition of the land as prayed for by the Appellant and further ordered that the cultivations and buildings therein be allotted amongst the parties as claimed before the Licenced Surveyor according to the report marked as "X1".

Thereafter, B.A.P. Jayasooriya Licensed Surveyor prepared the final Partition Plan bearing No. 1963 dated 29.08.1999.

The 2nd – 5th Respondents thereafter filed a Petition under Section 189 of the Civil Procedure Code to amend the said Judgment on the basis that in terms of deed marked as P4, the Plaintiff and the 1st – 5th Respondents were equally entitled to the house and plantations situated within the land.

After considering the submissions of the parties the learned District Court Judge delivered order dated 24.09.1999 allowing the application of the 1st – 5th Respondents by allotting the house situated in the land to the Appellant and ordered that the Appellant should pay the share of the assessed value of the said house to the 1st – 5th Respondents.

Being aggrieved by the said order the Appellant preferred the instant Appeal on the following grounds;

a) The application made under Section 189 of the Civil Procedure Code is procedurally incorrect, bad in law and impractical,
b) The 1st – 5th Respondents should have made an application under Section 48(4) of the Partition Act,
c) The learned District Judge going in to the merits of the case by way of Section 189 application nullifies the purpose of the Partition Act

Section 189 of the Civil Procedure Code reads;

> "(1) The court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which-is necessary to bring a decree into conformity with the judgment."

The question this Court has to consider is whether the error/mistake complained about by the 1st – 5th Respondents is in fact an error/mistake and if so whether it could have been corrected under the above provision or whether the 1st – 5th Respondents could have pursued a different course of action.

In the case of **Mohamed Iqbal Vs. Mohamed Sally** 1995 (2) SLR 310 it was held that;

> "(1) S. 189 of the Civil Procedure Code is exhaustive of the causes for which a Decree may be amended.

(2) This section cannot be invoked by Court for correcting mistakes of its own in law or otherwise.

(3) A Judge cannot reconsider or vary his judgment after delivery except as provided for in S. 189."

Per Ranaraja J.

"This Power of Court under S. 189 is to be exercised entirely at the discretion of court, and the discretion should be exercised sparingly and in general to avoid a miscarriage of justice; if not the principle of the finality of a judgment and decree will have no meaning."

U.L. Abdul Majeed in his book 'A Commentary on Civil Procedure Code and Civil Law' in Sri Lanka Volume 1, revised second edition (at 573) quotes the case of **Wijesundara Vs. Herath Appuhamy et al** 67 CLW 63 which held that;

"An interlocutory decree in a partition action may be amended by the trial Judge if it appears that the decree is not in conformity with the judgment and that it has been entered as a result of an accidental omission on his part."

The learned Counsel for the 2nd, 3rd and 5th Respondents submits the case of **Gunasena Vs. Bandaranayake** 2000 (1) SLR 292 in which it was held that;

The Court of Appeal had inherent power to set aside the judgment dated 25.05.1998 and to repair the injury caused to the plaintiff by its own

mistake, notwithstanding the fact that the said judgment had passed the decree of court. This could not have been done otherwise than by writing a fresh judgment.

Per Wijetunga, J.

"The authorities..... clearly indicate that a court has inherent power to repair an injury caused to a party by its own mistake. Once it is recognized that a court would not allow a party to suffer by reason of its own mistake, it must follow that corrective action should be taken as expeditiously as possible, within the framework of the law, to remedy the injury caused thereby. The modalities are best left to such court. and would depend on the nature of the error."

The nature of the error/mistake complained about by the 1st – 5th Respondents is that although the Appellant and the 1st – 5th Respondents are siblings who had equal entitlements i.e. 2/24th share that as per the Judgement of the learned District Judge, further to the report of the Licensed Surveyor marked as "X1" the Appellant has been allotted the house and plantations within the corpus.

However, this Court observes that in report marked as "X1" dated 25.07.1993 referred to above and Report of B.A.P. Jayasooriya Licensed Surveyor dated 04.09.1997 both clearly indicate that the house and plantations within the corpus belong to the Appellant. The report of B.A.P. Jayasooriya Licensed Surveyor dated 04.09.1997 also indicates that the Appellant as well as the 2nd, 3rd, 4th, 5th 7th and 11th Respondents were present before the Licensed Surveyor when the Appellant claimed the house and plantations within the corpus.

This Court is therefore of the view that the error/mistake complained about is one which is outside the gamut of Section 189 of the Civil Procedure Code as mentioned above and as such the learned District Judge has erred in law by allowing the application of the 1st – 5th Respondents under this Section.

As correctly submitted by the learned Counsel for the Appellant the 1st – 5th Respondents could have pursued a different course of action but they could not have made the application under Section 189 of the Civil Procedure Code.

This Court reiterates the views expressed by Ranaraja J mentioned above that 'this Power of Court under S. 189 is to be exercised entirely at the discretion of court, and the discretion should be exercised sparingly and in general to avoid a miscarriage of justice; if not the principle of the finality of a judgment and decree will have no meaning."

In the circumstances as discussed above this Appeal is allowed and the order of the learned District Judge dated 24.09.1999 is hereby set-aside and the reliefs as prayed for in Petition dated 11.11.1999 is hereby granted.

Appeal Allowed.

Judge of the Court of Appeal

M.M.A. GAFFOOR J

I Agree.

Judge of the Court of Appeal