GNANAPANDITHEN AND ANOTHER
v.
BALANAYAGAM AND ANOTHER

SUPREME COURT
G. P. S. DE SILVA, CJ.,
ANANDACOOMARASWAMY, J. AND
BANDARANAYAKE, J.
SC APPEAL NO. 42/95
CA NO. 296/92
DC BADULLA NO. 62/P
3RD AND 5TH MARCH, 1998

Revision – Partition decree – Conduct of parties – indicative of a collusive partition action – Failure of court to add an interested party – S. 69 (1) of The partition Law – Failure to investigate title – Miscarriage of Justice – Relevance of delay in seeking relief.

The appellants were joint executors of the last will and testament of Rasammal Gnanapandithen. The 2nd appellant who claimed an interest in the land which was the subject matter of the partition action between the plaintiff and his brother the defendant, sought to intervenue in the action before judgment. This application was refused by the District Judge in breach of S. 68 (1) of the Partition Law. The defendant did not file a statement of claim nor did he appear in court. The deeds on which title to the land in dispute was claimed by the parties had no prior registration reference. The action was filed within 2 weeks of the execution of the deed. No satisfactory evidence of title was led. Neither the vendors nor their predecessors in title gave evidence. On that material the District Judge gave judgment and entered the interlocutory decree.

Held :

1. There was a total want of investigation of title. The circumstances were strongly indicative of a collusive action. In the result, there was a miscarriage of justice in the case, and the appellants were entitled to a revision of the judgment of the District Judge notwithstanding delay in seeking relief.

2. The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to the very special and exceptional circumstances of the case the appellants were entitled to the exercise of the revisionary powers of the Court of Appeal.

Cases referred to:

1. *Wijeratne v. Samarakoon* 71 CLW 87.
2. *Mather v. Thamodharam Pillai* 6 NLR 246.
3. *Biso Menike v. Cyril de Alwis* 1982 SLR 368.
4. *Mariam Beebee v. Seyed Mohamed* 68 NLR 36 at 38.
5. *Somawathie v. Madawala and others* (1983) 2 Sri LR 15 at 30 and 31.

AN APPEAL from the judgment of the Court of Appeal.

P. A. D. Samarasekera P.C with *S. Mahenthiran* and *A. R. Surendran* for petitioners-appellants.

A. K. Premadasa P.C with *L. S. Ponrajah* and *C. E. de Silva* for plaintiff-respondent.

T. B. Dillimuni for defendant-respondent.

Cur. adv. vult.

April 27, 1998.

G. P. S. DE SILVA, CJ.

This is an application in revision and *restitutio in integrum* filed by the 2 petitioners who are the joint executors of the last will and testament of Mrs. Gnanapandithen. The application was filed in the Court of Appeal on 15. 4. 92 seeking to set aside the judgment dated 17. 10. 89 and the interlocutory decree based thereon in case number P/62 of the District Court of Badulla. The petitioners further sought an order directing the District Court, Badulla, to add the petitioners as party defendants in the said partition action and to permit them to file a statement of claim and participate at the trial.

In the application the petitioners averred, *inter alia,* (*a*) that Mrs. Gnanapandithen died on 14. 8. 87 and that the last will was admitted to probate in the District Court of Mt. Lavinia in case No. 2295/T; (*b*) the deceased was the owner of the property sought to be partitioned in DC Badulla case No. P/62; (*c*) the premises had been leased to the Motor Service Station Ltd., and that after the expiry of the lease, the Company continued in occupation and paid rent to the deceased and thereafter to the 2nd petitioner ; (*d*) unknown to the petitioners the plaintiff had filed action against his brother the defendant to partition the property; (*e*) the 2nd petitioner having come to know that judgment was to be delivered in the said partition case on 17. 10. 89 filed papers in the District Court of Badulla on 16. 10. 89 and moved to intervene in the case; the application for intervention was disallowed and the District Court proceeded to pronounce the judgment on 17. 10. 89; (*f*) the plaintiff had thereafter negotiated with the petitioners and offered to withdraw the partition case and to purchase the land which was the subject matter of the partition action from the petitioners; (*g*) pursuant to these negotiations the plaintiff

deposited with the lawyers a sum of Rs. 600,000 as the purchase price and that the said money was still lying with the petitioners; the plaintiff, however, failed to withdraw the partition action and the action proceeded to the stage of the final plan being prepared, but the final decree had not been entered; (*h*) there has been a complete failure on the part of the District Court to investigate the title of each party as required by the partition law.

The application for revision and *restitutio in integrum* however, was dismissed by the Court of Appeal mainly on the grounds of undue delay (which remained unexplained) and the failure on the part of the petitioners to establish that there was a miscarriage of justice in the partition case or that the petitioners suffered "actual loss". The petitioners have now preferred an appeal to this court against the judgment of the Court of Appeal.

The first matter that arises for consideration is the validity of the order dated 17. 10. 89 made by the District Court refusing the application of the 2nd petitioner "to intervene" in the partition action. The application was made by way of petition and affidavit. In the petition dated 16. 10. 89 it was averred -

(*a*) that the petitioner is a joint executor of the last will and testament of Mrs. Gnanapandithen (the deceased);

(*b*) the deceased was the owner of the subject matter of the partition action and the husband of the deceased had previously let the premises to the Motor Service Station, Badulla; that the lessee continued to pay rent to the deceased and a photocopy of the letter in proof of the payment of the rent was annexed to the petition;

(*c*) the partition action was instituted in fraud of the rights of the deceased, her heirs, executors and administrators claiming title on deeds executed after the death of Mrs. Gnanapandithen. It is accordingly necessary for the intervenient petitioner to intervene in the action to satisfy the court "on the title of the said deceased and if interlocutory decree is entered without the title of the said property which forms the subject matter of this action being investigated, serious prejudice will be caused to the deceased's heirs, executors and administrators" :

(*d*) the intervenient petitioner accordingly asked that the court be pleased to defer the delivery of the judgment until he is heard and the court is satisfied of the rights of the estate of the deceased in the property sought to be partitioned. In the prayer the petitioner prayed – (i) that the delivery of judgment be deferred until the intervenient petitioner is heard, (ii) that the intervenient petitioner be granted two months' time to take necessary steps and satisfy the court of the rights of the estate of the said deceased in and to the property sought to be partitioned.

In regard to the above application the Court of Appeal has noted: "that there is no mention of the provisions of law under which this application was made. Nor is there a specific prayer for the addition of the 2nd petitioner as a defendant in the case". It seems to me that these are not material omissions which affect the validity of the application made by the 2nd petitioner to intervene in the partition action. The reason is that there is express provision in section 69 (1) of the Partition Law, No. 21 of 1977 which permits the court "at any time before the judgment is delivered in a partition action" to add "as a party to the action . . . any person who, claiming an interest in the land, applies to be added as a party to the action." On a reading of the petition and the affidavit it is clear that the 2nd petitioner has set out sound and cogent grounds for intervention in the partition action. However, the District Court in its order dated 17. 10. 89 refusing the application for intervention has failed to give **any reason whatsoever** for refusing the 2nd petitioner's application. In a very brief order the District Court conclusions on the submissions made by counsel. It is clearly an order which cannot stand a moment's scrutiny. Unfortunately, this was not a matter which received the attention of the Court of Appeal. I hold that the District Court was in grave error in refusing the application. (*Wijeratne v. Samarakoon,*[1])

Mr. Samarasekera for the petitioners-appellants submitted that the gravamen of the complaint of the petitioners was that the partition action itself was a **collusive** action. On a consideration of the material on record, it seems to me that the following crucial matters tend to support the complaint of the petitioners:

(1) The plaintiff and the defendant are brothers. The plaintiff filed the partition action on *30. 6. 88* claiming one half share of the land on Deed of Transfer 1811 dated *15. 6. 88.* It is to be

noted that the action was filed within 2 weeks of the execution of the deed.

(2) The defendant claimed the other half share on deed No. 1814 dated 19. 6. 88, that is within 4 days of the execution of the deed in favour of the plaintiff.

(3) In the deeds the address of the 1st vendor, the address of the plaintiff and the address of the defendant are all the same.

(4) The deeds had no prior registration reference. The *lis pendens* of the action would be connected only to the folio where the 2 deeds are registered. The result is that the declaration under section 12 of the Partition Law would not reveal to court the other instruments registered under the Registration of Documents Ordinance.

(5) The defendant did not file a statement of claim, nor has he appeared in court.

(6) The report of the surveyor shows that there has been no compliance with section 17 (2) of the Partition Law, No. 21 of 1977.

Moreover, the nature of the evidence led at the trial was altogether unsatisfactory. The plaintiff gave evidence and stated that the ownership of the land had been acquired by K. P. Rajanayagam and S. Sinnasamy (the predecessors in title) "by long possession". There was no reference to 'adverse' possession nor even a claim to possession for a period of ten or more years in the evidence. Neither of the vendors (the predecessors in title) gave evidence in regard to the nature of their possession. No other documents were produced to establish prescriptive possession although the property was situated in an urban area. It seems to me that this is not a case where the investigation of title by the trial Judge was merely inadequate. In my opinion there was **total want** of investigation of title. Mr. Samarasekera cited several decisions which have, over the years, emphasized the paramount duty cast on the court by the statute itself to investigate title. It is unnecessary to repeat those decisions here. For present purposes it would be sufficient to refer to the case of *Mather v. Thamotharam Pillai* [(2)] decided as far back as 1903, where Layard, CJ. stated the principle in the following terms :- "Now, the

question to be decided in a partition suit is not **merely matters between parties which may be decided in a civil action;** . . . The court has not only to decide the matters in which the parties are in dispute, **but to safeguard the interests of others who are not parties to the suit,** who will be bound by a decree for partition . . . "Layard, CJ. stressed the importance of the duty cast on the court to satisfy itself "that the plaintiff has made out a title to the land sought to be partitioned, **and that the parties before the court are those solely entitled to such land.**" (emphasis added). This the trial Judge in the case before us completely failed to do. On a consideration of all the matters set out above I am satisfied that a **miscarriage of justice** has actually occurred in the present case. The Court of Appeal has not addressed itself to these relevant matters which vitiate the judgment and the interlocutory decree based thereon.

On the other hand, the Court of Appeal focused on the undue delay on the part of the petitioners in filing the present application for revision and *restitutio in integrum*. It is true that there was a delay of 2 1/2 years and the petitioners have also failed to avail themselves of the right of appeal. These objections were strongly urged by Mr. A. K. Premadasa for the plaintiff-respondent. Mr. Premadasa further argued that the long period of inaction and failure to seek relief on the part of the petitioners was fatal to an application in revision or an application for *restitutio in integrum.*

According to the petitioners, shortly after judgment was entered for the partition of the land (one half share each to the plaintiff and the defendant) the plaintiff negotiated with the petitioners and their lawyers "and offered to withdraw the partition action and to purchase the land forming the subject matter of the partition action from the petitioners" (Para. 13 of the affidavit of the 2nd petitioner dated 15. 2. 92). Pursuant to the negotiations the plaintiff deposited with Messrs. Murugesu and Neelakandan, Attorneys-at-Law a sum of Rs. 600,000/- as the purchase price. The plaintiff, however, failed to withdraw the partition action as agreed and it was only at that point of time, the petitioners filed the present application. The plaintiff, however, denies that he ever agreed to withdraw the partition action. Mr. Premadasa stressed the fact that there was no document to prove the alleged agreement to withdraw the partition action. Mr. Premadasa contended that for 2 1/2 years the petitioners were concerned with the sale of the land, having received Rs. 600,000/- from the plaintiff

as "full consideration" and that they had deliberately abandoned the remedies available to them in law to challenge the order disallowing the application for intervention, the judgment for the partition of the land and the interlocutory decree based thereon. In these circumstances, counsel urged that the Court of Appeal rightly dismissed the application.

The question whether delay is fatal to an application in revision depends on the particular facts and circumstances of the case. Dealing with the question of delay in relation to a writ of certiorari, Sharvananda J. (as he then was) in *Biso Menika v. Cyril de Alwis*[3] stated: "when the court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the court would be loathe to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are **very extraordinary reasons** to justify such rejection". (emphasis added). The plea of undue delay relied on strongly by Mr. Premadasa has to be considered in the light of the very special facts and circumstances of this case. As stated earlier, there are several suspicious circumstances strongly indicative of a **collusive partition action.** The refusal of the application of the petitioners for intervention in the partition action is manifestly erroneous, considered particularly in the light of the duty imposed by the statute on the court to ensure that the rights of persons claiming title to the land are not placed in jeopardy by the decree sought from court. The claim of the 2nd petitioner was that the property belonged to the estate of a deceased person. The matter does not rest there. The judgment entered for the partition of the land is **clearly contrary to law** as there has been a **total failure** by the court to investigate the title of each party.

On a consideration of the proceedings in this case, I hold that there has been a miscarriage of justice. The object of the power of revision as stated by Sansoni CJ. in *Mariam Beebee v. Seyed Mohamed*[4] "is the due administration of justice. . .". In the words of Soza, J. in *Somawathie v. Madawala and others*[5]. "The court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred . . . **Indeed the facts of this case cry aloud for the intervention of this court to prevent what otherwise would be a miscarriage of justice."** The words underlined above are equally applicable to the present case. I am accordingly of the view that the Court of Appeal was in serious error when it declined to exercise its

revisionary powers having regard to the very special and exceptional circumstances of this partition case.

The appeal is accordingly allowed and the judgment of the Court of Appeal is set aside. The judgment dated 17.10.89 of the District Court and the interlocutory decree are also set aside. The District Court is directed to add the petitioners-appellants as defendants to the partition action, to permit them to file a statement of claim, and participate at the trial. In all the circumstances, I make no order for costs.

ANANDACOOMARASWAMY, J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal allowed.