CIVIL PROCEDURE

Ref. 01/02/2002

Issues of facts issues of law.

Kovilage Rosman Mary Juliet Silva v. Upali S.Alahakoon

C.A.No.427/96(F), D.C.Colombo No.16125/L

Decided by T.B.Weerasuriya, J. and N.K.Udalagama, J. on 29.03.2000.

If there are issues of fact to be decided before the issue of law can be tried together. In the circumstances, if the issue involves question of fact, it will manifestly be inconvenient and irregular to try it separately and to proceed with the case piecemeal.

Weerasuriya, J. Held:

The Plaintiff-appellant by his plaint dated 15.01.1993, instituted action against the 1st defendant-respondent and the 2nd defendant seeking the following reliefs.

(1) A declaration that plaintiff-appellant is entitled to the property described in the schedule to the plaint.

(2) An order for ejectment of the defendants therefrom.

(3) An order for damages in a sum of Rs.20,000/= and continuing damages at the rate of Rs.200/= per month, till recovery of possession and

(4) Costs.

The 1st defendant-respondent in his answer whilst denying several averments in the plaint, prayed for dismissal of the action. At the trial against the 1st defendant-respondent which commenced on 21.03.1996, Court accepted 14 issues to be tried therein. Upon the application of the 1st defendant-respondent and in the absence of any objection from the plaintiff-appellant, Court proceeded to try issue No.07 as a preliminary issue and directed parties to tender written submissions. Thereafter by her order dated 25.07.1996, learned District Judge held that Court has no jurisdiction to proceed with the action. It is from the aforesaid order that this appeal has been lodged.

It is manifest that if there are issues of fact to be decided before the issue of law can be dealt with, then all issues in the case ought to be tried together. In the circumstances, if the issue involves question of fact, it will manifestly be inconvenient and irregular to try it separately and to proceed with the case piecemeal.

Issue No.07 raised by the 1st defendant-respondent on the question of jurisdiction is as follows. "07. Does this Court have jurisdiction to entertain or try this action?"

It would appear that learned District Judge has decided issue No.07 as an issue of fact by proceeding to consider questions of fact, whether or not the 1st defendant-respondent was residing within the territorial limits of its jurisdiction and whether the cause of action arose within such territorial jurisdiction.

It is to be emphasized that Section 147 permits issues of law to be tried as preliminary issues where Court is of opinion that the case may be disposed of on the issues of law only.

For the foregoing reasons, I set aside the order of the District Judge dated 27.07.1996 and direct that trial proceed on all the issues.

The appeal is allowed with costs.

(Case referred Cathiravelu v. Dadabhoy 15 NLR 339 at page 341)

EVIDENCE

Ref: 02/02/2002

N.M.Fernando v. Republic of Sri Lanka

C.A.Appeal No.135/97, H.C.Gampaha No.86/94

Decided by F.N.D.Jayasuriya, J. and P.H.K.Kulatilaka, J. on 30.08.1999.

The evidence of motive certainly stands in relationship of cause to the central fact in issue in a murder prosecution. Even where the facts are not clear and distinct, the proof of a cogent and intelligible motive rendered that which is not clear to be intelligible.

When a prima facie case and cogent incriminating circumstances had been adduced against him, there is only an evidential burden on him either by giving or making a dock statement to explain away those highly incriminating circumstances established by the prosecution.

Jayasuriya, J. Held:

We have heard learned counsel for the accused-appellant and learned State Counsel. The learned counsel in arguing this appeal invited us to hold that Jayamuni Medalin Silva, the only eye witness to this incident called by the prosecution, gave incredible and untrustworthy evidence and therefore the findings and conviction reached and pronounced by the learned High Court Judge of Gampaha, convicting the accused of the commission of the offence of culpable homicide not amounting to murder which is an offence punishable under section 297 of the Penal Code, be set aside.

Discrepancies and inconsistencies do not relate to the core of the prosecution case and they are discrepancies which are on the periphery of the prosecution case. Further, we observe that these discrepancies are not due to a defect, dishonesty or fraud and are clearly referable to a genuine mistake in narrating the incident through the human frailties.

It is manifestly clear that the discrepancies and inconsistencies relied on learned counsel for the appellant which are not of that character and are likewise not material.

Stephen in his Introduction to the Law of Evidence sets out that the facts which stand in the relationship of CAUSE OR EFFECT to the fact in issue are highly incriminating and of probative weight specially in a prosecution for the offence of murder. The evidence of motive certainly stands in relationship of cause to the central fact in issue in a murder prosecution. Even where the facts are not clear and distinct, the proof of a cogent and intelligible motive rendered that which is not clear to be intelligible.

In the present case, the facts are demonstrably clear and the proof of an intelligible and cogent motive against the accused strengthened and substantiated the prosecution case.

The prosecution has led strong and cogent evidence of an intelligible motive against the accused and conduct, which is influenced by the fact in issue. In regard to the said motive, facts relating to it were within the exclusive knowledge of the accused and the mother of the deceased. It was a fact within the personal knowledge of the accused. These were the special circumstances which the accused could have explained away and shown that such facts never existed. The accused has come on stand in making the dock statement but in his dock statement he has not adduced facts in explanation of these special circumstances within his knowledge. In those circumstances both reason and logic drives the deciding authority to presume and infer that the accused did not refute such facts because he had no facts to adduce in reputation of the telling evidence of motive and denying the evidence of conduct influenced by the fact in issue.

When a prima facie case and cogent incriminating circumstances had been adduced against him, there is only an evidential burden on him either by giving or making a dock statement to explain away those highly incriminating circumstances established by the prosecution.

The Court will draw the aforesaid inference and presumption against him and arrive at an adverse inference on his failure to explain away these incriminating features. Having these principles in the forefront of our minds we hold that there is justification and substance in the findings and adjudications of the learned High Court Judge and his findings are supported by cogent evidence adduced against the accused at the trial.

In these circumstances, we affirm the findings and convictions reached and pronounced by the learned High Court Judge on the charge of culpable homicide not amounting to murder on the basis of intention which is an offence punishable under section 297 of the Penal Code which attracts a maximum term of imprisonment for a period of 20 years.

Having considered the submissions of learned counsel in mitigation, we set aside the sentence of ten years rigorous Imprisonment imposed by the trial Judge and we sentence the accused to a term of eight years rigorous Imprisonment which will take effect from the date when the accused appears before the High Court of Gampaha in terms of our order and judgment. Accordingly, the accused is directed to appear before the High Court as expeditiously as possible for the variation of the sentence to be given effect to by the present High Court Judge of Gampaha.

PARTITION ACT

Ref. 03/02/2002

Sections 40, 41, 42 and 44 of the Evidence Ordinance Section 48 of the Partition Act.

N.L.Kusum Silva v. A.Arunasiri de Silva

C.A.282/98, D.C.Kalutara No.6248/P

Decided by C.N.Jayasinghe, J & D. Jayawickrama, J. on 16.03.2000.

As the provisions of sections 40, 41, 42 and 44 of the Evidence Ordinance have been excluded as far as partition decrees are concerned by Section 48(3) of the Partition Act, a partition decree cannot be challenged even on the ground of fraud or collusion.

D.Jayawickrama, J. Held:

This is an application for revision and/or restitutio in integrum to set aside the judgment, interlocutory decree and final decree entered in District Court of Kalutara Case No.6248/P.

The Petitioner to this application who was not a party to the Partition Action filed this application on 31.03.1998 to set aside all the above orders on the basis that the Partition Action was a collusive action between the Plaintiff-Respondent and the 1st Defendant-Respondent.

According to Section 48(5) of the Partition Act 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 48(1) as against a person who, not having been a party to the partition action, claims any such right, title or interest to or any land or any portion of the land to which the decree related 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.

The Petitioner has not averred or proved that the decree was entered by a court without competent jurisdiction.

According to Section 48(3) of the Partition Act the interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by Section 48(1) notwithstanding the provisions of Section 44 of the Evidence Ordinance, which means that the above provisions in Section 44 will not apply to partition decree.

According to Section 44 of the Evidence Ordinance any party to a suit or other proceedings may show that any judgment, order or decree which is relevant under Section 40, 41 or 42 and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion.

As the above provisions of the Evidence Ordinance have been excluded as far as partition decrees are concerned by Section 48(3) of the Partition Act, a partition decree cannot be challenged even on the ground of fraud or collusion.

Under Section 48(1) of the Partition Act every interlocutory decree and final decree entered under the provisions of the Partition Act shall be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein and be final and conclusive for all purposes against all persons whomsoever, whatsoever right, title or interest they have, or claim to have, to or in the land to which such decree relates ant 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 encumbarances whatsoever other than those specified in that decree.

Although the Petitioner claims that this property is Sangiks property and therefore he had filed this application as Viharadhipathi, he has not substantiated how he became the Viharadhipathi which fact the Defendant has denied. Only a lawful Viharadhipathi can maintain an action in respect of the property of a Vihara.

In any event as the Petitioner claims title to this land by P.12 he does not get any title as that deed is void in law for the reason that deed of gift has been executed pending the Partition Action.

Although the learned counsel for the Petitioner submitted that the Plaintiff has not followed the provisions in Sections 12(1) and 12(3) of the Partition Act, in view of the above facts the petitioner is not entitled to be made a party to the Partition Action, as he was not a necessary party at the time of filing the Partition Action.

Even if the Petitioner has any right to the land his remedy if at all is an action for damages under Section 49 of the Partition Act.

For these reasons we hold that there is no merit in this application. The judgment, interlocutory decree and the final decree of the District Court are affirmed. The application is dismissed without cost.

PARTITION ACT

Ref: 04/02/2002

Somasena Nishanka v. P. K. Alice Nona

C.A. No. 250/94 (F)

Decided by T. B. Weerasuriya, J and N. E. Dissanayake, J on 23.08.2000.

In terms of section 8 of the Land Settlement Ordinance every settlement order once published in the Gazette shall be conclusive proof so far as the sate or any person is thereby declared to be entitled to any land or to any share or

interest in the land free of all encumbrances whatsoever other than those specified in such order. Thus it is to be noted that the settlement orders appears to be conclusive proof of title as a final decree in a partition action.

Weerasuriya, J. Held:

The plaintiff-respondent by her plaint instituted action to partition the land called Galge Landa morefully described in the schedule to the plaint. Licensed Surveyor Wilmot Silva on a commission issued by Court prepared the preliminary plan No.136 date 9.6.87 depicted the land sought to be partitioned.

The defendant-appellant in his statement of claim averred that by virtue of the crown grant, J.R.N.P.A. B.M.Karunathilaka Bandara became the owner of this land and he by deed No.5606 dated 2.6.72 attested by D.S. Wickramsinghe Notary Public Marked as D3 transferred the entire land to him and thereby he became the owner of the entire land.

This case proceeded to trial on 18 points of contest and at the conclusion of the case learned District Judge by his judgment dated 11.5.94 ordered partition of the land and allotted shares in equal proportion to the plaintiff-respondent and the defendant-appellant. It is from the aforesaid judgment that this appeal has been lodged.

Despite the plaintiff-respondent and defendant-appellant describing the land in different names, the land has been identified as the land referred to in Land Settlement Order as lot 388 and the extent was only 2 acres, 3 roods and 39 perches.

The only question that has to be determined is whether the settlement order had wiped out the title which devolved on the plaintiff-respondent. In terms of section 8 of the Land Settlement Ordinance every settlement order once published in the Gazette shall be conclusive proof so far as the sate or any person is thereby declared to be entitled to any land or to any share or interest in the land free of all encumbrances whatsoever other than those specified in such order. Thus it is to be noted that the settlement orders appears to be conclusive proof of title as a final decree in a partition action.

The plaintiff-respondent in her evidence had not adverted to either to the plantations nor to the improvements she had effected. There was a paucity of evidence relating to the plantations or of any improvements effected by her on this land.

There is also reference to the building made out of brick with Asbestos roof standing on lot No.3. However it is to be noted that there was no valuation of the said building by the Commissioner. At the trial before the District Court there was evidence that the defendant-appellant had possessed his ½ share as far back as 1963. He also asserted that since obtaining title to the entirety he proceeded to possess the entire property exclusively.

In view of the failure of the Commissioner to value the building standing on the land and the confusion arising from the manner in which the possession had been acquired by the defendant-appellant, it is an arduous task to ascertain the amount of compensation. Thus in the absence of any clear evidence relating to the plantations and the improvements effected, no order for compensation for improvement can be made.

For the foregoing reasons it would be clear that the rights that were acquired by the plaintiff-respondent by P2 had been superseded by the settlement order marked D1 and the crown grant marked D2 vesting the entire land with Karunathilaka Bandara free of any encumbrances. In the circumstances the defendant-appellant was vested with the entire property by deed marked D3 effected by the said Karunathilaka Bandara. Therefore the defendant-appellant is entitled to the entire property described in the schedule to the plaint. In the circumstances, we set aside the judgment of the Learned District Judge dated 11.5.94 and allow the appeal without cost.

REVISION

Ref: 05/02/2002

A.M.A.N.P.W.R.G.J.B. Aturupana v. P.K.N. Premasinghe

C.A. No. 1220/90

D.C. Badulla No. 370/L.

Decided by Udalagama, J and Nanayakkara, J on 07.11.2001.

Provisions of the section 329 cannot be circumvented by an application in revision when importantly there appears to be averment adducing the existence of exceptional circumstances warranting the invoking of the extra ordinary revisionary jurisdiction of this court. It is an extra ordinary jurisdiction that is vested in this court to be exercised under exceptional circumstances if no other remedy is available.

Udalagama, J. Held:

This is an application to revise two orders of the learned District Judge in D.C. Badullla case No.370/L dated 07.12.1999 restoring the claimant respondent to possession with damages under the provisions of section 328 of the Civil Procedure Code and the related order of 13.12.99 authorizing writ of execution with an accompanying order to break open if necessary.

It is conceded that the claimant-respondent subsequently to the execution of the Writ referred to above is presently in possession of the disputed premise. It is also conceded that the claimant-respondent had been so restored and paced in possession under the aforesaid provisions of section 328 of the Civil Procedure Code subsequently to a proper inquiry.

Section 329 of the Civil Procedure Code explicitly bars an appeal from any order made under the provisions of section 327 or 328 of the Civil Procedure Code. The remedy available to an aggrieved party is to establish his rights by instituting fresh action. I am inclined to the view that the provision of the above section 329 cannot be circumvented by an application in revision when importantly there appears to be averment adducing the existence of exceptional circumstances warranting the invoking of the extra ordinary revisionary jurisdiction of this court. It is an extra ordinary jurisdiction that is vested in this court to be exercised under exceptional circumstances if no other remedy is available.

A perusal of the amended petition of the petitioner dated 26.01.2000 and the supporting affidavit shows that the petitioner had failed to even urge the existence of exceptional circumstances. In the circumstances I would hold that the petitioner had filed to make out a case for revision.

Notwithstanding the above and perusing the impugned orders I am also unable to find any illegality to warrant the setting aside of the orders referred to above.

The claimant-respondent had been restored to possession only until the final decision of the pending appeal referred to above and even considering the merits of this application I would hold that any interference with impugned orders which appears based on facts, is not warranted.

Application dismissed with cost.