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

C.A.Revision Application No. 262/2006

D.C.Colombo No. 19202/P

W.Nimalawathie

76/6 Makola Road,

Kiribathgoda.Kelaniya

Petitioner

Vs

1. P.D.K.Perera
   Kalugampitiya watta, Gonawala
   Kelaniya

   Plaintiff-Respondent

2. P.V.V.Perera
   169/1, Makola Road,
   Kiribathgoda,Kelaniya

   Defendant Respondent

BEFORE: Deepali Wijesundera J., and

M.M.A.Gaffoor J

COUNSEL: J.M.Wijebandara with N.Sureschandra and S.Wickremasinghe for the Petitioner.

Muditha Premachandra for the Defendant Respondent

ARGUED ON: 10.02.2015

Decided on: 07.05.2015

Gaffoor J.,

This is a Revision Application in which the Petitioner is seeking to set aside the interlocutory decree entered on 23.10.2003 and the final decree entered on 21.04.2004 in the District Cout of Colombo in case No. 19202/P. The Petitioner in this application was not a party to the partition case, but the Plaintiff Respondent and the Defendant Respondent are the parties before the original court.

The Petitioner states in paragraph 18 of the Petition that –

a) No title was disclosed by the by the Plaintiff;
b) The Plaintiff relied her title on a Deed of Declaration executed in 2000 and the Defendant had admitted it;
c) There was no contest between the parties;
d) Plaintiff has not taken steps to notice the Petitioner;
e) After obtaining the decree, the Respondent without moving for execution of the decree had sought an order in the Magistrate's Court under Section 66 of the Primary Courts Procedure Act;

Wherefore she prays for the following, inter alia, reliefs set out in the Petition, namely :

i) To set aside the said interlocutory decree and the final decree entered by the District Court;

ii) To make order allowing the Petitioner to enter into the case and file statement of claim;

iii) To direct the District Judge to have a trial de novo;

iv) To stay the execution of the writ;

EXCEPTIONAL CIRCUMSTANCES AND LACHES

Revision is a discretionary remedy granted by Court but no one can invoke the revisionary jurisdiction of the Court of Appeal as a matter of right. Under normal circumstances revisionary relief will not be granted if there exists an alternative remedy. It is settled law that the exercise of the revisionary powers of the Appellate Courts is confined to cases in which exceptional circumstances exist warranting its intervention. See Hotel Galaxy (Pvt)Ltd., vs Mercantile Hotels Management Ltd., 1987 (1) Sri Lanka Law Reports page 5.

It must be noted that the Petitioner has not averred any special circumstances in her petition warranting the intervention of this Court to grant her the reliefs prayed for.

In the case of Bank of Ceylon vs Kaleel and others 2004 (1) Sri L.R page 284, it was held by this court that *"the court will not interfere by way of eviction when the law has given the Plaintiff-Petitioner an alternative remedy under Section 754(2), and when the Plaintiff has*

not shown the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction."

The interlocutory decree and the final decree had been entered in the District Court on 23.10.2002 and on 21.04.2004 respectively. But this application in Revision has been filed on 10th February 2006, i.e. after nearly two years.

The conspicuous delay makes the Petitioner guilty of laches. The Petitioner herself says in her petition that she became aware of the existence of the partition case only on 27.06.2005 at the Kelaniya Police Station. It also reveals that the documents marked P10 to P13 filed with the petition had been obtained by the Petitioner from the District Court office on 11.07.2005. Even soon thereafter the Petitioner has not taken steps to file this revision application. The Petitioner has not given any reason for this inordinate delay. "In an application for Revision it is necessary to urge exceptional circumstances warranting the interference of this Court by way of revision. Filing an application by way of revision to set aside an order made by the District Court 3½ years before the institution of the revision application is considered as inordinate delay and the application is dismissed on the ground of laches." See Lokuthuttiripitiyage Nandawathie vs M.D.Gunawathie and others C.A.769/2000 – D.C. Mt.Lavinia 33/92/P. The Defendant Respondent contends in her petition that the corpus in the partition action had been surveyed on two occasions by the Court Commissioner and the

Petitioner did not make any objection to the survey and did not intervene in the case even though she was aware of the pendency of the partition case in court. All notices were exhibited at the Grama Sevaka Office of the area. As such, it appears that the Petitioner was aware of the partition action pending in the District Court but she had not made her appearance in the case. As the petitioner has failed to give adequate reasons for her inordinate delay in making this belated application in revision, I am of the view that this application must be dismissed on the ground of laches.

The other matter I have to consider in relation to her laches is the Primary Court case. When the parties were produced before the Magistrate's Court by the Kelaniys Police in case No. 78555/2, the learned Magistrate on 24.10.2005 had made an order dismissing the case on the ground that the land in dispute could not be identified and the parties were advised to seek their rights in instituting a civil action. Even after this order was made on 24.10.2005, the Petitioner has failed to seek proper remedy either in the District Court or in this Court. Non-execution of the decree entered in the partition action is not a valid ground for her inaction.

FINALITY OF THE PARTITION DECREE

The proposition that, that a decree entered in a partition action is a decree in rem and it binds the whole world is manifest from the provisions of Section 48(1) of the Partition Act No. 21 of 1977. In

Odiris Appuhamy vs Caroline Nona 66 NLR 241 Basnayake C.J analysed the three sub-sections 1, 2 and 3 of Section 48 of the Partition Act and stated as follows :

"The three sub-sections taken collectively indicate that notwithstanding –

a) any omission or defect of procedure, or
b) in the proof of title adduced before the court, or
c) the fact that all persons concerned are not parties to the partition action;

the decrees are final and conclusive against all persons whomsoever except against a person who has not been a party 9to the partition action and claims a title to the land independently of the decree. Such a person must assert his claim in a separate action and can only succeed if –

a) *he proves that the decree had been entered by a court without competent jurisdiction; or*
b) *that the partition action has not been duly registered as a lis pendens;*

The present claim is one to be added as a party to the partition action and does not fall within the ambit of that provision. The District Judge has no power to set aside his own decree".

It is contended on behalf of the Petitioner that the decree entered in this case is fraudulent or collusive. But this contention is untenable in view of the provisions in section 48(3) of the Partition Law No.21 of 1977, which states :

> *'The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by sub-section (1) of this section notwithstanding the provisions of Section 44 of the Evidence Ordinance, and accordingly such provision shall not apply to such decrees.'* In terms of this provision, even if a decree in a partition action was obtained fraudulently or collusively, the decree cannot be impeached applying section 44 of the Evidence Ordinance.

In Norris vs Charles 63 NLR 501 which is a case decided under the old Partition Act No. 16 of 1951, it was held by Sinnatamby J,, *"The legislature at the same time realized that persons may be adversely affected by the collusive effect given to both the interlocutory decree and the final decree and by section 49 re-enacted the provisions of the proviso to Section 9 of the earlier Ordinance which gave such persons the right to bring an action for damages."* It must be borne in mind that sub-section 7 of Section 48 of the present Partition Law re-validates the provisions of the earlier Partition Act No. 16 of 1951 and grants

relief under Section 49 of the Partition law. The question of non-investigation of title of the parties will not arise in this case as there was no dispute as to the title between the Plaintiff and the Defendant. As such, the Court need not go into a voyage of discovery of title, which may arise only when there is a contest as to the title between the parties. Counsel for the Petitioner has cited several authorities in the written submissions to the effect that the court has a duty to investigate the title of the parties in a partition action. But this contention , as stated above, is applicable only when there is a contest or dispute between the parties with regard to their title. However, the duty of the court is to investigate the title of the parties is subject to the ..... limits of pleadings, admissions, points of contest etc., In this case, I do not see any wrong in the learned District Judge accepting the title of the parties who did not have a contest as to their title and they are admittedly two sisters who derive their title from the same source.

In this case, the Petitioner, inter alia, is asking to set aside the interlocutory decree entered on 23.02.2002 and the final decree dated 21.04.2004 and ordered to allow the Petitioner to enter to this case and file statement of claim. These reliefs cannot be granted as Section 49 of the Partition Law grants alternative reliefs to the Petitioner. Furthermore, since the Petitioner was not a party to the action, setting aside the

interlocutory and final decree would not make her a party in the case as she was not a party at the time judgment was delivered. Although Section 69 of the Partition Law provides for addition of party but this must be done at any time before judgment is delivered and not thereafter. The Petitioner cannot say that she is left with no relief. Right of persons who are not parties to a partition action are protected by Section 49 of the Partition Law. Section 49(1) of the Partition Law, as amended by Act No.17 of 1997, states:

"Any person, not being a party to a partition action, whose rights to the land to which the action relates have been extinguished or who is otherwise prejudiced by the interlocutory decree entered in the action, may, by separate action instituted not later than five years from the date of the final decree in the partition action, recover damages from any party to the action by whose act, whether of commission or omission, such damages may have accrued and where the whole or any part of such damages cannot be recovered from any such party, recover such damages or part thereof from any other person who has benefitted by any such act of such party. Any person who has benefitted by such act, may be made a Defendant in such separate action and shall, if damages are awarded in that action, be bound by the award to the extent of such benefit as may be determined by the Court, to be that derived by him from such act."

For the reasons stated above, I hold that the application of the Petitioner should be dismissed and accordingly I dismiss the Revision Application with costs fixed at Rs. 15,000/-.

Application is dismissed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL