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

Ranawaka Arachchige Don Seemon,
No.173, Egal Oya, Bulathsinhala.

C.A. Revision No.1217/2000
D.C.Matugama–1467/P

6th Defendant-Petitioner

Vs.

Kandana Arachige Geetin Appuhamy
Of Bulathsinhala.

Plaintiff-Respondent

And

1. Ranawaka Arachchige Noris
2. Ranawaka Arachchige Podinona
3. 3A. Dias Bamunusingha
   Egal Oya,
   Bulathsinghala.
   3B. Saradiel Singho
4. Cornelis Ranasinghe.
5. Ranawaka Arachchige Don Danth
7. Ranawaka Arachchige Hendrick
8. Ranawaka Arachchige Rosanona
9. Ranawaka Arachchige Sopinona
10. Rabawaja /acgcguge Nussu Biba
11. Ranawaka Arachchige Nadawathie

12 A. Amarasinghe Mudalige Amarasena
Polgahakanda, Bulathsinhala.

14 A. Ranawaka Arachchige Hendrick
Appuhamy of Hammadapiriya,
Bulathsinhala.

15 A. Leela Gunathilake Kuruppu Mulla
Panadura.

16A.Jayasinghe Muthukuda of Delmulla School, Bulathsinhala
17 Jinadasa Muthukuda
18. Y.Ananda William of Bulathsinhala.
19. Ranawaka Arachchige Alice Nona of Thilina, Bulathsinhala.
20. Ranawaka Arachchige Jamis Appu of Egal Oya, Bulathsinhala.
21. Ranawaka Arachchige Venasitissa of Botalagama, Bulathsinhala.
21 A. Shyamali Ranawaka of Bothalagama, Bulathsinhala.
22. Ranawaka Arachchige Don Jemis
23 Ranawaka Arachchige Don Seemon Appuhamy of Bulathsinhala.
24. Amarasinghe Arachchige Jaslin Nona of Bulathsinhala.
25. Bamunu Arachchige Madduma Appuhamy of Govinna.
25 A. Violet Matilda Weerakkody Kobawaka, Govinna.
26.Tantulage Philip Dementrious Edward Fernando of Kala Mulla.
27. P.Yasapala of Bulathsinhala.
28. Joslin Nona of Bulathsinhala.
29. A.Jayasinghe Sirisena of Bulathsinhala.

Defendants-Respondents

Before : **A.H.M.D. Nawaz, J**

&

H.C.J. Madawala, J

Counsel : Rohan Sahabandu, PC with Hasitha Amarasinghe for the 6th Defendant-Petitioner

J.M.Wijebandara with Manori Gamage for the 3rd Defendant-Respondent

Written Submissions on : 25/ 04 /2016
Judgment Date : 23 / 06 /2016

H. C. J. Madawala, J

This is a revision application filed by the 6th Defendant- petitioner to set aside the judgment of the District Court of Gampaha dated 5/8/1985 an /or in the alternative to vary the said judgment to the extent to include the rights of the petitioner in accordance with her title deeds and in the alternative to order a trial de novo and for cost. When this matter came up for argument on 28/6/2012 the counsel for the 3rd defendant-respondent raised the following preliminary objections,

1) The order in this case has been delivered as far back as in 1995 and the petition has filed in October 2000 that is nearly after 5 years. Therefore the petitioner is guilty of laches and the petitioner has not averred any explanation for this undue delay.
2) The petitioner has failed to aver exceptional circumstances warranting your Lord Lordships court to exercise revisionary jurisdiction of this court.
3) Petitioner has alternative remedy that is statutory right of appeal which he has not exercised in this application.
4) The petitioner has failed to aver and or annex the order delivered by the Learned District Judge in a similar application made to the District Court by the petitioner as depicted by Journal entry 114 and 115.

Parties moved to file written submissions with regards to the said preliminary objections and accordingly the 6th defendant- petitioner 3A substituted- defendant- respondent has file there written submissions.

The plaintiff-respondent instituted the partition action No P/1467 in the District Court of Kaluthara seeking to partition the land called "Mananegodella" described in the schedule to the original plaint, in extent of AO R3 P 37. The said action which was instituted in Kalutara was transferred to the District Court of Mathugama after the constitution of the District Court in Mathugama. The impugned order has been delivered on 29/6/1995 and the present application had been filed in October 2000, after 5 years.

In this plaint the plaintiff- respondent instituted partition action in the District Court of Gampaha instituted against 1st to 27th defendant- respondents seeking to partition the land called "Millagahawatte" containing in extent of 3 bushels paddy sowing. A commission was issued to the court commissioner to prepare the preliminary plan and accordingly plan No. 358 dated 22/10/1977 had been submitted to this court. That the 27th defendant respondent had intervene to this action to the said preliminary survey. As well as at various stages of the action and had been made parties to the action. According to the plaint the petitioner had given rights only to the 1st to 27th defendant- respondents and the other defendants have filed their statements of claims disputing the pedigree of the plaintiff and the devolution of title given by the plaintiff. Although the 18th defendant, who is her father was made a party to the action by the plaintiff and given rights in the pedigree, said Marukku Fernando had a greater right and interest in the land sought to be partitioned. The said Marukku Fernando who had a greater share of the land sought to be partitioned had transferred all his rights, title and interests to his three children. The petitioner the 36th defendant- respondent and the 31st defendant- respondent, as far back as 1949. The petitioner was not made a party to the action by the plaintiff nor was her rights interests or the shares were not disclosed in the plaint or the pedigree. The attorney-at-Law for the plaintiff had filed a declaration under section 12 of the Partition Law No. 21 of 1977, declaring that he had made all the necessary persons, parties to the action, he had made an incorrect declaration in doing so as he had failed to make the petitioner a party to the action in the first instance whose rights were duly registered in the Land Registry and could have been disclosed in the event a proper search had taken place. The petitioner stated that she was suffering from a mental disorder for a long period of time and was under constant medical treatment for a considerable period of time and hence could not intervene in the partition action due to the said illness. Her husband had left and deserted her due to her ill health and the petitioner was looked after by a domestic servant during the said period of time. During the year 2000 she came to know about the partition action from a relative of the petitioner and made inquiries thereafter from the District Court of Gampaha. The partition action had proceeded to trial on or about 23.03.1982 on the many points of contests raised on behalf of the contesting parties and after trial judgment had been entered on 05-08-1985. The points of contests had been answered in favour of plaintiff and had made order to partition the land in suit on the pedigree and the schedule of shares given by the plaintiff. Being aggrieved by the said judgment dated 05-08-1985, the 19th defendant above named had preferred an appeal bearing No. C.A. 874/85 (F). This appeal had been decided by this court on 02-07-1999 and by the said

judgment; the judgment of the District Court had been varied to the extent to exclude Lot 1 from the corpus and subject to the said variation, the appeal had been dismissed. The petitioner had lost her right, title and interests to the land in suit due to the plaintiff's willful act of not making the petitioner a party to the actions. This had caused grave prejudice to the petitioner. Being aggrieved by the said judgment the defendant- respondent above named had sought special leave to appeal from the Supreme Court which refused the said application for special leave to appeal on 23-02-2000.

The petitioner stated that her father is a direct descendent of an Original owner of the corpus who in addition to the title and interests he got from his father one Manuel Fernando as pleaded by the plaintiff in paragraph 17 of her plaint had become entitled to a further share by way of purchase from other co-owners to the land in suit. The Said Marukku Fernando on deed No. 2722 and 2994 dated 02-08-1928 and 06-11-1928 respectively and attested by Mr. R.P. W. Senevirathne had purchased a 346/1350 and 1/5 th share in his name and the said deeds too, had been properly registered the said Marukku Fernando on deed No. 12281 dated 6-11-1948 and attested by Mr. P.P. Jayawardena note to public transferred the said rights which were purchased on the aforementioned deed of transfer marked 'X 3' to the petitioner and she in turn by deed No 16709 dated 5-5-1949 and attested by Mr. J.P. Wicramatillake Notary Public re-transfer the said share back to her father said Marukku Fernando by deed for transfer bearing No. 16710 dated 5th May 1949 and attested by J.P.Wickramatillake Notary Public transfer all his rights, title and interest to his 3 children, the 31st defendant- respondent and the 36th defendant- respondent in equal shares. The petitioner stated that thus she became entitled to a 1/3rd of an undivided 592/1350 share of the corpus sought to be partitioned, and her title deeds were duly registered under the provisions of the Prevention of Frauds Ordinance. The petitioner stated that she had not disposed of the said rights and interests which devolved on her by deed No. 16710 at all times material to the action and hence the plaintiff should have made the petitioner a party to the partition action at the time of institution. It was submitted that grate loss, damage and prejudice is caused to the petitioner by the willful omission of her from the partition action. It was submitted that the instructing Attorney –at –Law had failed to observe the mandatory provisions of the partition law. Further the Learned trial Judge had failed to investigate the title of the parties as required by section 25 of the Partition Law and hence the entire proceedings in the said action is tainted with illegality and impropriety and bad on law. Further submitted that there is a fundamental error in the findings of the learned

Trial Judge and hence the judgment is bad in law. The petitioner also stated that the plaintiff had suppressed material facts which are of paramount importance to the case in obtaining a decree for partition and hence the judgment is bad in law.

The 6th defendant-petitioner stated that according to judgment dated 24-10-66, the 7/128 share of Fransinahamy remained unallotted as the alleged transfer deed was not produced, and in the interlocutory Decree entered, a 7/128 less 1/8 of the land in 4D5 left unallotted. The interlocutory decree was amended on 28-8-1968 and was entered allotting to, 7th defendant (Hendrick) the unallotted 7/128 less 1/8 of the land in 4D5 decree in the original interlocutory decree. The petitioner stated that even in the amended interlocutory decree dated 28-11-1967 it was decree that the 7th defendant is entitled to 7/128 less 1/8 of the land in 4D5. The petitioner gave evidence in the District Court of Mathugama on 11-12-1992 and claimed the rights of the 7th defendant on the basis of the pending partition deed No. 759 dated 3-11-1963 attested by Lal Wijegunawardana. After the inquiry the order was made by the Learned District Judge, accordingly the 7th defendant entitled to deed No. 3710. Thereafter the 7th defendant had transferred all rights, title interest and claim to compensation to the petitioner by deed NO. 759 dated 3-11-1963. The right allotted to the 7th defendant under the amended interlocutory decree will devolve on petitioner upon entering of the final decree, and the rights allotted to the 7th defendant in the interlocutory decree denied to him under the final decree which when entered will by operation of law pass title to petitioner. The petitioner made an application dated 13-3-1995 to the District Court of Mathugama to amend the final decree in order to allot the unallotted share of Francinahamy to the party entitle to that share. However The Learned District Judge dismissed the above petition dated 13-3-1995 after hearing the application and delivered his order on 29-6-1995.

It was submitted that the rights allotted to the 7th defendant under the amended interlocutory decree will devolve on petitioner upon entering of the final decree, and also there is no reason as to why rights allotted to the 7th defendant in the interlocutory decree should be denied to him under the final decree which when entered will by operation of law pass title to petitioner. It was submitted that upon the perusal of the final decree that the 7th defendant who was declared entitled to an 7/128 less 1/8 of the share of the land in 4D5 under the amended decree marked X6 and X7 does not get any rights in the final decree. Therefore it was submitted that the rights of 7th defendant have been wiped out under the final decree and this has given rise to a grave miscarriage of justice. The petitioner is a bona fide purchaser on deed No. 759 for valuable consideration which is a

perfectly valid deed under the Partition Law and the rights of 7th defendant will pass to him by operation of law upon the entering of final decree allotting to him as decreed in the amended interlocutory decree. It was submitted that there is a glaring irregularity in the final decree which has the effect of a judgment in rem binding everybody. In order to correct the grave injustice that has been caused by entering of an incorrect final decree it is necessary in the interest of justice and on account extraordinary circumstances arising out of a patently irregular final decree for these court in the exercise of the powers of revision to set aside the final decree and direct the District Court of Mathugama to allot to parties their rights on the basis of the shares allotted under the amended interlocutory decree.

Attention of Court has been drawn to the case **Mariam Beebee Vs. Seyed Mohamed and others 68 NLR Page 36 SANSONI, C.J** stated;

" The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The partition Act has not, I conceive, made any change in this respect, and the power can still be exercised in respect of any order or decree of a lower Court."

" It is open to another party to the action to ask this court in revision to set aside that decree (even though it may have been affirmed in appeal) and to remit the case to the lower court in order that proper steps may be taken in the action-see Chelliah V.Tamber (1 (7904) 5 Tamb. Rep. 52) ; Menchina-hamy V. Muniweera ((1950) 52NLR 409) ; Somapala v.Sirimanne (3(1954) 51 O.L.W. 31) One reason is , I think , that a partition action has always been recognized as having a special character, in that every party has the double capacity of plaintiff and defendant. Though in theory it is merely a proceeding by one or more admitted co- owners against the remaining co-owners, to obtain relief from the inconvenience of undivided possession, in practice it often involves a contest as to title- see Luchihamy v. Hamidu. 4 (1923) 26N/L/ R. 41)

According to the 6th defendant petitioner prayed that this court be pleased to exercise the power of revision to set aside the order of the Learned District Judge, to amend the final decree to confirm the amended interlocutory decree and for cost.

In **Somawathie Vs. Madawala (1983) 2 SLR 15, Sc case 5 bench decision SOZA J**

Stated;

"although the Act stipulated that decrees under the partition Act are final and conclusive even where all persons concerned were not parties to the action or there was any omission or defect of procedure or in the proof of title, the supreme Court continued in the exercise of its powers of revision and restitution-in-integrum to set aside partition decrees when it found that the proceedings were tainted by what has been called fundamental vice. In the case of **Ukku v. Sidoris T.S. Fernando J. (as he then was) declares as follows at page 93.**

"While that section (i.e. Section 48 of the partition Act) enacts that an interlocutory decree entered shall, subject to the decision of any appeal which may be preferred therefrom, be final and conclusive for all purposes against all persons whomsoever, I am of opinion that it does not affect the extraordinary jurisdiction of this court exercised by way of revision or restitution-in-integrum where circumstances in which such extraordinary jurisdiction has been exercised in the past are shown to exist."

The petitioner submitted that she is not seeking to set aside the judgment and the interlocutory decree. However as there is a serious miscarriage of justice due to non-inclusion of the rights of the 7th respondent in the final decree that he is entitled to have and maintain this application. It was submitted that rights of the 7th defendant, whose rights have purchased by me on deed 759 (X8), which rights were incorporated in the amended interlocutory decree were not incorporated in the final decree entered in this case and state that this would cause a grave miscarriage of justice and irreparable loss to the petitioner and that this court has extraordinary revisionary jurisdiction to set aside same and make order to incorporate the rights of the 7th respondent. As there is a serious miscarriage of justice that this court would not consider the delay and as no prejudice would be caused to any party to this partition action. That the relief prayed for in the original petition be granted from an unallotted share.

Accordingly the petitioner prayed to set aside the judgment of Learned District Court dated 5-8-1985 and/ or in the alternative to vary the said judgment to the extent to include the rights of the petitioner in accordance with her title deeds are in the alternative to order a trial de novo.

3rd defendant- respondent objecting to the petition stated that the petitioner is not entitled in law to have and maintain this actions for the following reasons.

(a) Laches

It was submitted that application by way of revision should be made within a reasonable time period. The main criteria is only a party acts in due diligence entitles to obtain reliefs. It was submitted that the impugned order had been delivered on 29-06-1995 and the present application had been filed in October 2000 after five years. It was also submitted that no explanation had been given in the petition for such a delay.

Lokuthuttiripitiyage Nandawathi Vs. Madapathage Dona Gunawathie and others CA 769/2000,DC Mt.Lavinia 33/92/P it was held that,

" Filing an application by way of revision to set aside an order made by the District Court 3 ½ years before the institution of the revision application is considered as inordinate delay and the application is dismissed on the ground of laches."

V.A. Kusumawathy Vs. P.M.Y.B.Heenbanda (C.A. No. 1945/2001 (App) D.C. Kegalla 7/M) The Court of Appeal held that the long unexplained delay disentitles the Petitioner to get any relief by way of revision.

The petitioner in this petition had averred that she was suffering from mental disorder for a long period of time and was under medical treatment for a considerable period of time and hence could not intervene in this matter. However there is no proof of her condition not at least a medical certificate has been attached.

Hence we find that the petitioner is guilty of laches as this explanations delay caused is not proved.

(b) That the petitioner had failed to adhere to Court of Appeal (Appellate Procedure) Rules 1990.

Compliances with the said rules is mandatory in an application for revision and non-compliance is fatal.

Rule 47 of Court of Appeal (Appellate Procedure) rules read as follows,

47:- The petition and Affidavit expected in the case an application for the exercise of the powers conferred by Article 141 of the constitution shall contain an averments that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter. Where such an averment is found to be false and incorrect the application may be dismissed.

The present petition does not contain averments required by rules and therefore must be dismissed. The petitioner also has failed to file certified copies of relevant documents nor has sought permission of court to tender the same subsequently. It was submitted that irregularity is fatal for an application for revision.

Rule 3 (1) a of Court of Appeal (Appellate Procedure) Rules 1990 impose mandatory duty on the petitioner to file originals or certified copies of the documents along with the petition. The final decree has not been produced to court.

In the case of **M.M.Imamdeen Vs. Peoples Bank(C.A.L.A. 150/97)** Justice Udalagama adverting to the importance of compliance with the rules in refereeing an application has said," perusing the brief we have no alternative but to uphold this objection. Except for a certified copy of the order of the Learned District Judge dated 08-07-1997 the other copies of the necessary documents filed are not certify. If certified copies could not have been obtain in time it was the bounden duty of the petitioner to mention that in his petition, and obtain leave of the court to tender them subsequently. The petitioner has failed to abide by this provision."

The attention the Court is was also invited to the case of **Urban Development Authority Vs. Ceylon Entertainments Limited and another.** 2002 BLJ 65 it was held, the original documents or duly certified copies should be filed thereof in compliance with the Court of

Appeal (Appellate Procedure) Rules and if there be any difficulty in tendering the original or certified copies the Application should expressly reserve his right to tender them on a subsequent date with leave of court.

In **Vishaka de Alwis Vs. Weerasinghe Arachchige Asoka CA 779/2003 BASL News Jan/Feb 2007** it was held that the plaintiff has failed to comply with rule 3 (1) A Court of Appeal (Appellate Procedure) Rules 1990. On this grounds too petitioner's application should necessarily be dismissed.

(c) Exceptional Circumstances

It was submitted that revisionary Jurisdiction vested in the Appellant Courts is an extraordinary power which could be exercised only if the party seeking regards disclose exceptional circumstances warranting the intervention of superior court. Failure to aver exceptional circumstances in the petition is fatal in an application for revision.

Mallawaarachchi et el Vs. Emalihamy et al CA Application No. 1452/2000 reported in 2004 Jan/ Feb News Letter

A preliminary objections was raised by the defendant- respondents that there was no exceptional circumstances averred in the petition to invoke the revisionary jurisdiction of the Court of Appeal. Their Lordships held that failure to comply with an established important legal principle was fatal to the application for revision.

It was bought to notice of Court that the petitioner neither has pleaded exceptional circumstances nor do exist exceptional circumstances in this case. It was submitted that only revisionary Jurisdiction vested in the Appellant Court is an extraordinary power which could be exercised only if the party seeking redress discloses exceptional circumstances warranting the intervention of the superior court. Hence it was submitted that the petitioner's case must be dismissed for that reasons alone.

(d) It was also submitted that impugned order is an interlocutory order, which the petitioner has the statutory right of Appeal first having obtained leave from court. In the instance case the petitioner having failed to exhaust such right has preferred the present revision

application after 5 years. The appellant had not indicated to court that any special circumstances exist which would invite court to exercise its powers of revision, particularly since the appellant had not availed himself of the right of appeal under section 754 (2) which was available to him no relief could be granted by way of revision. A revision is an extraordinary jurisdiction vested in the Court of Appeal to be exercised under exceptional circumstances, if no other remedy is available.

It was held, in the case of **Vanik Incorporation Vs. Jayasekara 1997 (2) SLR 365** revision is not available until and unless remedy is available to the petitioner is exhausted.

The attention of the court was kindly invited to the case of **Boyagane D.C. Mills(Pvt) Ltd Vs. Sardawathie Kumarihamy Wanduragala CA No. 1221/2000** It was held that,

"Since the statutes makes express provision under Section 754 (2) of the Civil Procedure Code to make an appeal by way of leave to appeal against an interlocutory order by the party dissatisfied with it cannot invoke the jurisdiction of the Court of Appeal by way of revision."

(e) It was submitted that the caption of the version application filed by the petitioner. The original caption and the entire caption is not mentioned. Hence the petition is liable be dismissed.

Accordingly it was submitted for above reasons the petitioner's petition should be dismissed in-limine.

The following Cases Law depict stated that the revision application cannot be maintained.

Davidson vs. Silva, 2 S.C.R. 10 Fernando vs. Fernando, 72 NLR 549

As a general rule, the Supreme Court will not, except in very exceptional cases, review an order from which an appeal might have been, but has not been taken.

Navaratnasingham vs. Arumugam (1980 (2) S.L.R. 1) it was held,

Where petitioner invokes the jurisdiction of the Appellate Court by way of revision as in the present case, the court expects and insists on *uberrima fides* and where the petitioner's affidavits contradict the record of the trial judge the court would be very slow to permit this.

Thilagaratnam Vs. Edirisinghe (1982(1) S.L.R. 56) Though the appellate court's powers to act in revision were and be exercised whether an appeal has been taken against the order of the original court or not such powers would be exercised only in exceptional circumstances.

Iynul Kareeza Vs. Jayasinghe (1986 (1) C.A.L.R. 109)

Though the powers of the Court of Appeal in revision are wide and exercisable whether an appeal has been taken against the order of the original court or not, such power should be exercised only in exceptional circumstances and having regard to the facts of each case.

The plaintiff-petitioner having sought and having been granted permission and having amended the plaint failed to make application for leave to appeal from the order of the District Judge and failed to show exceptional circumstances for revision by the Court of Appeal or to establish that his substantial rights have been denied, an extraordinary remedy could not appropriately be granted.

Hotel Gaalxy (Pvt) Ltd. Vs. Mercantile Hotels Management Ltd. (1987)(1) S.L.R. 5)

It is settled law that the exercise of the revisionary powers of the appellate court is confined to cases in which exceptional circumstances exist warranting its intervention.

Wijesinghe Vs. Tharmaratnam (Sri Skantha Law Report Vol. IV, Page 47)

Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of the court.

Samadh Vs. Musajee (1988 (2) C.A.L.R. 147)

That revision is a discretionary remedy and cannot be exercised except when there is no right of appeal or there is no alternative remedy and exceptional circumstances exist to invoke the jurisdiction of the Court of Appeal. In the instant case there is no appeal but the party has an alternative remedy by way of a separate action. But exceptional circumstances do exist in this case in that if he does not invoke the jurisdiction of the court he runs the risk of being ejected from the Premises which he is occupying.

Perera Vs. Peoples Bank (Bar Journal (1995) Vol. IV Part I page 12

Revision is a discretionary remedy and the conduct of the petitioner is intensely relevant for the granting of such relief.

On perusal of the record we find that the petitioner has failed to aver and or annex the order delivered by the Learned District Judge in a similar application made to the District Court by the petitioner as depicted by Journal entry 114 and 115. The petitioner has not exercised the alternative remedy. As the final decree in case has not been produced for perusal and as the petitioner is guilty of laches and the cause of the undue delay is not duly proved by forwarding medical certificate. We uphold the preliminary objections raised by the 3rd defendant-respondent and accordingly we dismiss this revision application with cost.

JUDGE OF THE COURT OF APPEAL

A.H.M.D. Nawaz, J

I agree.

JUDGE OF THE COURT OF APPEAL