

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

T.W.Mary Nona (Deceased)

Malbe ,Pihimbuwa.

Court of Appeal No: Rev 168/07

DC Kurunegala No: 2163/P

G.D.Sriyani Mallika Weerasinghe

Malbe,Pihimbuwa.

Substituted Petitioner

Vs.

Sakkarapedige Gunapala of

Mahawela,Pihimbuwa.

Plaintiff-Respondent

01. Galketiyahene Dewage Mania alias

Lapia of Ogodapola,Pihimbuwa

02. Do Malani Kusumawathi of Matalapitiya.

03. Do Karunadewa (Deceased)

04. Wimalawathi, both of Ogodapola. (Deceased)

4A. Hapuwa Dewavalage Malani (Deceased)

Kusumawathi of Ihala Ogodapola,Pihimbuwa.

4B. Do Samadara

4C. Do Mangala Devi

4D. Do Nandawathie

4E. Do Malanie

4F. Do Sumanawathi

4G. Do Indrani Chandralatha

4H. Do Sarath Jayasundara

All of Ihala Ogodapola,Pihimbuwa.

And others

Defendants-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Mahanama De Silva with K.N.M. Dilrukshi for 1A Petitioner

M.S.A. Saheed with A.M. Hussain for 4A Defendant-Respondent

Written Submissions tendered on:

1A Petitioner on 5th March 2018

4A Defendant-Respondent on 4th May 2018

Argued on: 16th February 2018

Decided on: 12th June 2018

Janak De Silva J.

The original Petitioner filed this revision application and sought, inter alia, the following relief:

- (a) Set aside the final decree entered in D.C. Kurunegala Case No. 2163/P;
- (b) Permit Petitioner to submit an alternative scheme of partition to incorporate the buildings constructed by the deceased 3rd Defendant, the husband of the Petitioner, in the Lot allotted to the 3rd Defendant;
- (c) Make order staying further proceedings in D.C. Kurunegala Case No. 2163/P until the final determination of this application.

This application was filed on 14th February 2007.

For over ten years, it has drifted with the tide of many other cases awaiting final disposal in a system where laws delays are a bane to an effective system of administration of justice. During this period, the record testifies to one instance where an undertaking given to this Court by the 4A Defendant-Respondent (4A Respondent) was violated and later status quo ante restored and an apology tendered on her behalf.

On 11.02.2011 when this application was taken up for argument, the learned Counsel for the 4A Respondent raised a preliminary objection that the Petitioner in this application had failed to plead any exceptional circumstances to invoke the revisionary jurisdiction. After both parties filed written submissions, Court reserved judgement for 17.02.2012.

The journal entry of 17.02.2012 indicates that there is a complaint that several adverse orders were made without effecting substitution in respect of the 3rd Defendant who died on 23.02.2000 and that counsel agree to consider whether all the orders made after the death of this party should be set aside. The matter was re-fixed for 16.07.2012 for oral submissions of the parties.

On 19.11.2012 the matter was taken up before another division of this Court and it was informed that the 3rd Defendant had already been substituted in the District Court after filing of revision application and therefore fresh substitution does not arise. The learned Counsel for the 4A Defendant had informed Court that a preliminary objection had already been raised with regard to the lack of exceptional circumstances and oral submissions was fixed for 08.02.2013.

The order on the preliminary objection was finally delivered by another division of this Court on 24.05.2016. During the intervening period the original Petitioner died and was substituted by her daughter the 1A Petitioner.

On 16.02.2018 this matter came up before the present bench for the first time and the learned Counsel for the 4A Respondent raised another preliminary objection that they dispute that the original Petitioner is the wife of the deceased 3rd Defendant and challenged her *locus standii* to maintain this application. In the written submissions filed on behalf of the 4A Defendant it is also stated as follows:

“However, even if the petitioner establishes the fact that she is the wife of the 3rd defendant, still my respectful submission is that this application cannot be maintained in Law, because she has not been substituted in the room of the deceased 3rd Defendant, at the time of making this application.” (emphasis added)

This order is on the said preliminary objection on which I have had the benefit of receiving written submissions of both parties.

In my view this preliminary objection is frivolous and vexatious and needs to be dismissed with costs for several reasons.

Firstly, it is taken up more than 10 years after the application was filed. During this period, an undertaking was given to Court by the 4A Defendant which was later violated by her and status quo ante promptly restored after tendering an apology to Court. There was surely no need for any undertaking to be given if the original Petitioner lacked *locus standii* as claimed by the 4A Defendant.

Secondly, a preliminary objection on the alleged failure to plead exceptional circumstances was raised in 2011 when the preliminary objection raised now on *locus standii* could also easily have been raised. The failure on the part of the 4A Defendant amounts to a waiver of objection to the present preliminary objection, if there was ever one.

Sharvananda. C.J. in *Abeywickrema v. Pathirana and others*¹ sought to explain the legal ramifications of a waiver as follows:

A waiver would debar a person from raising a particular defence to a claim against him arising when either he agrees with the particular claimant not to raise that particular defence or so conducts himself as to be estopped from raising it.

A waiver must be an intentional act with knowledge. It necessarily implies knowledge of one's rights vis a vis the other party's infraction and an election to abandon those rights."²

In *Fernando v. Samarawera*³ it was held that:

"An intention to waive a right or benefit to which a person is entitled is never presumed. The presumption is against waiver, for though everyone is under our law at liberty to renounce any benefit to which he is entitled the intention to waive a right or benefit to

¹ (1986) 1 Sri.L.R. 120

² *Ibid.* at page 152

³ 52 N.L.R. 278

which a person is entitled cannot be lightly inferred but must clearly appear from his words or conduct."

The 4A Defendant did raise a preliminary objection to the revision application in 2011. The one raised now on *locus standii* was not raised then although the 4A Defendant knew or ought to have known that the 3rd Defendant died before the revision application was filed.

Thirdly, as adverted to earlier the question of proper substitution in respect of the 3rd Defendant who died on 23.02.2000 was raised on 17.02.2012 and when the matter was taken up before another division of this Court on 19.11.2012 it was informed that the 3rd Defendant had already been substituted in the District Court after filing of revision application and therefore fresh substitution does not arise. This was another missed opportunity for the 4A Defendant to have raised the preliminary objection raised now.

Fourthly, on 27.02.2017 this matter came up for argument on top of the list before another division of this Court, the parties agreed to file written submissions on the substantive case. The 4A Defendant could have well raised the new preliminary objection without agreeing to dispose the matter by way of written submissions. The failure on the part of the 4A Defendant amounts to a waiver of objection again to the present preliminary objection, if there was ever one.

The preliminary objection of the 4A Defendant was initially framed on the basis that the original Petitioner has not established that she was the wife of the deceased 3rd Defendant. In the written submissions, an extended preliminary objection is set out which reads as follows:

"However, even if the petitioner establishes the fact that she is the wife of the 3rd Defendant, still my respectful submission is that this application cannot be maintain (sic) in Law, because she has not been substituted in the room of the deceased 3rd Defendant, at the time of making this application."

The 4A Defendant had full knowledge of all relevant facts relating to the present preliminary objection but chose to abandon for more than ten (10) years. In the words of Weerasuriya J. in *Dondenu v. Earnest Perera*⁴ "Waiver is the voluntary abandonment with full knowledge of the relevant facts of a right or benefit".

In any event, the marriage certificate of the original Petitioner and the deceased 3rd Defendant has been submitted to Court.

I have no hesitation in overruling the preliminary objection, both in the original form raised as well as its extended formulation. It is a frivolous and vexatious application made after more than ten (10) years of the filing of this application.

This brings me to the question of costs. Laws delay is topical at legal and judicial fora due to its acute impact on the administration of justice. It has ancient antecedents as Shakespeare makes the law's delay one of the ills of life which led Hamlet to think of suicide. Such discourse is meaningless unless Courts employs all possible preventive measures at its disposal when an opportunity arises. In my view, the instant preliminary objection is a text book example of a litigant choosing to delay proceedings by raising a frivolous and vexatious preliminary objection in a revision application filed more than ten years ago in relation to a partition action filed in 1974. In these circumstances, an order for high costs is more than justified.

Accordingly, I dismiss the preliminary objection raised by the 4A Defendant and considering the circumstances of the case, award the 1A Petitioner costs of this application fixed at Rs. 25,000/=.

The substantive application will be fixed on top of the list on the earliest convenient date to parties.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal

⁴ (2003) 2 Sri.L.R. 123