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

Totagamuwe Jayasena,
Palamalanga,
Bombuwela.
Petitioner

C.A. Application No: 1660/2004/Revision
D.C. Kalutara Case No. 6658/P

Vs.

1. Aluthdurage Weerasinghe,
(Deceased)
1A. Kandedurage Mallika Kularatne,
2. Kandedurage Mallika Kularatne,
3. Aluthdurage Aruna Jagath
Kumara Weerasinghe,
4. Aluthdurage Leelawathie,
(Deceased)
4A. Kandedurage Mallika Kularatne,
All of Palama Langa,
Bomuwala.
Plaintiff-Respondents
And Several Others

Before: Mahinda Samayawardhena, J.

Counsel: Harsha Soza, P.C., with Srihan Samaranayake for the Petitioner.
S.A.D.S. Suraweera for the Plaintiff-Respondents.

Supported
& Decided on: 02.11.2018

Samayawardhena, J.

The petitioner filed this application for revision and/or *restitutio in integrum* dated 17.08.2004 seeking to set aside the Judgment and the Interlocutory Decree entered by the learned District Judge of Kalutara dated 23.02.1999 in the Partition Case No. 6658/P.

It is the position of the petitioner that he came to know about the partition action when the surveyor came to the land to prepare the final scheme of partition. This has happened on 14-16 March 2000.

In the facts and circumstances of this case, this is not believable. Assuming this is correct, the petitioner has come before this Court four years and five months after he became aware of the case.

There cannot be any dispute that this is an unreasonable delay unless the delay can be explained. A person who is invoking the extraordinary jurisdiction of this Court by way of revision and/or *restitutio in integrum* must act in promptitude.

The petitioner knows it and therefore explains the delay in paragraphs 20-22 of the petition. What the petitioner in those paragraphs says is that, as he was not a party to the case, he could not seek relief from the Court, but he awaited until the outcome of the application of the 11A defendant who made an application to the District Court to set aside the Judgment and the Interlocutory Decree, and the District Court allowed that application by order dated 16.10.2001, which was later set aside by this Court on 28.06.2004.

In a revision application, there is no necessity for this Court to call for the original case record from the District Court. The law requires the petitioner to tender all the material documents. However, in this case, this Court has called for the original case record for another purpose.

When I go through the original case record, it is clear that the above explanation of the petitioner contains serious suppressions and misrepresentations of core matters.

The learned District Judge, in the Judgment, has left ½ of the corpus unallotted. The petitioner together with nine others including his mother-Ranso Nona (who were not parties to the case) has made an application to the District Court by way of a petition dated 02.05.2000 and an affidavit dated 24.05.2000 seeking permission to lead evidence to claim their undivided rights from the ½ portion left unallotted and thereafter to amend the Interlocutory Decree and prepare a fresh scheme of partition.[1] The petitioner's proxy dated 24.05.2000 and the

[1] Vide pages 230-237 of the original Case Record.

petitioner's mother's proxy dated 19.03.2000 are also found in the original case record.[2] The petitioner has suppressed this vital fact from this Court and the said application (made by way of petition and affidavit) has not been tendered to this Court.

Thereafter the matter has been fixed for the inquiry by the District Court and according to the proceedings dated 20.11.2000, at the inquiry, the present petitioner has given evidence without any objection from anybody including the Attorney-at-Law of the plaintiffs.[3] Without any reference to such application or inquiry, I find those proceedings among other documents tendered by the petitioner.

The petitioner's claim is for Lot 3 in the Preliminary Plan together with the house standing thereon. This he has claimed in his evidence at the inquiry.

After leading all the evidence, for reasons best known to the petitioner and his lawyer, the application has been withdrawn.[4]

It must be mentioned that, at that time, although the scheme of partition had been prepared by the surveyor as per the Interlocutory Decree, no Scheme Inquiry had been held.

I guess that the petitioner and nine others withdrew that application placing reliance on the prospect of success of the application of the 11A defendant, which ultimately did not materialize.

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[2] Vide pages 410 and 411.
[3] Vide pages 351-357 of the original Case Record.
[4] Vide last page of the said proceedings.

I must mention that the petitioner did not withdraw that application after the District Court allowed the application of the 11A respondent, but well before it. The petitioner withdrew that application on 20.11.2000 and the District Court allowed the 11A defendant's application on 16.10.2001.

This suppression, in my view, is a serious suppression. Revision is a discretionary remedy, and the party who is seeking that remedy, must act with *uberimma fides* (utmost good faith). If he is later found to have acted in a manner to deceive the Court, the Court need not go into the merits of the matter, but shall dismiss the application *in limine* without further ado. That is settled law.

In that backdrop, even though it is absolutely not necessary, let me consider, for completeness, the other aspects of the petitioner's application.

The petitioner says that his mother-Ranso Nona who was a claimant before the surveyor was not served with Notice as required by the Partition Law and therefore she was not aware of the case until the surveyor came to the land for final division.

According to the Report of the Preliminary Plan, there had been two claimants-Mary Nona and Ranso Nona-to whom Notices have been served by the surveyor. The fact that Notice was served is denied not by Ranso Nona but by his son-the petitioner. Ranso Nona (now deceased) was a party to the application which I referred to earlier (which was suppressed from this Court). Nowhere in that application does Ranso Nona make such an allegation. She was claiming rights from the

unallotted portion. Soon after the Preliminary Survey, the other claimant-Mary Nona (to whom the surveyor says Notice was served) has filed the proxy.[5] That also belies the petitioner's assertion that Notice was not served on her mother. What more, according to the Report of the Preliminary Plan, Lot 3 and the building and plantation standing thereon have been claimed by Ranso Nona and it has so been recorded by the surveyor. Therefore, there is no room whatsoever to say that she was not given Notice. According to section 18(2) of the Partition Law, No. 21 of 1977, as amended, such Report of the Surveyor can be used as evidence without further proof subject to making an application by any party to call the surveyor to give oral evidence.

The petitioner relies only on the Deed No. 3864 marked P5 to claim rights from the corpus. There had been another Partition Case No. 6656/P to the adjoining land. The petitioner who is admittedly the 8th defendant in that case, has claimed title to the land to be partitioned in that case also on the same Deed and the learned District Judge in that case has accepted that Deed and given rights—vide the statement of claim marked X1, the Judgment marked X3 and the Final Plan marked X2 tendered by the learned counsel for the plaintiffs. The petitioner has suppressed that fact also from this Court. That means, the rights stemming from that Deed have been finally decided, and the petitioner cannot now produce the same Deed to claim title to the adjoining land which is the subject matter of the present case. The learned President's Counsel for the petitioner draws

[5] Vide JE No.15 of the DC Case Record and the proxy is found at page 403 of the Case Record.

the attention of the Court to Plan X2 referred to above and the other Plan (P6) mentioned in the Deed 3864, and points out that, a part of Lot 3 has not been included to the corpus in the other case. If that is so, the petitioner as the 8th respondent should have taken steps in that case (No.6656/P) to show the entire Lot 3.

Taking all the facts and circumstances into account, I refuse to issue Notice and dismiss the Application but without costs.

Judge of the Court of Appeal