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

In the matter of an application for revision and/or restitutio in integrum in terms of Article 138 and 145 of the Constitution of Sri Lanka against an Order dated 21.09.2008 of the Learned District Judge of Awissawella in Case No. 275/P

Jayasinghe Mudiyanselage Ariyawathi,
No. C/64/1, Amithirigala South,
Amithirigala.
And 11 Others.
Applicant Petitioners Under 70(2) of the Partition Law

CASE NO: CA/RI/21/2018

DC AWISSAWELLA CASE NO: 275/P

Vs.

Kehelwala Gamaralalage Nimal Padmabandu,
Amithirigala South,
Amithirigala.
Substituted Plaintiff-Respondent
And 3 Other Respondents

Before: Mahinda Samayawardhena, J.

Counsel: J.M. Wijebandara for the Petitioners.

Respondents are absent and unrepresented.

Decided on: 09.01.2019

Samayawardhena, J.

The 12 petitioners filed this application for revision and/or *restitutio in integrum* seeking basically to set aside the Partition Judgment entered several years ago, and the order delivered on 21.09.2018 disallowing the application of the petitioners to dismiss the partition action under section 70(2) of the Partition Law, No. 21 of 1977, as amended.

Out of these petitioners, the 11th and 7th petitioners are, according to the petition, the 1st and 7th defendants in the partition case. The other petitioners are not parties to the partition case. They have, for the first time, made applications under section 70(2) of the Partition Law, after the pronouncement of the Judgment and the registration of the Interlocutory Decree.

The 11th and 7th petitioners who have participated at the trial with full legal representation and given 1/5th share each by the Judgment, can, in my view, have no right to move in revision and/or *restitutio in integrum* challenging the Judgment entered many moons ago. According to the Journal Entries, they have throughout been represented by their Attorneys until the case was, in my view, erroneously, laid by the Court on 03.11.2006.

The 11th and 7th petitioners have no right to make an application under section 70(2) of the Partition Law seeking dismissal of the action for non-prosecution, after the 6th defendant, in terms of the proviso to section 70(1) of the Partition Law, made an application to substitute him as the plaintiff and permit him to prosecute the action. Vide *Peiris v. Chandrasena [1999] 3 Sri LR 153*.

It is elementary that the 11th and 7th petitioners who are parties to the action cannot, pending partition, claim prescriptive title to the corpus.

The other petitioners (except 11th and 7th) who are not parties to the main case, cannot come before this Court by way of *restitutio in integrum* as that remedy is only available to a party to the action. Vide *Perera v. Wijewickreme (1912) 15 NLR 411, Menchinahamy v. Muniweera (1950) 52 NLR 409, Dissanayake v. Elisinahamy [1978/79] 2 Sri LR 118, Sri Lanka Insurance Corporation Ltd v. Shanmugam [1995] 1 Sri LR 55, Fathima v. Mohideen [1998] 3 Sri LR 294 at 300, Velun Singho v. Suppiah [2007] 1 Sri LR 370*.

The remaining matter is whether the other petitioners can succeed in the revision application.

It is the position of these petitioners that according to the Journal Entry No. 160 dated 03.11.2006, the case has been laid by, and until 2017—for more than 10 years—no steps have been taken to prosecute the action, and during that period they acquired prescriptive rights to the land, and therefore the learned District Judge was wrong to have refused their

applications to dismiss the action in terms of section 70(2) of the Partition Law for non-prosecution for more than two years.

This argument presupposes that they have prescribed to the land when they made the application under section 70(2). Who has decided it? The petitioners themselves. This goes to show the vanity of that argument. Can the Court, at that stage, i.e. after entering the Interlocutory Decree but before entering the Final Decree, have another inquiry in the partition case to decide whether the petitioners, who are not parties to the action, have prescribed to the land pending partition? The answer shall necessarily be in the negative. According to that argument, the petitioners have started prescriptive possession as soon as the case was laid by in 2006. Is it practically possible? Have they maintained adverse possession? Against whom have they maintained such possession? These are only questions with no answers.

Section 70(2) of the Partition Law, in terms of which the petitioners made the application before the District Court, reads as follows:

> *Any party in a partition action or any person claiming an interest in the land in respect of which such action has been instituted, may, if no steps have been taken to prosecute the action for a period of two years, apply, by way of motion to court, to have such action dismissed, and the court may dismiss the action if it is satisfied that dismissal is justified in all the circumstances of the case.*

Dismissal is not automatic when no steps are taken for two years. Before entering an order of dismissal, the Court shall be satisfied that dismissal is justified in all the circumstances of the case.

According to the Journal Entry No. 158, the Court Commissioner to whom the commission has been sent to prepare the final scheme of partition, has sought some instructions from Court. According to the Journal Entry No. 159, the Court has, in the presence of the Attorneys-at-Law of the plaintiff and the 2nd, 5th and 7th defendants, dictated the instructions to be sent to the Court Commissioner. Then, according to the Journal Entry No. 160, the plaintiff's Attorney-at-Law has stated to Court that the plaintiff is absent, and thereafter the Court has simply laid by the case. I cannot understand why the Court laid by the case on the ground of the absence of the plaintiff, which is not necessary when the plaintiff is represented by his Attorney-at-Law. The plaintiff's physical presence is absolutely not necessary on a calling date when he is represented by his Attorney.

Section 70(1) of the Partition Law reads as follows:

> *No partition action shall abate by reason of the non-prosecution thereof, but, if a partition action is not prosecuted with reasonable diligence after the court has endeavoured to compel the parties to bring the action to a termination, the court may dismiss the action:*
>
> *Provided, however, that in a case where a plaintiff fails or neglects to prosecute a partition action, the court may, by*

> *order, permit any defendant to prosecute that action and may substitute him as a plaintiff for the purpose and may make such order as to costs as the court may deem fit.*

According to section 70(1), it is the duty of the Court to endeavor to compel the parties to bring the action to a termination, which the District Judge in this case has manifestly failed to discharge. There is absolutely no reason for the District Judge to lay by a partition action *ex mero motu* after the Interlocutory Decree is entered. An order to lay by a case causes, especially a partition case, enormous difficulties because when the case is to be taken back to the roll, the party who makes the application shall take all the troubles to serve notices to all the parties or their registered Attorneys afresh.

In *Samsudeen v. Eagle Star Insurance Co. Ltd. (1962) 64 NLR 372 at 379* it was held that:

> *The practice of "laying by" cases has been disapproved in certain judgments of this Court and, in our opinion, this practice should ordinarily be avoided and the practice indicated by Bonser C.J., in Fernando v. Curera (1896) 2 NLR 29, observed. Where, however, an order "laying by" a case has been made by a Court, the duty of restoring the case to the trial roll rests, in our opinion, on the Court and not on the parties.*

Further, in my view, the petitioners cannot use section 70(2) of the Partition Law as a shield. They can only use it as a weapon. To put differently, the petitioners could, if no steps were taken for two years, make an application under section 70(2) seeking

dismissal of the action. But, once a party takes a step to prosecute the case, the petitioners cannot object to it on the basis that no steps were taken for two years, as, a step has already been taken within two years before such objection is taken. The two-year period shall be counted from the date of the last entry of an order or proceeding in the record[1] for otherwise it would lead to absurdity allowing one to make an application under section 70(2) seeking dismissal of the action at any time before the termination of the proceedings on the basis that, at one stage of the case, no step was taken for two years.

I refuse to issue notice on the respondents. Application is dismissed.

Judge of the Court of Appeal

[1] Cf. section 402 of the Civil Procedure Code