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

Bandaranayaka
Liyanaarachchilage Pemawathi,
Kapugedara,
Angunakolapelessa.
Petitioner

CASE NO: CA/RI/133/2010
DC HAMBANTOTA CASE NO: 299/P

Vs.

Coranelis Wickremasinghe
Arachchi (deceased)
Original Plaintiff
Wickremasinghe Arachchige
Keerthiratne,
Kankanamgama,
Agunakolapelessa.
Substituted Plaintiff-Respondent
And Several Other Defendant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: W. Dayaratne, P.C., with R. Jayawardena for the Petitioner.

Rohan Sahabandu, P.C., with Chathurika Elvitigala for the Substituted Plaintiff-Respondent.

Decided on: 02.05.2019

Samayawardhena, J.

The petitioner filed this application for *restitutio in integrum* seeking restoration of her rights to Lot 2 in the Preliminary Plan by way of amending the Judgment dated 09.08.1989 and the Interlocutory Decree entered thereon and to permit her to file a statement of claim and proceed with the case.

The plaintiff filed the action in the District Court to partition the land known as Kosgahawatta among the plaintiff and the 1st-5th defendants. At the preliminary survey, the mother of the petitioner, Pinhamy, claimed before the surveyor. Notices have been issued on Pinhamy, but could not be served. However, as seen from the Journal Entry No.35 dated 22.06.1987, the learned District Judge in his own handwriting has written that Pinhamy was present in Court on that day and on being inquired she said that she was unable to appear in the case. The petitioner in paragraph 21(iv) of the petition and the corresponding paragraph of the affidavit states that "*the journal entry on 22.06.1987 to the effect that Pinhamy was present in court and had disclaimed any right to the corpus is erroneous*."

A party cannot in appeal dispute what the Judge has written in his own handwriting in a case record unless he has first taken up that matter before the lower Court. Here, the petitioner is not even a party to the case. On the other hand, Pinhamy did not make such an allegation against the Judge. People who have interests in the land to be partitioned can come before the District Court without formal notice being served.

In *Andradie v. Jayasekera Perera [1985] 2 Sri LR 204* at 208 Siva Selliah J. held:

> *It has been held in the cases Orathinahamy v. Romanis (1900) 1 Browne's Rep. 188, 189 and Gunawardene v Kelaart (1947) 48 NLR 522, 524 that the record maintained by the judge cannot be impeached by allegations or affidavits and that "the prospect is an appalling one if in every appeal it is open to the appellant to contest the correctness of the record". Gunawardena v. Kelaart (supra) Thus in the face of what appears on the record it is not possible for this court to controvert the record of the District Court unless in the first instance material has been provided before the District Court itself.*

In *Chaminda v. Republic of Sri Lanka [2009] 1 Sri LR 144* at 148 Sisira de Abrew J. held:

> *In my view a litigant can't make a convenient statement in court and contradict a judicial record. In this regard I am guided by the following judicial decisions. OlC Ampara police Station Vs. Bamunusinghe Arachchige Jayasinghe CA 37/98 HC (PHC) APN 38/98 CAM 8.9.98 Jayasuriya J remarked: "A litigant is not entitled to impugn a judicial*

record by making a convenient statement before the Court of Appeal." In Gunawardane v. Kelart 48 NLR 52 Supreme Court held: "The Supreme Court will not admit affidavits which seek to contradict the record kept by the Magistrate".

In *Vannakar v. Urhumalebbe [1996] 2 Sri LR 73* at 75-76 Jayasuriya J. stated:

Justice Dias in King v. Jayawardena 48 NLR 489 at 503 has considered the earlier line of decisions laying down the cursus curiae with regard to the legality of filing convenient and self-serving affidavits in appeal to vary and contradict the record or with a view to purge a default which had taken place before the Court of first instance. After a review of these decisions he held that no party ought to be permitted to file a belated self-serving and convenient affidavit to contradict the record, to vary the record or to purge a default where they have not taken proper steps to file such affidavits before the Judge or President of the Court of first instance or tribunal respectively. Vide also the judgment of Justice Canekeratne in Gunewardena v. Kelaart 48 NLR 522. If a party had taken such steps to file papers before the presiding officer of Court of first instance, then an inquiry would be held by him and the self-serving statements and averments could be evaluated after cross-examination of the affirmant when he gives evidence at the inquiry. If such a procedure was adopted the Court of Appeal would have the benefit of the recorded evidence which has been subjected to cross examination and the benefit of the findings of the judge of the Court of first instance. When such procedure is not adopted, Justice Dias

> *ruled that the Court of Appeal could not take into consideration self-serving and convenient averments in the affidavits to contradict and vary the record or to purge a default committed before the Court of first instance. In the courts of first instance I have respectfully followed such prudent observations made by judges with considerable experience in the actual working of the Magistrate and of the District Courts. In the circumstances this Court refuses to take into consideration the self-serving and convenient oral assertions on the facts made by the learned counsel for the Appellant for the first time at the hearing of this appeal.*

I reject the contention of the petitioner that her mother, Pinhamy, was unaware of the partition action.

After trial, the Judgment had been entered in 1989 and the appeal filed against the said Judgment had been dismissed by this Court in 2001.

Thereafter a commission has been issued to prepare the final scheme of partition. According to paragraphs 15 and 16 of the petition and the corresponding paragraphs of the affidavit, the petitioner says that, when the surveyor came to the land for final survey on 02.06.2003 and 06.05.2006, she along with two others obstructed the surveyor to execute the commission as a part of a different land claimed by them was being surveyed, and until the surveyor showed her the Preliminary Plan and informed her of the purpose of his visit she was unaware of the partition case.

That means, at least in 2003, when the surveyor came to the land to prepare the scheme of final partition, the petitioner knew about the partition case.

However, the petitioner has come before this Court in 2010, i.e. 7 years after she became aware of the partition action.

In paragraph 22 of the petition and the corresponding paragraph of the affidavit the petitioner says that she waited to come before this Court until the contempt inquiry for obstruction of the surveyor was over. This explanation is completely unacceptable. Contempt inquiry has nothing to do with this application. Contempt proceedings have commenced in 2007, and I find in the Journal Entry No. 88 dated 25.04.2005, the petitioner has made an application to the District Court for intervention and thereafter as seen from the Journal Entry No. 89 dated 29.08.2005, that application has been virtually withdrawn. The petitioner has come before this Court 5 years after that application for intervention.

It must be stressed that "*the power to grant relief by way of restitutio in integrum is a matter of grace and discretion.*" (*Usoof v. Nadarajah Chettiar (1958) 61 NLR 173 at 177*) The petitioner cannot seek restitution as of right. A person invoking the jurisdiction of this Court by way of *restitutio in integrum* must act with "*the utmost promptitude.*" (*Menchinahamy v. Muniweera (1950) 52 NLR 409 at 414, Babun Appu v. Simon Appu (1907) 11 NLR 44 at 45, Sri Lanka Insurance Corporation Limited v. Shanmugam [1995] 1 Sri LR 55*)

As Chief Justice Sansoni stated in *Cassim v. Government Agent, Batticaloa (1966) 69 NLR 403 at 404* "*There must be finality in litigation, even if incorrect orders have to go unreversed.*"

I have no hesitation to conclude that the petitioner did not act in promptitude and is clearly guilty of laches in coming to this Court and on that ground alone the application of the petitioner shall be dismissed.

There is another more fundamental matter, which disentitles the petitioner to maintain this application. That relates to standing of the petitioner to file this application. By looking at the reliefs sought for in the prayer to the petition and the penultimate paragraph of the petition, it is abundantly clear that this is purely an application for *restitutio in integrum* (and not an application for revision and/or *restitutio in integrum*).

There cannot be a dispute that the petitioner was not a party to the partition action. It is well settled law that an application for *restitutio in integrum* can only be filed by a party to the action. *(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 petitioner has no *locus standi* to file this application.

Application of the petitioner is dismissed with costs.

Judge of the Court of Appeal