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

Baruhupolage Karline Perera,
Diyagama,
Galpatha.
1st Plaintiff-Petitioner

CASE NO: CA/RI/6/2018
DC KALUTARA CASE NO: 5701/P

Vs.

Baruhupolage Rohana Bandula
Keerthisinghe Perera,
Diyagama,
Galpatha.
1A Defendant-Respondent

Before: A.L. Shiran Goonerartne, J.
Mahinda Samayawardhena, J.

Counsel: Daphne Peiris for the 1st Plaintiff-Petitioner.
N.M. Riyaz for the 1A Defendant-Respondent.

Argued on: 14.05.2014

Decided on: 23.05.2019

Samayawardhena, J.

The 1st plaintiff-petitioner filed this unique application "*for revision in the nature of restitutio in integrum*" seeking to set aside four specific orders dated 22.11.2007, 23.11.2007, 29.11.2007 and 11.01.2017 of the District Court of Kalutara delivered in Partition Case No. 1701/P.

The case has been instituted in the District Court 30 years ago in the year 1989. The Final Decree (P8) has been entered in 2003. According to the Final Decree, Lot 8 of the Final Plan (P7A) has been left unallotted. This has been done pursuant to the order dated 18.11.1993 (P3), which has been affirmed by this Court in appeal. In that order P3, it has *inter alia* been stated that in case the 1st and 2nd defendants later prove their entitlement to the said unallotted shares, Court can consider to allot those shares to the said defendants.

In the meantime, the 1st defendant has died and, according to the JE No.100 (of the District Court case record) dated 22.11.2007, his two children, namely, Rohana Bandula Keerthisinghe Perera and Chandra Jayantha Perera have been added as 10th and 11th defendants. This is the first order the 1st plaintiff seeks to set aside. It is significant to note that this addition has been made, as seen from the journal entry, without any objection from the plaintiff. It says: "*No objections from the plaintiff. Appointment made.*" Hence the plaintiff cannot, 12 years thereafter, challenge that order by an "*application for revision in the nature of restitutio in integrum*". In any event, that order, whether set aside or not, has no significance whatsoever either to the plaintiff's case or to the 1st defendant's case as no steps thereafter have been taken on that basis.

The second order which the 1st plaintiff seeks to set aside is the order made on the following day, i.e. 23.11.2007 reflected in JE No.101 whereby upon petition and affidavit being filed, the aforesaid Rohana Bandula Keerthisinghe Perera was appointed as the 1A defendant (instead of the 10th defendant). There was no reason for the plaintiff to object to it as only the defendant's number has been changed from 10 to 1A. The 1st plaintiff cannot now challenge that order after 12 years.

The third order which the 1st plaintiff challenges is the order dated 29.11.2007 (P12). According to the proceedings, that was the date of inquiry into the application in respect of the claim for unallotted shares. It is noteworthy that, according to the proceedings, the plaintiff has been fully represented by his Attorney-at-Law on that day. At the inquiry, the 1A defendant, namely, Rohana Bandula Keerthisinghe Perera has given evidence and he has not been cross examined by the Attorney-at-Law of the plaintiff. Having satisfied with that uncontroverted and unchallenged evidence, the Court has made order allotting Lot 8 of the Final Plan to the 1st and 2nd defendants in common, 2/3 and 1/3 share respectively, and further ordered to amend the Final Decree accordingly. The 1st plaintiff has no right whatsoever to challenge that order after 12 years.

The 2nd defendant has later died leaving behind his wife and two children, and the 1A defendant has purchased their rights on Lot 8 by way of a Deed, and made an application to appoint him as the legal representative of the deceased 2nd defendant[1] and deliver possession of the entire Lot 8 to him. This application has been allowed by the District Judge by order dated

[1] Vide pages 134-144 of the DC Brief.

11.01.2017. This is the last order which is being canvassed in this application.

It is the submission of the learned counsel for the 1st plaintiff that under section 52 of the Partition Law, the 1A defendant is only entitled to an order for delivery of possession for 2/3 share of the 1st defendant, and he is not entitled to take possession of the 1/3 share in Lot 8 allotted to the deceased 2nd defendant.

If the learned counsel accepts that the substituted 1A defendant can take possession of the 2/3 share in Lot 8 allotted to the deceased 1st defendant, the 1A defendant can be substituted in place of the deceased 2nd defendant (on the application already made before the District Judge with the consent of the heirs of the deceased 2nd defendant) and take possession of the balance 1/3 share as well.

In any event, the 1st plaintiff does not explain why she waited more than 1 year and 2 months to challenge this order. The order is dated 11.01.2017 and she came before this Court on 20.03.2018.

Revision or *restitutio in integrum* is a discretionary relief. It is granted not as a matter of right but as a matter of grace at the discretion of Court.

A party seeking a discretionary relief must act with utmost promptitude and come to Court without delay.

It appears from P13 that the 1st plaintiff has gone before the High Court of Civil Appeal by way of revision just before her coming to this Court and withdrawn that application for reasons best known to her. As a copy of the said revision application

has not been tendered to this Court, it is not clear on what grounds and challenging which orders, the 1st plaintiff went before the High Court.

It is trite law that a party seeking a discretionary relief must also act with *uberrima fides*—utmost good faith. If he is later found to be in lacking in that respect, the Court will not hesitate to dismiss the application *in limine* on that ground alone without going into the merits of the matter.

By looking at the JE No.111 it appears that the Fiscal could not hand over possession of Lot 8 to the 1A defendant as a part of a building put up in the adjoining Lot has encroached on Lot 8. It is this matter which has triggered the 1st plaintiff to file this applicaton.

Then by JE No.112 dated 05.06.2017 and the petition and affidavit relevant to that application[2] it is clear that the 1st plaintiff has sold her portion of land which she got from the Final Decree as far back as in 2007 to a third party by way of a Deed of Transfer and after several transactions, it has been purchased by the petitioner in the application relevant to JE No.112 (who has not been made a party to the present application), and the said third party by that application sought not to demolish the part of the building gone to Lot 8 until common boundary between Lot 8 and adjoining Lot 6 is demarcated with the assistance of a surveyor. The 1A defendant has filed objections to this application[3] with documents to prove that, when the construction was about to be made by the said third party encroaching on Lot 8, he made a complaint to the

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[2] Vide pages 145-191 of the DC Brief.
[3] Vide pages 192-205 of the DC Brief.

police and despite objections, construction was carried out at their own peril. It appears from JE No.113 and 115 that the District Court has dismissed that application of the third party on 25.09.2017 on a preliminary objection.

However the 1st plaintiff did not tender a copy of the said order, nor did he highlight those events in the instant application, and presented this case on a different complexion giving the impression to this Court that still she is the owner of Lot 6. This is a suppression or misrepresentation, if not deliberate distortion, of the real facts.

The 1st plaintiff on that ground and also on merits is not entitled to succeed this application.

I unhesitatingly dismiss the application with costs fixed at Rs. 50,000/= payable by the 1st plaintiff to the 1A defendant.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Court of Appeal