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

Kankanthri Padmasiri,
No. 67/5,
Rubber Estate Road,
Gangodawila,
Nugegoda.
Petitioner

CASE NO: CA/REV/898/2001
DC MT. LAVINIA CASE NO: 6/91/P

Vs.

Heeraluge Jayaratne Perera,
No. 65/1,
Kesbewa Road,
Gangodawila,
Nugegoda.
Plaintiff-Respondent
and Several Other Defendant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: W. Dayaratne, P.C., with Nadeeka Arachchi for the Petitioner.
Samantha Vithana for the 1st-3rd, 7th-10th Defendant-Respondents.
S.N. Wijithsingh for the 23rd Defendant-Respondent.

Decided on: 18.10.2019

Mahinda Samayawardhena, J.

The Plaintiff filed this partition action in the District Court of Mt. Lavinia by plaint dated 25.03.1991 naming 32 parties as Defendants seeking to partition the land described in the schedule to the plaint among the Plaintiff and the 1st-10th Defendants in the manner set out in paragraph 25 to the plaint, and to leave the remining portion of the land unallotted, as he was unaware of the rightful owners to the said portion of the land. After trial, the learned District Judge delivered the Judgment on 08.12.1997. The Petitioner has filed this application for revision and/or *restitutio in integrum* seeking to set aside this Judgment and the Interlocutory Decree entered thereon on the basis that he was unaware of the case until the Court Commissioner came to the land to prepare the final scheme of partition.

Upon Interlocutory Decree being entered in terms of the Judgment, the learned District Judge issued the commission to the Court Commissioner to prepare the final scheme of partition. Accordingly, when the Court Commissioner went to the land on 29.02.2000 to carry out his statutory duty *inter alia* under section 31 of the Partition Law, several persons including the Petitioner to this application has objected to it.[1] Thereafter, they, including the Petitioner, have been dealt with for contempt of Court, and the contempt inquiry has been concluded on 21.07.2000.[2]

However, the Petitioner made this application seeking to set aside the Judgment and the Interlocutory Decree, and add him as a party to the case in order for him to file a statement of claim and contest the case, on 20.06.2001 as seen from the date stamp on the original petition dated 16.06.2001. That means, even assuming that he was unaware of this case, at least, by 29.02.2000, he, without doubt, knew about this case; but, did not think it fit to immediately make this application to Court to minimize the damage which would cause to others by making a belated application. If I may summarize, he made this application 10 years after the filing of the case, 3 ½ years after the Judgment, and 1 year and 4 months after he admittedly knew about the case. This delay, which has not been explained to the satisfaction of the Court, in my view, is unreasonable, in the facts and circumstances of this case. It is trite law that a party seeking a

[1] Vide paragraph 4 of the Petition of the Petitioner dated 16.06.2001 and JE No.77 dated 26.06.2000.
[2] Vide JE No.95 dated 21.07.2000.

discretionary remedy such as revision or *restitutio in integrum* shall come to Court without delay, for otherwise, the application is liable to dismissed *in limine* without going into the merits.

For completeness, let me now have a look at the merits of the Petitioner's application in brief.

He claims 7 perches of the corpus by Deed marked P8 dated 09.09.1989. The Plaintiff states that this Deed has not been registered in the Folio or any other connected Folio where the *lis pendens* in this case has been registered.

The Petitioner has not elaborated the devolution of his title for this Court to understand his entitlement to the land. He has not, at least, produced a copy of the Deed of his vendor which is referred to in his Deed P8.

Nor has he satisfied the Court by way of superimposition, or by referring to a particular lot in the Preliminary Plan or the proposed Final Plan, that the land described in Deed P8 falls within the corpus. In short, by looking at P8 this Court cannot say that the Petitioner is a co-owner of this land.

Although section 48(3) of the Partition Law empowers this Court to vary the partition Judgment of the District Court in the exercise of revisionary and/or *restitutio in integrum* jurisdiction, this Court cannot exercise that jurisdiction carelessly or irresponsibly, unless it is fully

satisfied that a grave miscarriage of justice has occurred due to no fault of the Petitioner.

For the aforesaid reasons, I am not inclined to grant reliefs sought for by the Petitioner.

The Petitioner has, if so advised, two options: to make an application to the District Court in order to secure his alleged entitlement from the portion left unallotted in the Judgment[3]; or, to file an action under section 49 of the Partition Law for damages.[4]

Application of the Petitioner is dismissed but without costs.

Judge of the Court of Appeal

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[3] (Dantanarayana v. Nonahamy 79(2) NLR 241, Sapin Singho v. Luwis Singho [2002] 3 Sri LR 271)

[4] Perera v. Adline [2000] 3 Sri LR 93, Navaratne Manike v. Padmasena [2010] 2 Sri LR 165