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

In the matter of an application for leave to appeal in terms of Article 128 of the Constitution to be read with Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC Appeal No. 14/2012
SC HC LA No. 369/2012
WP/HCCA/Col. No. 86/2010 (LA)
DC COL No. 14447/P

Indrasena Arasaratnam Kenneth Virasinghe,
C/O Air Vice Marshal A.B. Sosa,
No. 36/4A, Sri Medhananda Avenue,
Off Sujatha Road, Kalubowila,
Dehiwela.

PLAINTIFF – PETITIONER – RESPONDENT – APPELLANT

-VS-

Vajira Kalinga Wijewardena,
No. 21/4, Buller's Lane,
Colombo 07.

4TH DEFENDANT – RESPONDENT – PETITIONER - RESPONDENT

BEFORE : Hon. N.G. Amaratunga J,
Hon. S. Marsoof PC, J, and
Hon. S. Hettige PC, J

COUNSEL : Wijeyadasa Rajapaksha, PC with Rasika Dissanayake for the Plaintiff-Petitioner-Respondent-Appellant.

Kuwera de Zoysa, PC with Senaka de Seram for the 4th Defendant-Respondent-Petitioner-Respondent.

ARGUED ON : 17.09.2012

DECIDED ON : 01.08.2013

SALEEM MARSOOF J:

This appeal is in a way a sequel to the decisions of our appellate courts in *Virasinghe v Virasinghe* [2002] 1 SLR 1 (CA) and [2002] 1 SLR 264 (SC), and focuses on the consequences of the alleged delay in applying for delivery of possession of the *corpus* of a partition action, or part thereof, to which a person is entitled to by virtue of a final decree entered into, or a sale held, in terms of the Partition Law, No. 21 of 1977, as subsequently amended. The primary question on which this Court has granted the Plaintiff-Petitioner-Respondent-Appellant (hereinafter referred to as "the Appellant") leave to appeal against the judgment of the Provincial High Court of the Western Province holden in Colombo (hereinafter referred to as the "Civil Appellate High Court") dated 26th August 2011, is-

"Whether their Lordships of the Civil Appellate High Court have erred in law by failing to appreciate the fact that the twelve months time frame referred to in Section 52 of the Partition Law is applicable only if any interference or dispossession had occurred after the delivery of the possession?"

This Court also permitted, at the instance of the learned President's Counsel for the 4th Defendant-Respondent-Petitioner-Respondent (hereinafter referred to as "the Respondent"), another question for consideration, which is as follows:-

"In view of the averment in paragraph 5 of the Petition dated 28th January 2001 marked P12 filed by the Appellant in the District Court, is not Section 52A, the relevant provision in the Partition Law under which the application ought to have been made, and if so, is it time barred?"

The basic facts

A brief summary of the material facts of the case will be useful to understand the context in which these questions arise for determination in this appeal. The Appellant instituted in the District Court of Colombo, the partition action from which this appeal arose, seeking to partition the land described in the schedule to the Plaint, wherein he claimed an undivided half share of the *corpus,* while disclosing that his two brothers, the 1st and 2nd Defendants-Respondent-Petitioner-Respondents (hereinafter referred to respectively as "1st and 2nd Defendants") were entitled to the remaining part of the *corpus* on an equal basis.

At the trial there was no dispute with regard to the devolution of shares as claimed by the Appellant and the 1st and 2nd Defendants, and the learned District Judge pronounced the judgment dated 20th October 1993, holding that the Appellant was entitled to a half, and the 1st and 2nd Defendants each to one fourth, of the *corpus,* and that the 4th Defendant-Respondent-Petitioner-Respondent (hereinafter referred to as the "Respondent") was a monthly tenant of the house bearing assessment No. 21/4, Buller's Lane, Colombo 07, situated on the *corpus.* The learned District Judge also held that in all the circumstances of the case, partition is inexpedient and impracticable. Pursuant to the said judgment , on 25th October 1993, the District Court entered interlocutory decree for the sale of the common property, with the right of first refusal reserved to the said co-owners, namely, the Appellant and the 1st and 2nd Defendants as contemplated by Section 26(2)(b) of the Partition Law. After the final decree was entered on 22nd March 2002, the 1st and 2nd Defendants conveyed their shares in the *corpus* by Deed No 1133 dated 16th January 2003 attested by N.K.U Bandula, Notary Public, to the Appellant, who became the owner of the entire *corpus,* which transfer was subsequently approved by the District Court.

Since certain claims made by the 3rd Defendant Bank of Ceylon on a mortgage bond, were settled during the pendency of the case in the District Court, and there was no appeal against the finding of the learned District Court that no money was owed to the said Bank, the only matter that remained in contention was the claim of the Respondent as a tenant of the house bearing assessment No. 21/4, Buller's Lane, Colombo 07, situated on the *corpus.* By his Statement of Claim, the Respondent had claimed that he was the tenant of the said premises from 1st January 1985, and that by virtue of the Indenture of Lease bearing No. 74 dated 17th December 1985 executed by the 1st and 2nd Defendants and attested by S. Thurairaja, Notary Public, he also acquired leasehold rights over the premises for 10 years, which tenancy rights were protected by the Rent Act, No. 1 of 1972, as subsequently amended. He had also claimed that he was entitled to a sum of Rs. 200, 387.95, by way of compensation for improvements.

On an appeal by the Appellant to the Court of Appeal, that Court decided in *Virasinghe v Virasinghe* [2002] 1 SLR 1 (CA) *inter-alia* that the said Indenture of Lease, having been executed after the registration of *lis pendens* in the case, was a nullity, but that since a monthly tenancy had existed prior to the date of the execution of the said Deed of Lease, there was no legal impediment against the claim of the Respondent as monthly tenant. Significantly, the Court of Appeal also held "the protection afforded by the Rent Act is available to the 4th Defendant-Respondent as against all the co-owners on the ground that they had acquiesced in the letting." It was this aspect of the matter that had to be looked into by this Court in the *Virasinghe v Virasinghe* [2002] 1 SLR 264 (SC). In the course of his judgement in this case, S.N. Silva CJ (with Bandaranaike J and Yapa J concurring) observed at page 271 that "the 4th Defendant should not have been permitted to add another string to his bow by raising issues based on a monthly tenancy, being a matter in respect of which the Court could not enter a decree having finality." This Court clarified the position further and at page 273 of its judgement noted that any genuine claims of a tenant who is entitled to continue in occupation in that capacity are well safeguarded by the provisions of Sections 48 (1) and 52 (2) of the Partition Law read with Section 14 of the Rent Act, and that it would "be inconsistent with the scheme of the Partition Act and the provisions in the Rent Act to bring the claim of a monthly tenant within the scope of trial in a partition action." This Court accordingly, allowed the appeal and set aside judgement of the Court of Appeal, as well as the findings of the District Court in respect of issues Nos. 10, 11, 12 and 16 on the basis that these issues should not have formed the subject-matter of the trial in the partition action.

The impugned decision

Having thus set out the background facts, it is now possible to focus on the particular application that gave rise to the present appeal. Having fully acquired title to the entirety of the *corpus* by virtue of Deed No 1133 dated 16th January 2003, the Appellant made an application under Section 52(1) of the Partition Law for an order for delivery of possession. The District Court issued the order for delivery of possession in favour of the Appellant on or about 16th December 2003. When the Fiscal went to the *corpus* on 12th January 2004 to deliver possession of the premises to the Appellant, the Respondent, who claimed tenancy rights to the premises situated in the *corpus*, resisted the Fiscal relying on the aforesaid judgement of the Supreme Court. Thereafter the Appellant resorted to the procedure set out in Section 325(1) of the Civil Procedure Code to obtain possession of the *corpus*, and at the ensuing inquiry in the District Court, a preliminary objection was raised by the said Respondent on the basis that an application under Section 325(1) of the Code cannot be maintained for the purpose of taking possession of a *corpus* or part thereof under a decree issued in a partition action. The learned Additional District Judge by his order dated 6th December 2004 upheld the said preliminary objection and rejected the application of the Appellant.

Thereafter, the Appellant made a fresh application dated 28th January 2005 for delivery of possession under Section 52(2)(a) of the Partition Law, as the learned Additional District Judge has in his order dated 6th December 2004, expressed the view that the application for delivery of possession should be made under that section. This Order of the learned Additional District Judge was not canvassed in appeal by any of the parties. The Respondent filed his Statement of Objections dated 26th May 2005 wherein he raised two preliminary objections, of which what is material to the present appeal is objection (a) thereof, namely that "since in terms of Section 52 A of the Partition Law the application has not been made within twelve months of the date of dispossession or interference with possession, it is prescribed in law".

When the case came up for inquiry on 2nd September 2005, an application was made by the learned Counsel for the Respondent that the aforesaid preliminary objections be taken up for hearing prior to going into the merits of the case, but learned Counsel for the Appellant objected to the said application on the basis that the said preliminary objections *ex facia* have no merit and that the 4th Defendant was seeking to prolong the said case that has been instituted over twenty years ago. The learned Additional District Judge decided that the inquiry should be proceeded with, and permitted the Appellant to lead his evidence, and after the evidence-in-chief of the Appellant was led, learned Counsel for the Respondent moved for a postponement of the case for the cross-examination of the Appellant.

The Appellant objected to a an adjournment, a postponement was granted subject to a prepayment of costs to the Appellant, against which order an application for leave to appeal was filed in the Court of Appeal. Consequent to a settlement being reached in the Court of Appeal, the order for prepayment of cost was set aside and the case remitted to the District Court to proceed with the inquiry under Section 52(2)(a) of the Partition Law. Thereafter when the case was again taken up for inquiry in the District Court on 6th of May 2010 before the District Court, learned Counsel for the Respondent moved that the preliminary objections be taken up for hearing, and the court directed the parties to tender written submissions on the basis of which the preliminary objections would be disposed of.

The learned District Judge in his order on the preliminary objections dated 20th August 2010, took into consideration the fact that the Fiscal was resisted on 17th January 2004 by the Respondent when he sought to execute a writ for delivery of possession to the Appellant; that thereafter, the Appellant resorted to the procedure laid down in Section 325 of the Civil Procedure Code for the purpose of having the Respondent evicted and to take over possession of the *corpus*, which was held by the District Court by its order dated 6th December 2004 to be an inappropriate procedure to enforce a final decree in a partition case; that the Appellant cannot be faulted for resorting to the wrong procedure, as it is the obligation of this lawyer to properly advise him in regard to the appropriate remedy; that in any event, the preliminary objection in question was a mere technicality resorted to by the Respondent particularly in the context that the partition action was instituted in 1985 and the interlocutory decree entered in the action had been confirmed in 2003; that in any event, the subsequent application for delivery of possession had been filed without any undue delay, on 28th January 2005, within two months of the aforesaid order of the District Court, and proceeded to overrule the preliminary objection.

The Respondent appealed against the decision of the District Court to the Civil Appellate High Court, and the High Court, by its impugned judgment dated 26th August 2011, allowed the appeal, set aside the order of the District Court and upheld the preliminary objections taken up by the Respondent. The High Court reasoned that since the fresh application in terms of Section 52(2)(a) of the Partition Law had been filed by the Appellant on 28th January 2005, after one year and ten days from 17th January 2004, on which date the Respondent resisted the Fiscal and prevented him from handing over possession of the *corpus* to the Appellant in terms of the writ of execution issued by the District Court, the fresh application had been field after the expiry of twelve months prescribed in Section 52A(1) of the said Law, and cannot therefore be maintained. In coming to this conclusion, the Civil Appellate High Court observed that it was trite law that any mistake made by a lawyer in the presentation of his client's case is attributable to the client, and that a failure to comply with mandatory time limits prescribed by law cannot be excused on the basis that a party to a case has been misled by his Counsel in selecting the appropriate remedy.

The applicable law

Thus, the question for determination in this appeal, as formulated by learned President's Counsel for the Appellant, is whether the Civil Appellate High Court has erred in law "by failing to appreciate the fact that the twelve months time frame referred to in Section 52 of the Partition Law is applicable only if any interference or dispossession had occurred after the delivery of the possession?" Learned President's Counsel for the Respondent sought to formulate the same question in a slightly different way, and paraphrased it as follows:

> "In view of the averment in paragraph 5 of the Petition dated 28th January 2001 marked P12 filed by the Appellant in the District Court, is not Section 52A, the relevant provision in the Partition Law under which the application ought to have been made, and if so, is it time barred?"

It may be stated at the outset that Section 52 of the Partition Law, as opposed to Section 52A of the Law, does not impose any time limit for seeking an order for delivery of possession pursuant to a final decree in a partition action. Section 52 of the Law, which consists of two sub-sections, reads as follows:

> (1) Every party to a partition action who has been declared to be entitled to any land by any final decree entered under this Law and every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court, shall be entitled to obtain from the court, in the same action, on application made by motion in that behalf, an order for the delivery to him of possession of the land; Provided that where such party is liable to pay any amount as owelty or as compensation for improvements, he shall not be entitled to obtain such order until that amount is paid.
>
> (2) (a) Where the applicant for delivery of possession seeks to evict any person in occupation of a land or a house standing on the land *as tenant for a period not exceeding one month* who is liable to be evicted by the applicant, such application shall be made by petition to which such person in occupation shall be made respondent, setting out the material facts entitling the applicant to such order.
>
> (b)After hearing the respondent, if the court shall determine that the respondent having entered into occupation prior to the date of such final decree or certificate of sale, is entitled to continue in occupation of the said house as tenant under the applicant as landlord, the court shall dismiss the application;
>
> Otherwise it shall grant the application and direct that an order for delivery of possession of the said house and land to the applicant do issue. (*Emphasis added*)

Section 52 of the Partition Law exclusively deals with the procedure for obtaining possession of any land to which a party is declared entitled by any final decree or any purchase of land at any sale held under the Partition Law in whose favour a certificate of sale has been entered by court. The divide between Section 52(1) and (2) is indeed simple, and while Section 52(1) of the Law, deals with the recovery of possession from any person, whether he is a party to the partition action or not, other than a monthly tenant, Section 52(2) spells out the procedure for proceeding against a monthly tenant. However, neither sub-section specifies any timeframe, whether of twelve months or otherwise, for seeking an order for delivery of possession pursuant to a final decree in a partition action.

It is for this reason that the learned President's Counsel for the Respondent has submitted before this Court, as he did in the lower courts, that insofar as the subsequent application for an order for possession was made by the Appellant after the Respondent successfully resisted the Fiscal and prevented him from handing over possession of the *corpus* to the Appellant, he was precluded by Section 52A of the Partition Law from maintaining any application to regain possession lodged after twelve months from the date on which his possession of the land was interfered with or was lost. Section 52A of the Partition Law, which was inserted into the Law by Section 23 of Act No. 17 of 1997 provides as follows:-

> (1)Any person-
>
> (a) who has been declared entitled to any land by any final decree entered under this Law ; or
>
> (b) who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by Court; or
>
> (c) who has derived title from a person referred to in paragraph (a), or paragraph (b)
>
> and whose possession has been, or is interfered with or who has been dispossessed, shall, if such interference or dispossession occurs within ten years of the date of the final decree of partition or the entering of the certificate of sale, as the case may be, be entitled to make application, in the same action, by way of petition for restoration of possession, *within twelve months of the date of such interference or dispossession*, as the case may be.
>
> (2)The person against whom the application for restoration of possession is made, shall be made the respondent to the application.
>
> (3) The Court shall, after due inquiry into the matter, make order for delivery of possession or otherwise as the justice of the case may require:
>
> Provided that, no order for delivery of possession of the land shall be made where the respondent is a person who derives his title to the land in dispute or part thereof directly from the final decree of partition or sale, or is a person who has acquired title to such land from a person who has derived title to such land under the final decree of partition or sale, or from the privies or heirs of such second mentioned person. (*Emphasis added*)

The twelve month time limit: is it applicable?

Learned President's Counsel for the Appellant has submitted that the above quoted provisions of the Partition Law amply demonstrate without any ambiguity that the requirement that an application should be lodged within a twelve month time frame, is relevant only where any interference or dispossession had occurred after the delivery of the possession of the *corpus*. He submitted that it is common ground in this case that the *corpus* has so far not been delivered to the Appellant, and is enjoyed by the Respondent contrary to law and against all norms of justice. He emphasised that an application is made under Section 52(2)(a) of the Partition Law not for the purpose of restoration of possession but only for delivery of possession, as there is adequate provision in Section 52A for any person whose possession is interfered with or who is dispossessed after the *corpus* was delivered to him, to regain his possession. He has stressed that these are distinct provisions intended to deal with entirely different situations.

Responding to these submissions, learned President's Counsel for the Respondent has pointed out that the Appellant who made his application under Section 52(2) of the Partition Law, should in all the circumstances of this case, have made his application in terms of Section 52A of the Law which specifically deals with a situation where there is interference with possession or dispossession. He has submitted that since the Appellant had been declared entitled to a half share of the *corpus* along with his two brothers who were declared entitled to the rest, and since he had thereafter purchased their rights and obtained certificates of sale as contemplated by Section 52A(1)(b) of the Partition Law, he was entitled to an order for restoration of possession in the same action, if there is any interference with his possession or he is dispossessed "within ten years of the date of the final decree of partition or the entering of the certificate of sale, as the case may be". He stressed that in terms of the aforesaid provision, he is bound to make his application for restoration of possession, "within twelve months of the date of such interference or dispossession, as the case may be", and should fail if his application is not made within the specified time limit. He argued, with great force, that the Appellant cannot overcome the time-bar by resorting to Section 52(2) when there is specific provision in regard to the matter in Section 52A of the Partition Law.

It is trite law that, as observed by M.D.H. Fernando J in *The Ceylon Brewery Limited v Jax Fernando, Proprietor, Maradana Wine Stores,* (2001) 1 SLR 270 at 271, "provisions which go to jurisdiction must be strictly complied with", and more so, when a time limit is laid down in any provision that confers jurisdiction on a court of law to entertain an application for any relief. There is no doubt that Section 52A of the Partition Law, which contains a time limit of twelve months for making an application for restoration of possession, is such a jurisdictional provision, and the aforesaid time limit is necessarily mandatory. However, that begs the question that arises for determination on this appeal, namely, whether the application of the Appellant can be characterised as an application seeking an order for possession, as it is contended on his behalf, or is an application for restoration of possession, as is contended by learned President's Counsel for the Respondent.

What was the nature of the application?

In answering the question as to the nature of the application dated 28th January 2005 made by the Appellant to the District Court, it is necessary to examine the context in which the question arises. It is the contention of the learned President's Counsel for the Appellant that the Appellant has never been in physical possession of the *corpus.* He has pointed out that the Respondent was put into occupation of the house situated in the *corpus* by the 1st and 2nd Defendants, on the basis of a monthly tenancy with effect from 1st January 1985, and that thereafter, as already noted, an Indenture of Lease bearing No.74 dated 17th December 1985 was executed by the said Defendants on 17th December 1984 for a period of 10 years, even after the expiry of which period, the Respondent has continued to occupy the said house. Learned President's Counsel for the Respondent has insisted that the Respondent was the tenant of all the co-owners of the corpus, and that this was decided by the District Court in this case, and the said decision was affirmed by the Court of Appeal in *Virasinghe v Virasinghe* [2002] 1 SLR 1 (CA), which appears to have taken the view that the Respondent was the tenant of all the co-owners by reason of their acquiescence in the tenancy.

However, it is noteworthy that the decisions of the District Court as well as the Court of Appeal in regard to this question were set aside on appeal by this Court in *Virasinghe v Virasinghe* [2002] 1 SLR 264 (SC). As S.N.Silva, CJ., took pains to explain at page 270 of his erudite judgment:

> "Thus, it is seen that the Partition Law makes the same distinction as section 2 of the Prevention of Frauds Ordinance of 1840 as amended, in respect of the type of lease that would not be considered as an

encumbrance affecting land. In both laws, whilst a lease for a specified period exceeding one month is considered an encumbrance affecting land and should be notarially executed, a lease at will or for a period not exceeding one month (same language used in both laws) is not considered an encumbrance affecting land. Therefore, it is not permissible to enter a finding, in a judgment, interlocutory decree or final decree, in a partition action with regard to any claim of a monthly tenant in respect of the land that is sought to be partitioned."

Having said that, his Lordship went on to observe at page 272 of his judgment that where any applicant for possession, who "does not recognize the person in occupation as a tenant, moves for an order for the delivery of possession in terms of Section 52(1), any person in occupation who claims to be a tenant entitled to continue such occupation of the house as tenant under the applicant as landlord, could resist the Fiscal and seek hearing from Court to establish his right in terms of Section 52(2)(b)". Hence, for the disposal of the present appeal it is not necessary to deal with the question, as to whether the Respondent is entitled to continue to occupy the said house as the tenant of the Appellant, as that question can be looked into in the course of the inquiry in the District Court under Section 52(2)(b) of the Partition Law.

There is no doubt that the Appellant is, in all the circumstances of this case, entitled to seek an order for delivery of possession in terms of Section 52 of the Partition Law. In considering the present application of the Appellant dated 28th January 2005, it is necessary to examine not only paragraph 5 thereof, as suggested by learned President's Counsel for the Respondent himself, but also its the preceding paragraphs of the said application, which narrate the history of the litigation in a concise manner. It will be apparent from these paragraphs, that after the final decree was entered in 2003, pursuant to an application made by the Appellant in terms of Section 52(1) of the Partition Law for an order for delivery of possession, the Fiscal proceeded to the *corpus* on 17th January 2004 to execute the writ of execution issued by the District Court on 12th January 2004. Upon the Respondent resisting the Fiscal on that date, after making a futile attempt to obtain possession of the *corpus* in terms of Section 325 of the Civil Procedure Code, the application dated 28th January 2005 was made seeking delivery of possession in terms of Section 52(2)(b) of the Partition Law. In paragraph 5 of the said application, the Appellant states as follows:-

> "එකී භුක්තිය භාරදීමේ ආඥාව ක්‍රියාත්මක කිරීමට 2004.01.17 වන දින කොළඹ දිසා අධිකරණයේ පිස්කල් නිළධාරී තැන නඩුවට අදාළ ස්ථානයට ගිය නමුත් ඉහත නම් සඳහන් හතරවෙනි විත්තිකාර-වගඋත්තරකරු පිස්කල් නිළධාරී තැන විසින් පැමිණිලිකාර-ඉල්ලුම්කරුට හෝ ඔහුගේ බලයලත් නියෝජිතයෙකුට භුක්තිය භාරදීම සම්බන්ධයෙන් විරෝධතාවය දක්වමින් එසේ භුක්තිය භාර දීමට ප්‍රතිවිරෝධය ප්‍රකාශ කරමින් ඊට අවස්ථාවක් ලබානොදි එය අවහිර කරන ලදි. ඒ අනුව එකී පිස්කල් නිළධාරීට නඩුවට අදාළ ස්ථානයේ භුක්තිය පැමිණිලිකාර-ඉල්ලුම්කරුට හෝ ඔහුගේ බලයලත් නියෝජිතයෙකුට භාරදීමට නුපුලුවන් විය. මෙම කරුණු එකී පිස්කල් තැන ගරු අධිකරණයට වාර්තාවක් මගින් ඉදිරිපත් කර ඇති අතර, එකී වාර්තාව මෙම පෙත්සමේ අත්‍යවශ්‍ය කොටසක් බැවින් එම වාර්තාව මෙහි අවශ්‍ය කොටසක් ලෙස ඉදිරිපත් කරයි."

It is manifest that this application has been made after approximately one year and ten days from the date of the resistance of the Fiscal. It is also clear that while the earlier application, which ended up in the Fiscal being resisted, was made under Section 52(1) of the Partition Law, the subsequent application in the context of which this appeal arises, was made in terms of Section 52(2)(a) of the Partition Law. In both these applications, the Appellant has moved for an order for delivery of possession to him, as the sole owner of the *corpus*. Neither provision under which the Appellant has sought an order for delivery of possession seek to impose any limitation of time for making the application, and in insisting that the application should have been made

within a twelve month time frame, the Respondent is relying on the provisions of Section 52A of the Partition Law, which the President's Counsel for the Appellant has submitted, caters for an entirely different situation.

Section 52A was introduced to the Partition Law by way of an amendment in 1997 to give relief to a person who having been in possession of the *corpus* of a partition action or part thereof, was declared entitled to the same by a final decree entered under the Partition Law, or who after acquiring possession of the corpus by virtue of any order for delivery of possession made in terms of Section 52 of the said Law, has been deprived of such possession or where such possession has been interfered with. In such a situation, the District Court is empowered by Section 52A(3) of the Partition Law to hold an inquiry and make order for delivery of possession (order for restoration of possession) or otherwise as the justice of the case may require.

The present appeal arises in an entirely different situation, as the Appellant claims that he has never enjoyed possession of the *corpus* in whole or in part. It is manifest that the Appellant has not invoked the provisions of Section 52A of the Partition Law, nor is he entitled to do so as that provision only caters to cases where a person who alleges that he has been in possession of the *corpus* or part thereof complains of an interference with his possession or of dispossession. All that the Appellant has sought to do through his application dated 28th January 2005, is to seek an order for delivery of possession in terms of Section 52(2) of the Partition Law, on the basis that he has never been in physical possession of the corpus of the partition action, or part thereof. In my view, just as much as the *rei vindicatio* action and the possessory remedy are the twin remedies provided by our common law for the protection of ownership (*dominium*) and possession (*possessio*) which are two different and distinct though complementary legal concepts with distinct elements and requirements, the partition decree with its Section 52 procedure for acquiring possession and the order for restoration of possession embodied in Section 52A of the Partition Law are the twin remedies provided by the Partition Law for the ending of co-ownership with the acquisition of sole ownership and the protection of possession. Just as much as the common law identifies distinct elements and requisites for the two common law remedies, the Partition Law too identifies distinct elements and requisites for the two primary remedies provided by the said Law, and the twelve months time frame is applicable to the latter of these two remedies.

In these circumstances, I am not at all impressed by the submission of the learned President's Counsel for the Respondent that the Appellant ought to have made his application for an "order for restoration of possession" in terms of Section 52A(3) of the Partition Law, nor am I persuaded by his submission that the words "whose possession has been, or is interfered with or who has been dispossessed" as used in Section 52A(1) of the Law apply "to both situations, where a person is dispossessed after the decree or where a person is unable to get possession due to the fact that the owner's possession has been interfered with on a continuing basis, even prior to the decree."

Conclusions

Since unlike Section 52A of the Partition Law, Section 52(2) does not contain any time limit for its invocation, I am of the opinion that the appeal should be allowed, and that for the foregoing reasons, both substantive questions on which leave to appeal has been granted should be answered in favour of the Appellant. I hold that the preliminary objection (a) raised before the District Court was rightly overruled by the order of that court dated 20th August 2010. I also hold that the Civil Appellate High Court erred in its decision dated 26th August 2011 in setting aside the said order of the District Court.

I accordingly make order setting aside the judgment of the High Court of the Provinces of the Western Province holden in Colombo dated 26th August 2011 and affirming the order of the District Court of Colombo dated 20th August 2010. Since in my view the prosecution of the application made by the Appellant for orders for delivery of possession have been unduly delayed by the raising of preliminary objection (a), which delay has accrued to the benefit of the Respondent, I hold that he should pay to the Appellant a sum of Rs. 100,000 by way of costs of this appeal.

JUDGE OF THE SUPREME COURT

NIMAL GAMINI AMARATUNGA J

JUDGE OF THE SUPREME COURT

SATHYA HETTIGE PC J

JUDGE OF THE SUPREME COURT