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

A.M. Malani Chandralatha,
No. 311,
Parakandeniya,
Imbulgoda.
2B Defendant-Petitioner-Appellant-Appellant

SC/APPEAL/99/2016
WP/HCCA/GAM/LA/13/2014
DC GAMPAHA 16859/P

Vs.

Ampe Mohottige Podihamine,
No. 20/1, Katuwalamulla,
Ganemulla.
Substituted Plaintiff-Respondent-Respondent-Respondent

1B. A.M.A. Surangi Nilmini Dissanayake,
Wakkunuwela,
Nakkawatte.
4A. Prabachandra Weliwita,
5. Prabachandra Weliwita,
6. Nandana Weliwita,
All of Kendaliyaddapaluwa, Ganemulla.
Defendant-Respondent-Respondent-Respondents

Before: Hon. Justice S. Thurairaja, P.C.
Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando

Counsel: Rasika Dissanayaka with Sandun Senadhipathi for the 2B Defendant-Petitioner-Appellant-Appellant.

S.A.D.S. Suraweera for the Substituted Plaintiff-Respondent-Respondent-Respondent.

Sudarshani Cooray for the 6th Defendant-Respondent-Respondent-Respondent.

Argued on: 29.10.2024

Written submissions:

By the 2B Defendant-Petitioner-Appellant-Appellant on 24.08.2016.

By the Substituted Plaintiff-Respondent-Respondent-Respondent on 23.11.2016 and 24.02.2025.

By the 6th Defendant-Respondent-Respondent-Respondent on 15.11.2016 and 12.11.2024.

Decided on: 14.05.2025

Samayawardhena, J.

This is a partition action instituted in the District Court of Gampaha on 23.05.1972—more than fifty years ago. After trial, the judgment dated 29.05.1992 was delivered on 01.06.1992, wherein it was declared that the plaintiff was entitled to an undivided 2/8 share, the 1st defendant to a 1/8 share, and the 2nd defendant to a 5/8 share of the corpus, which was identified as Lot 1 in the Preliminary Plan. The appeal preferred by the 2nd defendant against the said judgment was dismissed by the Court of Appeal

by judgment dated 12.12.1995. That judgment was read in the District Court on 01.03.1996. However, no steps were taken by the plaintiff or any other defendant for 15 years to prosecute the action to finality.

On 26.04.2011, the plaintiff revoked his previous proxy and filed a new proxy. Thereafter, as recorded in Journal Entry No. 99 dated 26.06.2012, the Attorney-at-Law for the substituted plaintiff tendered the Interlocutory Decree and moved that a commission be issued to a surveyor for the preparation of the Final Partition Plan. The District Judge accordingly signed the Interlocutory Decree, directed its registration, and issued the commission. The Registrar of Lands duly registered the Interlocutory Decree and reported it to Court. However, when the surveyor visited the land on 24.10.2012 to carry out the final survey, the 2(b) defendant objected to it. The surveyor reported the obstruction to Court, and contempt proceedings were instituted against the 2(b) defendant.

In the meantime, the Attorney-at-Law for the 2(b) defendant filed a petition and affidavit dated 12.03.2013, invoking the provisions of section 70 of the Partition Law, No. 21 of 1977 read with section 839 of the Civil Procedure Code, seeking to set aside the orders made by Court on 26.12.2012, on the ground that they were made *per incuriam*.

The District Court, by its order dated 10.02.2014, refused the said application, and the High Court of Civil Appeal of Gampaha, by its judgment dated 16.07.2015, affirmed the order of the District Court. This appeal with leave obtained is against the judgment of the High Court. Leave to appeal was granted by this Court primarily on the following two questions of law:

(a) *Did the District Court and the High Court err in law by failing to consider the provisions of section 70(2) of the Partition Law, No. 21 of 1977, in making the impugned orders?*

(b) Are the impugned orders of the District Court and the High Court contrary to section 337 of the Civil Procedure Code, read with section 79 of the Partition Law, No. 21 of 1977?

Section 70 of the Partition Law, which deals with the subject of non-prosecution of partition actions, reads as follows:

> *70(1) 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.*
>
> *(2) 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.*
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> *(3) Where the court dismisses an action under this section, it shall cause a copy of the order of dismissal of the action to be registered at the Land Registry in the folio in which the lis pendens in the action was registered, or the continuation thereof.*

A dismissal of a partition action for want of prosecution is a rare occurrence. For practical purposes, all parties in a partition action are plaintiffs. A party who appears as a defendant today may take steps as a plaintiff tomorrow,

to prosecute the action to finality. If that party fails to do so with due diligence, the Court may permit any other defendant to continue the prosecution of the action. The judgment in a partition action is, in essence, the result of a collective effort by the plaintiff, the defendants, and the District Judge.

According to section 70(1) of the Partition Law, where the plaintiff fails to prosecute the action, the Court is under a duty to make every endeavour to compel the parties to bring the action to a conclusion by inquiring whether any of the defendants is willing to assume the role of the plaintiff and proceed with the case. Only if all such efforts fail, may the Court dismiss the action.

A District Judge presiding over a partition action should not wait for some lapse on the part of the plaintiff to dismiss the action and relieve himself of further responsibility. The intention of the legislature is clear from the language of the section itself, where the words "shall" and "may" are used purposefully within the section: *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.*

Although the 2(b) defendant heavily relies on section 70(2), the provisions of section 70(2) must be read subject to section 70(1), and not in isolation. Section 70(1) is not confined to the original plaintiff. It applies to any party—whether plaintiff or defendant—who undertakes to prosecute the action. If such a party fails to take steps for a period of two years, dismissal of the action is not automatic. In the first place, an application must be made to Court by a party to the action or by any person claiming an interest in the land to be partitioned, by way of motion with notice to the other parties. Upon hearing the parties, the Court "*may dismiss*" the action only "*if it is satisfied that dismissal is justified in all the circumstances of the case*."

In the present case, the 2(b) defendant made such an application to dismiss the action after the substituted plaintiff had already taken steps to prosecute the action, pursuant to which the District Judge had made orders.

The application made by the 2(b) defendant under section 70 of the Partition Law read with section 839 of the Civil Procedure Code seeking dismissal of the action is misconceived in law.

The next question concerns the applicability of section 337 of the Civil Procedure Code. Section 337 reads as follows:

> *337. (1) No application (whether it be the first or a subsequent application) to execute a decree, not being a decree granting an injunction, shall be granted after the expiration of ten years from—*
>
> *(a) the date of the decree sought to be executed or of the decree, if any, on appeal affirming the same; or*
> *(b) where the decree or any subsequent order directs the payment of money or the delivery of property to be made on a specified date or at recurring periods, the date of the default in making the payment or delivering the property in respect of which the applicant seeks to execute decree.*
>
> *(2) Nothing in this section shall prevent the court from granting an application for execution of a decree after the expiration of the said term of ten years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within ten years immediately before the date of the application.*
>
> *(3) Subject to the provisions contained in subsection (2), a writ of execution, if unexecuted, shall remain in force for one year only from its issue, but—*

(a) such writ may at any time, before its expiration, be renewed by the judgment-creditor for one year from the date of such renewal and so on from time to time; or

(b) a fresh writ may at any time after the expiration of an earlier writ be issued,

till satisfaction of the decree is obtained.

The 2(b) defendant contends that, in terms of section 337(1) of the Civil Procedure Code, a decree cannot be executed after the expiration of a period of 10 years, but in the instant case, the District Judge ordered execution upon an application made after a delay of fifteen years.

In terms of section 337(1), no application to execute a decree shall be granted after the expiry of 10 years from the date of the decree sought to be executed or of the decree, if any, on appeal affirming the same. As I will explain below, irrespective of the date on which the decree is signed by the Judge, unless there has been an appeal against the judgment, the date of the judgment shall be regarded as the date of the decree for the purpose of execution. If an appeal has been preferred, the ten-year period shall be computed from the date of the appellate judgment.

Section 337(1) applies only to an executable decree. An Interlocutory Decree in a partition action is not an executable decree; it merely determines, *inter alia*, the undivided shares of the parties in the corpus. It is only the Final Decree of Partition that is executable. In the present case, the plaintiff never sought to execute the Interlocutory Decree.

The 2(b) defendant also finds fault with the entering the Interlocutory Decree 15 years after the judgment of the Court of Appeal. The entering of the Decree is a purely ministerial act, and the Interlocutory Decree once entered relates back to the date of the judgment (*Petisingho v. Ratnaweera* (1959) 62 NLR 572, *Ariyaratne v. Lapie* (1973) 76 NLR 221, *Dissanayake v.*

Elisinahamy [1978-79] 2 Sri LR 118, *Koralage v. Marikkar Mohomed* [1988] 2 Sri LR 299).

The Interlocutory Decree will not be rendered invalid on the ground that it was not entered and signed by the Judge on the same day the judgment was delivered. As was held in *Fernando v. The Syndicate Boat Company Limited* (1896) 2 NLR 206 "*The decree in a case is merely the formal expression of the results arrived at by the judgment, and it is not necessary that it should be drawn up and signed by the Judge who pronounced the judgment. That may be done by any Judge of the Court.*" *Vide* also *Sidoris Silva v. Palaniappa Chetty* (1902) 5 NLR 289.

In terms of section 48, subject to the conditions stated therein, both the Interlocutory Decree entered under section 26 and the Final Decree of Partition entered under section 36 are final and conclusive. In other words, the Interlocutory Decree, although non-executable, does not become invalid if the action does not proceed to finality.

The argument advanced on behalf of the 2(b) defendant regarding the applicability of section 337 of the Civil Procedure Code is devoid of merit.

Before I part with this judgment, let me add this for completeness. I had occasion to consider the question of execution of Final Decree in a partition action in *Bandusena v. Weerasekera and Others* (SC/APPEAL/172/2017, SC Minutes of 30.01.2024), where, after a detailed analysis of the law, I concluded (with the concurrence of the other two Justices) that, "*in terms of section 52 of the Partition Law read with section 337 of the Civil Procedure Code, an application for delivery of possession in a partition action must be made within ten years of the date of the final decree of partition, the issuance of the certificate of sale, or the decree on appeal affirming the same.*"

I answer the above two questions of law in the negative and the appeal is dismissed with costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.
I agree.

Judge of the Supreme Court