

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

In the matter of an application for *Restitutio-In-Integrum* and Revision under and in terms of Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka

Court of Appeal

Case No: RII/0001/2024

DC Avissawella

Case No: 20502/P

Disanayake Arachchilage Gnanawathie,
No. 11 and 13,
Warakapola Road,
Galapitamada

Plaintiff

Vs

1. Tennakon Mudiyanseelage Dingiri
Menike alias Seelawathie (deceased)

1A. Senanayake Mudiyanseelage Thusitha
Upul Kumara Senanayake
(Substituted)
No. 25/1, Wanatha Road, Pamunuwa
Maharagama.

And Others

Defendants

AND NOW BETWEEN

Senanayake Mudiyanseelage Thusitha
Upul Kumara Senanayake
No. 25/1, Wanatha Road, Pamunuwa
Maharagama.

Substituted 1A Defendant-Petitioner

Vs.

Disanayake Arachchilage Gnanawathie
(Deceased)
No. 11 and 13
Warakapola Road,
Galapitamada

Plaintiff-Respondent

AND OTHERS

Before : R. Gurusinghe J
&
M.C.B.S. Morais J

Counsel : Widura Ranawaka with Menaka Warnapura
for the substituted 1A Defendant-Petitioner

Supported on : 23-01-2025

Decided on : 04-03-2025

R. Gurusinghe

The original plaintiff instituted Partition Action bearing No. 20502/P in the District Court of Avissawella in 1997, seeking to partition a land described in the schedule to the plaint. After trial, the Learned Additional District Judge of Avissawella delivered the judgment, allowing the partition of the land as per the shares given in the judgment. There was no appeal against that judgment.

The case has been called for several days to submit a commission for partition. On 12-02-2021, the plaintiff stated that he did not wish to proceed with the action. Thereafter, 5A defendant undertook to prosecute the action. As the 5A defendant failed to submit a commission for partition, the Learned Additional District Judge dismissed the action.

1A defendant-petitioner filed this application before this court seeking to set aside the dismissal of the action. On behalf of 1A defendant-petitioner, it was submitted that when 5A defendant failed to take necessary steps, other parties should have been allowed to proceed with the action.

Section 70A (1) of the Partition Law No. 21 of 1997, as amended, is as follows:

- (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.

In terms of the provisions of section 70 of the Partition Law, before dismissing a partition action for non-prosecution, the court has to compel the parties to bring the action to a termination. In this case, the Learned Additional District Judge dismissed the action when the 5A defendant who had undertaken to prosecute the action had not taken steps to tender a commission for partition. The Learned Additional District Judge has not inquired from the other parties whether any party would like to prosecute the action. This is an action for which judgment has already been delivered, and there was no appeal against it. As such, the judgment stands. 1A defendant-petitioner is willing to prosecute the action.

In the case of Peiris and Others v Chandrasena and Others 1999 3 SLR 153 Justice Gunawardana held that;

S. 70 states that no partition action shall abate by reason of non-prosecution, and it imposes a duty on the Court to 'compel the parties' to bring the action to an end - which duty the Court in this case has failed to fulfil. Where a delay in an action is the act or omission of the Court, no party shall suffer for it.

It was further stated as follows;

70 of the Partition Act, which holds, the solution to this problem reads thus: "no partition action shall abate by reason of non-prosecution thereof, but, if a partition action is not prosecuted with reasonable diligence after the Court has endeavoured to compel parties to bring the

action to a termination, the Court may dismiss the action: provided, however, that in a case where the plaintiff fails or neglects to prosecute a partition action, the Court may, by order permit any defendant to prosecute the 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". (156)

One must not forget the fact, as the Court had (forgotten) that section 70 makes it imperative or mandatory, before the action is dismissed, that (to quote the very words of the section): the "Court had endeavoured to compel the parties to bring the action to a termination". One could say without fear of contradiction that there would have been, at least, some, amongst the 60 odd parties, who would have been willing to go on with the case had they been "compelled" more so as there was, in fact, very little left to be done, as the interlocutory decree itself had been entered on 12.4.1965, ie nearly seven years prior to the date that the plaintiff had been noticed to follow up. Even after the lapse of nearly 14 years, after the notice was served on the plaintiff to which there had been no response, the Court had been content to let the case idle till the 4th defendant-respondent made the application, on his own, that he be permitted to continue the action. Thus, it will be seen that if the action had stagnated, without being prosecuted, the District Court had only to thank itself for that and I cannot bring myself to believe that parties should be penalized or inconvenienced by making an order of dismissal. I think it is superlatively right to say that the Latin Maxim: Actus curiae neminem gravabit - should come to the rescue of this case, rather of the parties, which maxim means that an act of the Court shall prejudice no man. Where a delay in an action is the act or the omission of the Court, no party shall suffer for it. (157)

In terms of the provisions of section 70 of the Partition Law, the court should have endeavoured to compel the parties to bring the action to a termination. According to the journal entry, the Learned Additional District Judge has not followed the procedures contemplated in section 70.

In the circumstances, we set aside the dismissal of the action. We direct the present District Judge to allow the 1A defendant petitioner or any other defendant, who is willing to prosecute the action from the point immediately before it was dismissed.

Judge of the Court of Appeal.

M.C.B.S. Morais J.
I agree.

Judge of the Court of Appeal.