

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

Lakshmi Mangalika Sooriyarachchi
Substituted Plaintiff

CA Restitution 927/2008

D.C. Matara P/16631

Vs

1. Chandrasiri Ediraweera
2. Ranjan Ediraweera

Defendants

AND NOW BETWEEN

Mendis Silva Ediraweera
Petitioner

Vs

Lakshmi Mangalika Sooriyarachchi
Substituted Plaintiff – Respondent

Chandrasiri Ediraweera

Ranjan Ediraweera

1st and 2nd Defendants –
Respondents.

BEFORE : Deepali Wijesundera J.
M.M.A. Gaffoor J.

COUNSEL Lasitha Chaminda for the
Petitioner
H. Withanachchi for the
Defendants - Respondents.

ARGUED ON : 14th July, 2015

DECIDED ON : 06th May, 2016

Deepali Wijesundera J.

The plaintiff respondent instituted an action in the District Court to partition a land morefully described in the schedule to the plaint and a preliminary survey had been done. Court had issued notice on the claimants before the surveyor. The plaint had been amended thereafter with permission of court and lis pendens registered again in keeping with the land surveyed. After notice a party was added as the second defendant. The case was taken up for trial and the plaintiff's evidence and the documents marked have gone uncontested. The learned District Judge had delivered judgment and Interlocutory decree had been entered, and a commission was issued for the final scheme of

partition. The final plan was prepared and accordingly Final Decree was entered based on plan no. 1323. The parties have moved for writ of possession to divide the land. The writ was executed. The petitioner claims that lots 8 and 10 of final plan no. 2900 were allocated to him in another District Court partition action.

The petitioner had first filed a revision application in the Civil Appellate High Court in Matara to set aside the Final Decree but has later withdrawn the same. The instant application for Restitution-in-Intergrum was filed after that.

The petitioner's counsel submitted that the learned District Judge erred in law when he failed to examine the title deeds marked and the extent of the land surveyed which was larger in extent. The petitioner stated that the plaintiff respondent fraudulently suppressed title deeds and the District Judge failed to examine the deeds marked and to find that the corpus was larger than what was shown in the deeds.

The petitioner submitted that the revisionary jurisdiction and the jurisdiction on restitution conferred on the Appellate Court is discretionary and should be exercised in proper circumstances. The

petitioner stated that his rights to lots 8 and 10 in plan 2900 has been violated by the plaintiff respondent's and the first defendant respondent's collusive actions. Citing the judgment in **Singho and another vs Suppaiah and others 2007 (1) SLR 370** stated that *"notwithstanding the relief claimed by way of Restitution in Intergrum the relief by way of revision does lie to the petitioner"*.

The instant application is not a Revision application.

The respondents learned counsel submitted that the instant application is misconceived in law and liable to be dismissed. He stated that the petitioner's remedy if any would have been under section 49 of the Partition Law.

The respondents further stated that the petitioner by making an application for Revision and then by withdrawing it later had forfeited his rights to claim relief. The respondents also said that the petitioner is guilty of laches and is not entitled to seek remedies which are discretionary.

The respondents citing the judgments in **Perera vs Wijewickreme 15 NLR 411** and **Sri Lanka Insurance Corporation Ltd**

vs Shanmugam 1995 1 SLR 55 argued that it is a basic requirement that the person who seeks restitution should have been a party to the legal proceedings.

In the instant case the preliminary survey was done in 1995 and the final survey in 2000 and the petitioner who claimed two lots in the final plan pleads ignorance of both surveys. The petitioner stated that when the decree was executed in 2008 he came to know about the partition decree.

The petitioner who claims lots 8 and 10 in plan 2900 should have been aware of it if not both one of the surveys and should have taken steps to show that his lands were erroneously included in the corpus but without taking steps in the District Court or the High Court they have moved for Restitution in the instant application. The petitioner failed to disclose fraud or collusion in keeping with section 48 of the Partition Act. A final decree can only be set aside if fraud or collusion is proved.

The petitioner has also failed to explain the delay in filing the instant application. A party who has been sleeping over his rights does not get the privilege to invoke the discretionary jurisdiction of this court.

Since the petitioner is not entitled to the remedy by way of Restitution, the appropriate remedy would have been to act under section 49 of the Partition Act. In Menchinahamy vs Muniweera the Supreme Court has decided that Restitution in Intergrum whould not be available to a party if that party had another remedy available to him.

For the afore stated reasons I decide to refuse the application of the petitioner with costs fixed at Rs. 25,000/=.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor J.

I agree

JUDGE OF THE COURT OF APPEAL