

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

H.A. Udaya Kumar,
No. 48, Galle Road,
Keselwatta,
Panadura.
Petitioner

CASE NO: CA/375/2012/RI

DC PANADURA CASE NO: 2163/P

Vs.

Kusuma Wickrema Surendra
alias Kusumawathi Wickrema
Surendra (Deceased),
Uswatta,
Nagoda,
Kalutara.

Plaintiff-Respondent

Modera Acharige Nishanthi Inoka
Dharmadasa
And 3 Others

Substituted Plaintiff-Respondents

Modara Acharige Don Perly,
No. 35, Sri Jina Mawatha,
Keselwatta,
Panadura.

Defendant-Respondent

Before: Mahinda Samayawardhena, J.
Counsel: W. Dayaratne, P.C., with R. Jayawardena for
the Petitioner.
H. Withanachchi for the Plaintiff-Respondent.
Decided on: 23.09.2019

Mahinda Samayawardhena, J.

The Petitioner filed this “*application for restitutio in integrum under Article 138 of the Constitution*” in 2002 seeking to set aside the Judgment and the Interlocutory Decree entered in the Partition Case No. 2163/P of the District Court of Panadura and to “*make the Petitioner a party to the case and allow him to file his Statement of Claim and to proceed with the trial thereafter*”. Upon the application being supported *ex parte* for Notice and Stay Order, a previous Bench of this Court has allowed both, and the Stay Order is in operation to date.

This application cannot be maintained on two grounds.

Firstly, it is settled law that an application for *restitutio in integrum* can only be filed by a party to a case¹, and a Partition Case is not an exception.²

It was held in *Sri Lanka Insurance Corporation Ltd v. Shanmugam*³ that:

¹ For example: *Perera v. Wijewickreme* (1912) 15 NLR 411, *Menchinahamy v. Muniweera* (1950) 52 NLR 409, *Fathima v. Mohideen* [1998] 3 Sri LR 294 at 300, *Velun Singho v. Suppiah* [2007] 1 Sri LR 370

² *Dissanayake v. Elisinahamy* [1978/79] 2 Sri LR 118, *Ranasinghe v. Gunasekera* [2006] 2 Sri LR 393

³ [1995] 1 Sri LR 55 at 59

The power of restitution differs from revisionary power of this court in that the latter is exercised where the legality or propriety of any order or proceedings of a lower court is questioned. Restitution reinstates a party to his original legal condition which he has been deprived of by the operation of law. Thus it follows, the remedy can be availed of only by one who is actually a party to the legal proceeding in respect of which restitution is desired.

It is clear from the reliefs prayed for by the Petitioner himself which I quoted above that he was not a party to the case.

According to section 69(1) of the Partition Law, No. 21 of 1977, as amended, the District Court can add parties only until the Judgment is delivered.⁴

However, in terms of section 48(3) of the Partition Law, the Court of Appeal can add parties even after the Interlocutory or Final Decree being entered by way of revision to avert miscarriage of justice when it is found that proceedings were tainted by fundamental vice.⁵

Addition of a new party cannot be done by way of an application for *restitutio in integrum*. It has to be upon an application for revision. This is an application for *restitutio in integrum* and not revision.

Secondly, according to section 66 of the Partition Law, any voluntary alienation of the land to be partitioned after the *lis pendens* is duly registered is void.

⁴ Gnanapandithen v. Balanayagam [1998] 1 Sri LR 391 at 394

⁵ Somawathie v. Madawala [1983] 2 Sri LR 15

However, it is not obnoxious to section 66, if parties transfer the interests which they would acquire upon the conclusion of the Partition Case.⁶

But those persons who acquire such rights pending partition after *lis pendens* is registered need not be made parties to the case.⁷

The Petitioner in this case has not purchased interests from the parties to the case, which they would acquire upon the conclusion of the Partition Case.

Assuming he has, the *lis pendens* in this Partition Case has been registered on 29.03.2007⁸, and the Petitioner has acquired rights by Deed No. 216 executed on 08.04.2007 and registered on 17.04.2007⁹. That means, the Petitioner has acquired rights by way of a Deed after the registration of the *lis pendens*, which is not valid in the eyes of the Partition Law.

Petitioner's application is clearly misconceived in law. I dismiss the application with costs.

Judge of the Court of Appeal

⁶ Sirisoma v. Sarnelis Appuhamy (1950) 51 NLR 337, Jayathilleke v. Somadasa (1967) 70 NLR 25

⁷ Sirinatha v Sirisena [1998] 3 Sri LR 19, Abeyratne v. Rosalin [2001] 3 Sri LR 308

⁸ Vide page 103 of X12 tendered with the Petition, which is a copy of the DC Case Record.

⁹ Vide X7.