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

CASE NO: CA/RI/20/2017

DC MATHUGAMA CASE NO: 4513/P

1. Kannangaraarachchige Kumudini Sandya,
   Arawa Road,
   Palligoda South,
   Mathugama.
2. Kekulandala Liyanage Don Siripala,
   No. 1/186,
   Aluthgama Road,
   Mathugama.
3. Amugoda Kankanamge Kusumawathie,
   No. 12/186,
   Aluthgama Road,
   Mathugama.
4. Sapuarachchige Rathnapala,
5. Sapuarachchige Piyasiri Hemachandra,
   Both of No. 27/186,
   Aluthgama Road,
   Palligoda South,
   Mathugama.

   Petitioners

Vs.

1A. Sujatha Nandaseeli Vithana,
Captain Jeewan Vithana
Mawatha,
Aluthgama Road,
Mathugama.

2. Dona Seemanralalage
Dhanawathi Gunawardena,
Gamini Mawatha,
Mathugama.

Plaintiff-Respondents

And Other Defendant-Respondents

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Cooray for the Petitioners.
Rohana Deshapriya for the 2nd Plaintiff-Respondent.
J.M. Wijebandara for the 6th, 11th and 12th Defendant-Respondents.
Arjuna Perera for the 7th, 9th and 10th Defendant-Respondents.

Argued on: 30.09.2019

Decided on: 24.10.2019

Mahinda Samayawardhena, J.

The two plaintiffs have filed this action (No. 4513/P) by plaint dated 26.06.2006 in the District Court of Matugama to partition the land in extent of 2 Roods and 30 Perches depicted in Plan No. 112821 of the Surveyor General among the plaintiffs and the 1st-7th defendants. At the uncontested trial, only the 2nd plaintiff has given evidence and marked the deeds. After trial the learned District Judge has delivered the Judgment dated 19.03.2014 partitioning the land among the two plaintiffs and the 1st-7th and 9th-12th defendants. The Interlocutory Decree has thereafter been entered, and commission has been issued to prepare the final scheme of partition. Thereafter the five petitioners to this application who were not parties to the main case have made applications to the District Court under section 839 of the Civil Procedure Code seeking to set aside the Judgment and the Interlocutory Decree on the basis that parts of their lands have also been included into the Preliminary Plan, which they became aware for the first time when the surveyor came to the land for final survey. These applications have rightly been rejected by the learned District Judge by order dated 10.11.2016, and thereafter the leave to appeal application filed against that order in the Provincial High Court of Civil Appeal of Kalutara has correctly been withdrawn by the petitioners to file this application for revision and *restitutio in integrum*. In the meantime, the proposed Final Plan has been prepared and several parties including the 2nd plaintiff who was the sole witness at the trial have filed objections to the proposed scheme of partition.

At the argument before this Court, the learned counsel for the 6th, 11th and 12th defendants took up four preliminary objections to the maintainability of this application. As the learned counsel was very keen on having a ruling on them prior to considering the merits of the petitioners' application, I will first deal with them. They are as follows:

1. There is no averment in the body of the petition or in the prayer to the petition seeking restitution.

2. The petitioners cannot be added as parties as prayed for in view of section 69 of the Partition Law.

3. The petitioners are guilty for lashes.

4. As the petitioners are not parties to the main case, they cannot seek restitution.

It is convenient to deal with the 1st and the 4th objections together. Those two objections are based on the premise that this is a pure *restitutio in integrum* application. I cannot possibly understand, by reading the petition, on what basis the learned counsel states so, when nowhere in the petition has it been stated that this is a pure *restitutio in integrum* application. In the legend of the petition, which is part of the caption, it is stated that: "*In the matter of an application for Revision or restitutio in integrum in terms of Article 138 and 145 of the Constitution against the Judgment dated 23.04.2014 and Interlocutory Decree dated 24.09.2014*." In paragraphs 10 and 11 of the petition also the petitioners seek to set aside the

Decree by invoking the jurisdiction of this Court by way of revision or *restitutio in integrum*.

It is settled law that an application for *restitutio in integrum* can only be filed by a party to a case[1], and a Partition Case is not an exception.[2]

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

> *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.*

When the petitioners expressly state that this is an application for revision or *restitutio in integrum*, how can this be dismissed *in limine* on the basis that this is a pure *restitutio in integrum* application?

The learned counsel was heard to say that the application made to the Provincial High Court of Civil Appeal was withdrawn to file a *restitutio in integrum* application before this Court, for

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[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

otherwise, the petitioners could have field a revision application in the Provincial High Court of Civil Appeal. I cannot agree. The application filed before the Provincial High Court of Civil Appeal was a Leave to Appeal Application against the order of the District Court refusing the application of the petitioners to intervene after the Interlocutory Decree was entered. The District Judge's order is correct as he had no jurisdiction to do it. It is significant to note that the petitioners in this application do not seek to canvass that order. They seek to set aside the Judgment and the Interlocutory Decree entered by the District Court on different grounds, which I will advert to later.

As far as revisionary jurisdiction is concerned, both the Court of Appeal and the Provincial High Court of Civil Appeal have concurrent or parallel jurisdiction.[4] The petitioners can come either before this Court or before the Provincial High Court of Civil Appeal by way of revision.

However, in terms of section 5D(1) of the High Court of the Provinces (Special Provisions) Act, No.19 of 1990, as amended by High Court of the Provinces (Special Provinces) (Amendment) Act No. 54 of 2006, once a revision application which could have been filed before the Provincial High Court of Civil Appeal is filed before this Court, the President of the Court of Appeal can transfer such application to the appropriate Provincial High Court of Civil Appeal for hearing and determination of the matter. Section 5D(1) reads as follows:

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[4] Vide my Judgment in Munasinghe v. Ariyawansa, CA/RI/15/2018, decided on 02.11.2018.

> *Where any appeal or application in respect of which the jurisdiction is granted to a High Court established by Article 154P of the Constitution by section 5A of this Act is filed in the Court of Appeal, such appeal or application, as the case may be, may be transferred for hearing and determination to an appropriate High Court as may be determined by the President of the Court of Appeal and upon such reference, the said High Court shall hear and determine such appeal or the application, as the case may be, as if such appeal or application was directly made to such High Court.*

Let me now advert to the 2nd preliminary objection. The learned counsel vehemently submits that in view of section 69 of the Partition Law, No. 21 of 1977, as amended, which states that "*The court may at anytime before judgment is delivered in a partition action add as a party to the action, on such terms as to payment or prepayment of costs as the court may order*", there is a positive legal bar in adding the parties after the Judgment is delivered in a partition action whether it be by the District Court or by the Court of Appeal.

According to the learned counsel, the Court of Appeal can set aside the Judgement and the Interlocutory Decree, but has no jurisdiction to add parties and allow them to file statements of claim and order retrial, in part or in full. If that argument is accepted, after setting aside the Judgment and the Interlocutory Decree by this Court, the case is left in limbo. I have no hesitation in rejecting that argument in toto.

The bar forbidding addition of parties after the Judgement applies to the District Court and not to the Court of Appeal. In terms of section 48(3), the powers of the Court of Appeal to set aside the Interlocutory and Final Decrees by way of revision and/or *restitutio in integrum* to avert miscarriage of justice when proceedings were tainted with fundamental vice have been expressly preserved.

As the learned counsel was both serious and confident in that submission, let me advert to only two cases to dispel any lingering doubts.

In *Gnanapandithen v. Balanayagam*[5], G.P.S. De Silva C.J. concluded thus:

> *I am accordingly of the view that the Court of Appeal was in serious error when it declined to exercise its revisionary powers having regard to the very special and exceptional circumstances of this partition case. The appeal is accordingly allowed and the judgment of the Court of Appeal is set aside. The judgment dated 17.10.89 of the District Court and the interlocutory decree are also set aside. The District Court is directed to add the petitioners-appellants as defendants to the partition action, to permit them to file a statement of claim, and participate at the trial. In all the circumstances, I make no order for costs.*

In *Maduluwawe Sobitha Thero v. Joslin*[6], the petitioner filed a revision application to set aside the Judgement, Interlocutory Decree and the Final Decree. Wimalachandra J. concluded:

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[5] [1998] 1 Sri LR 391 at 397-398

> *For these reasons, I am of the strong view that this is a fit case for this Court to intervene in the exercise of its revisionary powers to avert a miscarriage of justice. Accordingly, I set aside all the proceedings in the District Court up to the stage of the plaint and permit the petitioner to intervene in the partition action No. 389/00/P and to file a statement of claim. The petitioner is entitled to recover Rs. 10,500 as costs of this inquiry from the plaintiff-respondent.*

The learned counsel's last objection is that the petitioners are guilty of lashes. It is the position of the petitioners that they came to know about this case when the surveyor came to the land to prepare the final scheme of partition. Soon thereafter they went to the District Court to add them as parties, which was rejected by the District Court. Then they rushed to the Provincial High Court of Civil Appeal against that order by way of an Application for Leave to Appeal. Having realized that the District Judge's order refusing the application for want of jurisdiction is correct, they came before this Court by way of revision or *restitutio in integrum*. In my view, there is no delay. The delay is attributable to the several unsuccessful attempts of seeking relief from different Courts. Such delay shall be excused.

In *Biso Menika v. Cyril De Alwis*[7] Sharvananda J. (later C.J.) stated:

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[6] [2005] 3 Sri LR 25 at 32
[7] [1982] 1 Sri LR 368 at 380

> *The Court of Appeal has held that it cannot excuse the delay caused by the petitioner's appeal to the Committee of Inquiry set up by the present Minister in 1977. The question is, did the delay result from the petitioner pursuing a legal remedy, not a remedy which is extra legal. If the petitioner has been seeking relief elsewhere in a manner provided by the Law he cannot be guilty of culpable delay. Further the predisposition of parties to explore other lawful avenues which hold out reasonable expectation, of obtaining relief without incurring the expense of coming into Court cannot be overlooked or censored and any delay caused thereby cannot e characterized unjustifiable.*

In *Rathnayaka v. Sarath, Divisional Secretary, Thihagoda*[8], Wijayaratne J. stated:

> *It is pertinent to note that delay unexplained and undue in the circumstances of the case only can be considered in rejecting an application. The petitioner however has explained the delay occasioned by the unsuccessful application before the Provincial High Court Matara. In those circumstances the period during the of the proceedings before the Provincial High Court is neither undue delay nor is it unexplained. However it is for the court to consider whether the delay is unreasonable.*

For the aforesaid reasons, I overrule all the preliminary objections.

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[8] [2004] 3 Sri LR 95 at 99

Let me now consider the merits of the petitioners' application. As I have already stated, the petitioners' grievance is that, without their knowledge, parts of their lands have been surveyed and included into the Preliminary Plan of this case, and they became aware of it when the surveyor came to the land to prepare the proposed final scheme of partition. Their short complaint is that there is no proper identification of the corpus.

There cannot be any dispute that identification of the corpus is of paramount importance in a partition case. That is the first thing the District Judge shall do in a partition case. It is only after the identification of the corpus, the District Judge shall embark upon the arduous task of investigation of title of the corpus. In other words, if the corpus cannot be properly identified, investigation into the title does not arise.

In this case the plaintiffs filed the action to partition the land known as *Atambagahawatte Pitakattiya* in extent of 2 Roods and 30 Perches depicted in the Surveyor General's Plan No. 112821.[9]

The surveyor who prepared the Preliminary Plan has in his Report in answering the most important question of the Report as to whether the land surveyed is the land to be partitioned, states that he is unable to say so, as he could not identify the land by making a superimposition of the Surveyor General's Plan No. 112821 (which depicts the land to be partitioned), due to points of fixation being changed over the years.[10] According to the surveyor, the Plan No. 112821 of the Surveyor General, a copy of which is not found in the case record, has been prepared

[9] Vide page 83 of X.
[10] Vide pages 203-204 of X.

in or around 1870, that is, nearly 150 years ago. Then he has drawn the Preliminary Plan depicting 2 Roods and 29.83 Perches as shown by the parties present at the survey.

There is no dispute that there is another partition case (4063/P) pending in the same District Court to the adjoining land. The main reason given in the petition is that a portion of the corpus in 4063/P has been included into the Preliminary Plan in this case. According to the copy of the plaint in 4063/P,[11] the plaintiff in that case is the 1st petitioner to this application. That case has been filed on 24.02.2003 and this case (4513/P) on 26.06.2006.[12] The learned counsel for the 6th, 11th and 12th defendants submitted that, if that is correct, the petitioners could have shown to the surveyor the correct land in 4063/P, and therefore no prejudice has been caused to the petitioners thereby. By looking at Plan No.341[13] and Plan No. 1/2016[14], it appears to me that a part of the land which is the subject matter in 4063/P has been included into this case. That cannot be done. The Judgment in this case has been delivered before the other case as there was no contest.

According to Plan No. 1/2016, Lot Nos. 5 and 6 of the Surveyor General's Plan No. A699, have also been included into the corpus of this case. Those two Lots are shown in Plan 1/2016 as C and D. Lot C is claimed by a person known as D.S.D. Gunawardena who is not a petitioner to this application, and Lot

[11] Vide page 343-347 of X.
[12] Vide page 78 of X.
[13] Vide page 355 of X.
[14] Vide page 374 of X.

D is claimed by the 2nd petitioner to this application. Lot D is Lot 6 in Plan A699.

According to the title Deeds of the 2nd petitioner[15], the North of Lot D in Plan No. 1/2016 is the land depicted in Title Plan No.112821[16], which is the subject matter of the instant action. In other words, the plaintiffs filed this action to partition the land depicted in Plan No.112821.

It is noteworthy that the name of the land to be partitioned and the name of the land described in the schedules to the title Deeds of the 2nd petitioner is the same, which is *Atambagahawatte Pitakattiya*, but the land to be partitioned in this case (4513/P), which is the land described in Plan 112821, lies to the north of the 2nd petitioner's land.

Then it is clear that there is a serious question as to the identification of the corpus.

Hence I am of the view that the Judgment, and the Interlocutory Decree prepared in terms of the Judgment, insofar as the identification of the corpus is concerned, cannot be allowed to stand.

When intervention after the Interlocutory Decree is entered is allowed, there is no necessity in each and every case to order trial *de novo* as a matter of course and direct the plaintiff to prove his case all over again.[17] The Appellate Court shall identify the particular grievance of the aggrieved party who came

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[15] Vide pages 96-103 of Y.
[16] Vide in particular, schedules in pages 99 and 101 of Y.
[17] Vide Alasuppillai v. Yavetpillai (1949) 39 CLW 107

before it and give specific directions to the District Judge bearing in mind that order for trial *de novo* would cause serious inconvenience to the parties to the case. The order shall cause minimum damage to the proceedings so far conducted in the District Court.

This was emphasized by Soza J. in *Somawathie v. Madawala*[18] in the following manner:

> *But in the circumstances of this case the extent to which the Court should intervene in the exercise of its revisionary powers should be given some thought. To set aside all the proceedings would be too sweeping and cause unnecessary hardship, inconvenience and delay. The substantial relief which R. B. Madawela wanted when he first intervened was the exclusion of lot 4 in plan No.3392 of 17.8.1970 made by S. T. Gunasekera Licensed Surveyor marked X9 although he could very well have staked a claim for an undivided 3 acres from the whole land to include Lot 4. As it is there is a well established fence on the north of Lot 4 and, as I said before, even the plaintiff's husband referred to this Lot as R.B. Madawela's land at the first preliminary survey. Hence it is reasonable to infer that after his purchase in 1943, R.B. Madawela fenced off a portion with the consent of Ensina Pereira who was the owner at that time of the entire remainder, and began possessing it as his own. This is Lot 4 in plan X9. Accordingly it would meet the ends of justice if without setting aside the interlocutory decree it is only amended by excluding from the corpus*

[18] [1983] 2 Sri LR 15

> *decreed to be partitioned, Lot No. 4 in plan No. 3392 (X9). I also order the final decree and the proceedings leading up to it from the stage of the interlocutory decree are set aside.*[19]

The petitioners lay no claim in the land to be partitioned in this case, which is the land depicted in Plan No.112821. Therefore the Judgment as to title to the land need not be disturbed. The question relates only to the identification of the corpus. Hence the District Judge is directed to allow the petitioners and any other party including D.S.D. Gunawardena mentioned in Plan No.1/2016 to intervene in the action and tender their statements of claim in order to show why portions of the land depicted in the Preliminary Plan in this case shall be excluded from the corpus. In that process, (a) the Court Commissioner can be directed to superimpose the Preliminary Plan in 4063/P on the Preliminary Plan in this case, and (b) the Government Surveyor on behalf of the Surveyor General or the Court Commissioner can be directed to superimpose Lots 5 and 6 of Title Plan A699 referred to in Plan 1/2016 on the Preliminary Plan. However, this shall not prevent the parties to this case from claiming prescriptive title to those portions, if so advised.

Insofar as the identification of the corpus is concerned, the Judgment and the Interlocutory Decree entered are set aside and the learned District Judge is directed to deliver a separate order and enter an amended Interlocutory Decree after further evidence is, if necessary, recorded on the above directions.

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[19] At page 32

Application of the petitioners are allowed. No costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Court of Appeal