

In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

In the matter of a Revision Application and *restitutio in integrum* in terms of Article 154 P (3) and 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 753 of the Civil Procedure Code.

C.A. Case No:

1046/03 (Revision)

D.C. Kandy Case No:

11188/P

1. Zulaiha Umma (deceased)
 2. Raihana Beebi
- Both of No: 216, Rambuke ela.

Plaintiffs

Abdul Raheem son of Abdul Cader
Vilanagama, Rambuke ela.

Substituted 1st Plaintiff

Vs.

1. Daughter of Abdul Cader Rahuma Beebi
 2. Daughter of Abdul Cader Jameela Umma alias Sabiya Umma
- All of No: 216, Rambuke ela.
3. Murugand Jeganathan
 4. M.D.M. Sheriffdeen
 5. K.M.S. Hanifa
- All of Vilana, Rambuke ela.
6. Mohomed Rasheed son of Abdul Cader
- of No: 206, Rambuke ela.

Defendants

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1. Muhandiramagedara Mohomed Ismail Segu Sahabdeen
- No: 12, Halgolla, Batagoladeniya.
2. Gammahalgedara Jamaldeen Muhammadu Cassim
- No: 204, Rambuke ela, Vilanagama.

Petitioners

Vs.

1. Zulaiha Umma (deceased)
 2. Raihana Beebi
- Both of No: 216, Rambuke ela.

Plaintiff-Respondents

Abdul Raheem son of Abdul Cader
Vilanagama, Rambuke ela.

Substituted 1st Plaintiff-Respondent

Vs.

1. Daughter of Abdul Cader Rahuma Beebi
 2. Daughter of Abdul Cader Jameela Umma alias Sabiya Umma
- All of No: 216, Rambuke ela.
3. Murugand Jeganathan
 4. M.D.M. Sherifdeen
 5. K.M.S. Hanifa
- All of Vilana, Rambuke ela.
6. Mohomed Rasheed son of Abdul Cader
of No: 206, Rambuke ela.

Defendant-Respondents

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And now between

1. Muhandiramlagedara Mohomed Ismail Segu Sahabdeen
No: 12, Halgolla, Batagoladeniya.
2. Gammahalgedara Jamaldeen Muhammadu Cassim
No: 204, Rambuke ela, Vilanagama.

Petitioner-Petitioner

Vs.

1. Zulaiha Umma (deceased)
 2. Raihana Beebi
- Both of No: 216, Rambuke ela.

Plaintiff-Respondent-Respondents

Abdul Raheem son of Abdul Cader
Vilanagama, Rambuke ela.

Substituted 1st Plaintiff-Respondent-Respondent

Vs.

1. Daughter of Abdul Cader Rahuma Beebi
2. Daughter of Abdul Cader Jameela Umma alias Sabiya Umma
All of No: 216, Rambuke ela.
3. Murugand Jeganathan
4. M.D.M. Sheriffdeen
5. K.M.S. Hanifa
All of Vilana, Rambuke ela.
6. Mohomed Rasheed son of Abdul Cader of No: 206, Rambuke ela.

Defendant-Respondent-Respondents

Before: Prasantha De Silva, J
S.U.B. Karalliyadde, J

Counsel: Mr. Lakshman Perera P.C. with Ms. Anjali Amarasignhe for the
Petitioner-Petitioner
Mr. Nizam Karipper P.C. with Mr. M.I.M. Iqaullah for Plaintiff-
Respondent-Respondents and Defendant-Respondent-Respondents

Written Submission tendered:

On 05.04.2018. by the Petitioner-Petitioner

On 20.06.2008 by the Plaintiff-Respondent-Respondents and Defendant-
Respondent-Respondents

Argued by way of written submissions

Decided on: 19.07.2021.

S.U.B. Karalliyadde, J.

By this Application for Revision and *restitutio in integrum*, the 1st and the 2nd Petitioner-Petitioners (hereinafter referred to as the 1st and the 2nd Petitioners) seek reliefs *inter alia*, to revise and set aside the judgement pronounced and interlocutory decree entered in the partition action bearing No. P/11188 in the District Court of Kandy, direct the District Judge to make the 1st and the 2nd Petitioners as parties to the action, permit them to file their statements of claim and investigate their title to the subject matter of the action.

The 1st and the 2nd Plaintiff-Respondent-Respondents (hereinafter referred to as the 1st and the 2nd Plaintiffs) instituted the partition action by plaint dated 06.12.1983. against the 1st to 6th Defendant-Respondent-Respondents (hereinafter referred to as the 1st - 6th Defendants) seeking to partition an amalgamated land identified and known as “Rambuke-ela Kumbura” which consists of two lands mournfully described in Schedules ‘A’ and ‘B’ in the plaint. The case has proceeded to trial on 20 points of contest between the parties and the learned District Judge, by the judgement dated 08.10.1996. (marked as P6) ordered to partition the subject matter allocating shares to the 1st and 2nd Plaintiffs and the 1st, 2nd and 6th Defendants as per the judgement.

Thereafter, interlocutory decree (marked as P6a) was entered and the commission was issued to prepare the partition plan. Accordingly, the partition was done and the final plan and the report (marked as P5) was returned by the Surveyor to the Court. In the meantime, filing a petition and affidavit dated 26.07.2002, the 1st and the 2nd Petitioners sought reliefs from the District Court *inter alia*, to add them as parties to the action and declare that they are entitled to 39/152 share of the land and amend the interlocutory decree accordingly.

The parties who were declared to be entitled to the shares of the subject matter by the judgment had objected to the application of the Petitioners. From the order dated 09.05.2003, the learned District Judge upholding their objection has dismissed the application of the Petitioners. Being aggrieved by the said order, the 1st and 2nd Petitioners filed the instant applications for Revision and the *restitutio in integrum*. The parties who were declared to be entitled to the shares of the subject matter by the District Court have objected to that application. When the matter came up for argument, both parties consented to abide by an order delivered by the Court on their written submissions dispensing with their rights to make oral submissions.

The 1st and 2nd Petitioners allege *inter alia*, that one Omar Lebbe was entitled on deed No. 643 dated 20.11.1929. (marked as P7) to a 39/152 share of the land described in Schedule 'A' to the plaint which forms the amalgamated land sought to be partitioned, he had mortgaged his share by deed of mortgage No. 7343 dated 25.009.1937. (marked as P8) to Mohammad Ismil Lebbe. They had acquired prescriptive title to the share of Omar Lebbe, after the death of Mohammed Ismil Lebbe on 30.09.1977, his rights were devolved on the 1st and 2nd Petitioners being his son and the nephew respectively and by possessing the land for nearly 40 years they have acquired prescriptive title to the land sought to be partitioned.

The learned Counsel for the Petitioners argue that if the proxy holding Attorney-at-Law for the Plaintiffs had done a search in the Land Registry after the partition action was registered as a *lis pendens* under the Registration of Documents Ordinance, and before filing the declaration under section 12 (1) of the Partition Law, No. 21 of 1977 (the Partition Law), he could have traced the entries concerning to the above stated deeds which the Petitioners are relied on and should have been made Omar Lebbe and/or Mohammad Ismil Lebbe parties to the action. Therefore, the learned Counsel for the Petitioners argue that the failure/omission of the Attorney-at-Law for the Plaintiffs to do a search of the entries in the Land Registry and include the names of the persons in the plaint who should have been made parties to the action as required by section 5 of the Partition Law is a violation of a mandatory requirement which makes the entire proceedings, judgement and the interlocutory decree a nullity.

Section 12 (1) of the Partition Law, enacts that;

“After a partition action is registered as a lis pendens under the Registration of Documents Ordinance and after the return of the duplicate referred to in section 11, the plaintiff in the action shall file or cause to be filed in Court a declaration under the hand of an Attorney-at-Law certifying that all such entries in the register maintained under that Ordinance as relate to the land constituting the subject-matter of the action have been personally inspected by that Attorney-at-Law after the registration of the action as a lis pendens, and containing a statement of the name of every person found upon the inspection of those entries to be a person whom the plaintiff is required by section 5 to include in the plaint as a party to the action and also, if an address of that person is registered in the aforesaid register, that address.”

Therefore, as provided by section 12, the plaintiff is required upon inspection of the entries in the Land Registry to file in Court a statement containing the name of every person whom he is required by section 5 to include in the plaint a party to the action and also, if an address of that person is registered in the register maintained in the Land Registry, that address.

Section 5 of the Partition Law, stipulates the persons who should be named as parties in the plaint in the following manner.

“The plaintiff in a partition action shall include in his plaint as parties to the action all persons who, whether in actual possession or not, to his knowledge are entitled or claim to be entitled-

(a) to any right, share or interest to, of, or in the land to which the action relates, whether vested or contingent, and whether by way of mortgage, lease, usufruct, servitude, trust, life interest, or otherwise, or

(b) to any improvements made or effected on or to the land:

Provided that in the case of a mortgage, the mortgagee or any person claiming any interest under him shall be included as a party only if he has registered an address for service of legal documents in terms of sections 6 and 28 of the Mortgage Act:

Provided further that if such mortgagee or person aforesaid claims under an instrument executed more than fifteen years prior to the institution of the action, he shall not be a necessary party to such action, unless he has registered an address for service of legal documents in terms of the aforesaid provisions of the Mortgage Act within a period of ten years prior to the date of institution of the action.”

Therefore, in the case of a mortgage, the plaintiff should make the mortgagee or any other person who claims any interest under the mortgage, a party to the action only if an address is registered for service of legal documents in terms of the provisos to the section 5 of the Partition Law.

In terms of section 6 (1) of the Mortgage Act, No. 6 of 1949 (the Mortgage Act) application for the registration of an address for the service of legal documents should be made substantially in the form set out in the First Schedule to the Mortgage Act and in terms of section 6 (2) of the Mortgage Act, the address for service should be registered in or in continuation of the folio in which is registered the mortgage of the land in respect of which the applicant has an interest.

The folios of the Land Registry in which the transactions over the land sought to be partitioned in the instant case are registered were tendered to the Court marked as P9, P9a and P9b. Nevertheless, it cannot be observed that in those folios the address/addresses of the mortgagee or the Petitioners were registered as the address/addresses which the legal documents could be served on them in terms of section 6 of the Mortgage Act. Under such circumstances, it is quite clear that the mortgagee or the Petitioners had failed to act in terms of section 6 of the Mortgage Act and therefore, in terms of section 5 of the Partition Law, they cannot be considered as necessary parties to the partition action.

For the reasons mentioned above, the Court cannot agree with the argument of the learned Counsel for the Petitioners that non-inclusion of the Petitioners as parties to the partition action is a violation of the provisions of section 12 (1) of the Partition Law, which makes the entire proceedings, judgement and the interlocutory decree a nullity.

The learned Counsel for the Petitioners cited *Somawathie vs. Madawala* (1983 2 SLR 15 at p. 30, 31) in which Mr. R. B. Madawala who was entitled to the rights of the subject matter on a deed of transfer had not made a party to the partition action. The Court has held that as a result, a miscarriage of justice has been caused to Mr. Madawala. But in the instant action as decided hereinbefore, the Petitioners cannot be considered as necessary parties to the action, the authority cited by the learned Counsel has no relevance to the instant action.

Considering all the above stated facts, I hold that the Petitioners have failed to satisfy the Court that a failure of justice or miscarriage of justice has been caused to them and exceptional circumstances exist for this Court to exercise its revisionary jurisdiction.

The position of the learned Counsel for the Petitioners is that the Petitioners and their predecessors in title possessed the land sought to be partitioned for 65 years to the date of the institution of the partition action on 06.12.1983. and they acquired prescriptive title to the land. If that fact is true, they could have intervened to the action when the notices regarding the partition action were dispatched in the Grama Niladhari's office or on the land in terms of sections 15 (1) and section 15(3) respectively, and/or after the Surveyor orally proclaimed and beaten tom-tom on the land in terms of section 17(2), and/or at the execution of the commission in terms of section 18, and/or on an application to the District Court by the Petitioners in terms of section 69 (1) (b) of the Partition Law and establish their prescriptive rights and title to the land sought to be partitioned at the trial. Nevertheless, the Petitioners have failed to do so.

Since the Petitioners are not parties to the partition action, in terms of section 48 (5) of the Partition Law, if they could have satisfied the District Judge that the District Court of Kandy had no jurisdiction to enter the interlocutory decree, they would not be bound by the final and conclusive effect given to the interlocutory decree by section 48 (1) of the Partition Law. But their position is not that the District Court of Kandy was lack of complete jurisdiction to enter the interlocutory decree.

Upon consideration of the above stated facts, I hold that the Petitioners are not entitled to any relief by way of *restitutio in integrum* either.

For the reason that the Petitioners have failed to satisfy the Court that they are entitled to any relief by way of revision or *restitutio in integrum*, I hold that the application of the Petitioners is without merit. Hence, I affirm the judgement pronounced and the interlocutory decree entered by the learned District Judge dismissing the Application of the Petitioners. Each Petitioner should pay Rs. 10,000/- each to the 1st, 2nd Plaintiffs, 1st, 2nd and 6th Defendants as costs of this Application.

JUDGE OF THE COURT OF APPEAL

I agree.

Prasantha De Silva J.

JUDGE OF THE COURT OF APPEAL