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

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

CA/RII/02/2020
WP/HCCA/MT/LA No: 07/2015 F
D.C. Mount Lavinia No. 93/94/P

1. Podimarakkalage Tecla Dorine Perera
   No.158, Pragathipura,
   Madiwela.

2. Kuruppu Arachchige Dona Dayawathie, (Deceased)
   No. 19/5, Weherakanda Road,
   Beddegana, Pitakotte.

2A. Walpolage Dona Candrani Pushpamala,
   No.19/5, Weherakanda Road,
   Beddegana, Pitakotte.

3. Kuruppu Arachchige Dona Charlette Matilda,
   No.223 A, Neelammahara Road,
   Boralasgamuwa.

Plaintiff-Appellants-Petitioners

-Vs-

1. Kuruppu Arachchige Dona
   Jayawathie,
   No.14, Hela Mawatha,
   Mailagasthenna,
   Badulla.

2. Kuruppu Arachchige Don
   Jayaratne,
   No.158/4D, Jayagath Mawatha,
   Hokandara North, Hokandara.

3. Kuruppu Arachchige Dona
   Gunawathie,
   No.41/8S/3E, Kalumuduketiya
   Watta,
   Watareka, Meegoda.

4. Jayatissa Wickramasinghe
   Gunasekara,
   No.07, Gemunu Mawatha,
   Subuthipura, Battaramulla.

4A & 5. Rev. Kananke Dhammadinna alias
   Jayantha Wickremasinghe
   Gunasekara,
   No.11, Samaranayake Mawatha,
   Kolonnawa.

6. Mallika Arachchige Somaratne Perera,
   No. 162/25, Duwa Road,
   Beddagana, Pitakotte.

7. Ranasinghe Arachchige Sugath alias Anura Ranasinghe,
   164, Duwa Road, Beddagana,
   Pitakotte.

8. Ranasinghe Arachchige Edmund Ranasinghe,
   164, Duwa Road, Beddagana,
   Pitakotte.

9. Somaratne Balagoda,
   No. 56/7, Koswatte Road,
   Rajagiriya.

Defendants-Respondents-Respondents

Before: Hon. D.N. Samarakoon, J.
Hon. Neil Iddawala, J.

Counsel: Mr. Jacob Joseph, for the Plaintiff- Appellants-Petitioners.

Mr. Samantha Vithana with Ms. Nishanthi Mendis instructed by Mr. Kalana Kodikara for the 4A and 5th Defendants- Respondents.

Mr. Chandrasiri De Silva with Thrimalee Sachindrani instructed by Mr. S.N. Rajapaksha for the 9th Defendant-Respondent-Respondent.

Argued on: 20.06.2023

Written submission tendered on: 10.08.2023 by the 04A and 05th Defendant- Respondents-Respondents

Decided on: 30.11.2023

D.N. Samarakoon, J

The plaint has been instituted on 25th November 1994, twenty nine years ago.

The land is Pelengahawatte of 0A. 03R. 16P. The plaintiff, by the plaint gave shares to 01st to 03rd plaintiffs, 01st to 03rd defendants, all relatives and to the 04th defendant, the only outsider.

The basis of the claim was that **Kuruppu Arachchige Don Abraham Appuhamy** being the original owner, who died intestate leaving his seven children, the 02nd and 03rd plaintiffs and 01st 02nd and 03rd defendants and K. A. Don Wijewardane

and K. A. Dona Rupawathie. Hence they inherited undivided 1/7th share each. Don Wijewardane died leaving his widow Podimarakkalage Tecla Dorin Perera, the 01st plaintiff and his siblings aforesaid upon which the 01st plaintiff got undivided 1/14th share and the others undivided 1/7 + 1/14 = undivided 13/84 each.

The plaint said that Dona Rupawathie together with one Mallikarachchige Percy Perera purported to transfer the entirety of the land upon deed No. 2018 dated 17th May 1994 to Jayatissa Wickremasinghe Gunasekera, the 04th defendant.

The 04th defendant, the only outsider, through a very brief Statement of Claims dated 12th August 1996 claimed the entire land pleading prescription too.

Very soon there was a trial on 11th November 1996 before Hon. Dammika Kitulgoda, Hon. District Judge of Mt. Lavinia. Plaintiffs were represented by learned counsel. The learned counsel of the 04th defendant, the only outsider, informed the Court that he has no instructions and hence he does not appear. In a brief judgment dated 24th February 1997, Hon. Kitulgoda ordered the partition of the land as per the shares given in the plaint. The 04th defendant too received the share allotted to him in the plaint.

Interlocutory Decree was entered accordingly.

The 04th defendant filed an affidavit dated 03rd November 1997, after eight months that he could not participate at the trial since he was suffering from malaria. On tendering objections dated 23rd February 1998, the plaintiffs stated that the case was fixed for trial (under the Partition Law No. 21 of 1977 there must be a "call to fix for trial" date) on 04th October 1996 and that the 04th defendant had not even filed a list of documents and witnesses by then.

It was recorded on the Journal Entry dated 14th July 1998 that the learned counsel for the plaintiff agrees to accept the medical certificate tendered by the 04th defendant. The matter was fixed for inquiry. As per the Journal Entry dated

18th November 1998, which was an inquiry date, the only decipherable entry in Sinhalese means,

> "…both parties move to fix for trial. Accordingly the I/D is set aside. Trial for 17th March 1999".

In an interim injunction application by plaintiffs dated 05th December 2000 (page 196 of the Original Case record) it was stated that the case is pending upon an inquiry under section 48(4) of the Partition Law on an application made by the 04th defendant.

There is a finality attached to an Interlocutory Decree of a Partition Case. It is only subject to (except on an appeal) subsections 04 and 05 of section 48. The relevant section is as follows,

Beginning of Quotation:-

"**Finality of Interlocutory and final decrees of partition**

> 48. (1) Save as provided in subsection (5) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom and in the case of an interlocutory decree, subject also to provisions of subsection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to and be final and conclusive for all purposes against all persons whomsoever whatever right title or interest they have, or claim to have or in the land to which such decree relates and **notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action;** and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

……

(4)

(a) **Whenever a party to a partition action-**

(i) has not been served with summons, or

(ii) being a minor or a person of unsound mind, has not been duly represented by a guardian ad litem, or

(iii) dies before judgment Is entered and no substitution of his heirs or legal representatives has been made or no person, has been appointed to represent the estate of the deceased party for the purpose of the action, or

(iv) **being a party who has duly filed his statement of claim and registered his address, fails to appeal at the trial,**

……

(d) **Where the court grants special leave as herein before provided the court shall forthwith settle in the form of issues the questions of fact and law arising from the pleadings and any further pleadings <u>which are relevant to the claim set up in the petition only</u> and the court shall appoint a date for the trial and determination of the issues.**

(e) Where the court determines any matter in issue in favour of the applicant, the court shall in accordance with its findings amend or modify the interlocutory decree to such extent and in such manner only as shall be necessary **to give to the successful party and to no other party or person whomsoever,** the right, title or interest to which such party is entitled, or in the event of the applicant being found entitled to the entirety of the said land forming the subject matter of the interlocutory decree the court shall set aside the interlocutory decree and dismiss the action.

(5) The interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by subsection (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree, if, but only if, he proves that the decree has been entered by a court without competent jurisdiction".

End of Quotation.

The Court cannot embark upon a full trial, as it did in this case, upon an application under section 48(4). It cannot set aside the Interlocutory Decree, which it entered after the trial wholesale and lock stock and barrel, as it purported to do on 18th November 1998.

It can receive pleadings and further pleadings **"which are relevant to the claim set up in the petition only."**

It is true that the 04th defendant claimed the whole land. But the investigation is limited to his claim only.

On 08th October 2001 the 01st and 03rd defendants have purported to file a Statement of Claims claiming undivided 13/84 share each. This is the share allotted to them in the plaint and which was given by the Interlocutory Decree dated 24th February 1997.

But a purported 05th defendant, Rev. Doctor Kananthe Dhammadinna Sthewira has filed a Statement of Claims dated 08th October 2001. This was facilitated by the wrong and irregular procedure followed by the learned district judges who sat on the Bench on and after 18th November 1998.

It is interesting to note, that as per the caption at page 267 of the original case record the 04th defendant is Jayatissa Wickremasinghe Gunesekera and the 05th defendant is Jayantha Wickremasinghe Gunasekera.

As per the caption of the motion filed in this case by 04A and 05 defendants on 26.07.2023, the 04th a and 5th defendant is Rev. Kananke Dhammadinna alias Jayantha Wickremasinghe Gunasekera.

The 05th defendant purported to set up an entirely new pedigree.

He said that of the land called Pelengahawatte of about 04 Acres the original owners were Mallikarachchige Francina Prerahamy and Hiripitiyage Carolis Silva who owned an undivided 1/10th of a share. He also pleaded that Mallikarachchige Yohanis Perera alias Johanis Perera and Mallikarachchige Charlis Perera who received that share from those original owners upon deed No. 16933 dated 23rd June 1909 the owners thereafter, out of whom, Johanis Perera received further undivided shares upon deed No. 9237 dated 06th November 1924. The 05th defendant claimed on a deed No. 62 dated 05th November 1996.

What happened in this case after 18th November 1998 is a classic example of what Dr. A. R. B. Amerasinghe J., said in **Fernando vs. Sybil Fernando, 1997** in the Supreme Court as,

> "There is the substantive law and there is the procedural law. Procedural law is not secondary: The two branches are complementary. The maxim **ubi ius, ibi remedium** reflects the complementary character of civil procedure law. The two branches are also interdependent. Halsbury (ibid.) points out that the interplay between the two branches often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives its remedy and effectiveness and brings it into being",

the only unfortunate consequence being because the wrong procedure was followed a wrong result having been achieved.

The meaning of **ubi jus, ibi remedium** is that "where there is a wrong, there is a remedy."

No one contend, that, the procedure followed in this case from the institution of the plaint, up to the entering of the judgment and the interlocutory decree on 24th February 1997 was wrong. Since there was no wrong, there was no accrual of a right to a remedy. The only exception to this was the medical certificate of the 04th defendant because it was permitted under section 48(4)(a)(iv). It does not seem to this Court because of the fact that the 04th defendant having not tendered a list of documents and witnesses and having tendered his purported medical certificate of malaria after a lapse of eight months from the trial, that, his application was genuine. But it is too late in the day to argue so, because, even a partition action is still civil litigation and evidence could be adduced without being verified for their truth and veracity on admissions. That was how the medical certificate was admitted. But, the "wrong" established by that admission of the medical certificate is limited, limited under section 48(4)(d) by the words, "**the pleadings and any further pleadings which are relevant to the claim set up in the petition only,",** which does not allow the filing of a statement of claims by the 05th defendant.

The 04th defendant did not plead any deed in his petition dated 03.11.1997 (at page 177 of the original case record). But the 04th defendant in his purported statement of claims dated 06.03.2000 had purported to plead several deeds, No. 1924 dated 06.11.1924, No. 16933 dated 23.06.1909, No. 1126 dated 06.11.1933 and No. 2026 dated 06.01.1994. He further said that although he had pleaded deed No. 2018 the vendors therein, the aforesaid K. A. Dona Rupawathie and M. A. Percy Perera do not have title. Hence the 04th defendant purported to set up an entirely new pedigree that he never pleaded in his petition, which he cannot do under the section.

Thereafter a 09th defendant too has filed an Amended Statement of Claims dated 25th September 2002.

He also purported to plead deed No. 16933 dated 23rd June 1909. There was no provision to accept this purported Amended Statement of Claims under section 48(4)(d) of the Partition Law.

At a certain stage, in the propagation of this wrong procedure giving rise to false rights, it appears that 04A defendant and the 05th defendant have become one.

The learned district judge who purported to give a judgment (which is actually a second judgment since section 48(4)(d) did not permit him to hold a full trial) decided that neither the plaintiffs, nor the 05th defendant have established title. His decision in regard to the claim of the 09th defendant was similar. Under section 48(4)(d) he could have considered only the claim of the 04th defendant who in 1997 tendered the medical certificate and no more. He had no right whatsoever to consider any other claims including that of a 04A and 05th defendant and 09th defendant.

In the High Court of Civil Appeal, the learned High Court Judge while agreeing with the learned district judge that plaintiff's action should be dismissed, upheld the claim of the 05th defendant on his purported Statement of Claims dated 08th October 2001, which could not have been filed in law.

The Supreme Court has granted leave to appeal against the judgment of the High Court of Civil Appeal, as it appears, on the basis that in a partition action a declaration of title could not have been entered in respect of that 05th defendant, which appears to be a "distant echo" of the illegality of the said purported Statement of Claims dated 08th October 2001 caused by the wrong procedure upon which it was admitted. The appeal was by the 09th defendant. But on 27th November 2019 the said appeal was withdrawn.

Now the plaintiff petitioners before this Court in their application for **Restitutio in Integrum** alleges that the 05th and 09th defendant acting in collusion purported to come to an agreement attested by Mr. L. M. A. M. Wannigama,

Notary Public and transfer parts of lands purportedly depicted upon a plan, nothing of which neither of them could do in law.

As per the above exposition of the legal position this Court does not consider factual positions, if any, averred for the 04A and 05th defendant or the 09th defendant, because even this Court is precluded from doing so under section 48(4)(d) of Partition Law.

But only in respect of the Preliminary Objection by the 04A and 05th defendant in their Statement of Objections dated 26th October 2022, that,

> "The petitioners cannot have and maintain this application before Your Lordships' Court in as much as Your Lordships' Court has no jurisdiction to entertain this application for revision and Restitutio in Integrum in terms of section 5C (1) and 5(C)(2) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006",

the following is adduced.

In respect of the question whether this court has jurisdiction to review judgments and orders made by the Civil Appellate High Court, the case *Gammeddalage Nilanthi Munasinghe and others vs. Amitha Ariyawansa and others, C. A. RI 15/2018* must be considered. The following extract is reproduced,

Beginning of the Quotation:-

> "The learned counsel for the petitioner accepts that a party cannot **by way of a final appeal** come before this Court against the Judgment or Order of the High Court of Civil Appeal. But the argument of the learned counsel is that, nevertheless, a party can come before this Court against the Judgment or Order of the High Court of Civil Appeal **by way of revision and/or restitutio in integrum** in terms of Article 138 of the Constitution.

If that argument is accepted, section 5C becomes meaningless, and the intention of the legislature will blatantly be defeated, as any party dissatisfied with any Judgment or Order of the High Court of Civil Appeal can come before this Court by way of revision and/or restitutio in integrum. Then the party dissatisfied with the Judgment or Order of the District Court will have three appeals—first to the High Court of Civil Appeal, second to the Court of Appeal, and third to the Supreme Court. That was obviously never the intention of the legislature. One of the main objectives of setting up High Courts of Civil Appeal is to curb laws delays in civil litigation and not to expand it.

.....

The question whether the Court of Appeal has jurisdiction to sit on Judgments and Orders made by the High Courts of Civil Appeal was particularly dealt with by Justice Salam (with Justice Rajapaksha agreeing) in the Court of Appeal case of Stephan Gunaratne v. Thushara Indika Sampath [CA (PHC) APN 54/2013 (REV)] decided on 23.09.2013.

That is a case where the plaintiff-petitioner in a partition action came before this Court by way of revision against the Judgment of the High Court of Civil Appeal at Ratnapura. Dismissing the application in limine without issuing notice, Justice Salam stated:

> "The question that now arises for consideration is whether the Court of Appeal can exercise its revisionary powers under Article 138 of the Constitution in respect of a judgment of the High Court pronounced under the Provisions of Act No 54 of 2006 when the proper remedy is to appeal to the Supreme Court. Appreciably, Section 5A of Act No 54 of 2006 quite specifically states that all relevant written laws applicable to an appeal, in the Court of Appeal are applicable to the High Court as well. This undoubtedly demonstrates beyond any iota of doubt that the scheme provided by

Act No 54 of 2006 to facilitate an appeal being heard by the Provincial High Court is nothing but a clear transfer of jurisdiction and in effect could be said that as far as appeals are concerned both the High Court and the Court of Appeal rank equally and are placed on par with each other. Arising from this statement of law, it must be understood that if the Court of Appeal cannot act in revision in respect of a judgment it pronounces in a civil appeal, then it cannot sit in revision over a judgment entered by the High Court in the exercise of its civil appellate jurisdiction as well, for both courts are to be equally ranked when they exercise civil appellate jurisdiction."

.....

End of the Quotation.

The following quotation, also from that case is from Justice Priyasath Dep (later Chief Justice).

Beginning of the Quotation:-

"A similar conclusion was reached by the Supreme Court in Balaganeshan v. OIC, Police Station, Seeduwa (SC SPL/LA No. 79/2015) decided on 01.04.2016 in interpreting similar provisions found in the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

That is a criminal case where the accused unsuccessfully appealed to the Provincial High Court against the Judgment of the Magistrate's Court. Being dissatisfied with the Judgment of the Provincial High Court sitting in appeal, the accused appealed to the Court of Appeal in terms of section 138 of the Constitution. The Court of Appeal dismissed the appeal in limine on the basis of want of jurisdiction. Rejecting leave to appeal against that dismissal, Justice Dep (as His Lordship then was) with Justice Wanasundera and Justice Jayawardena agreeing held that:

Continues the quotation,

““When the Provincial High Court exercises appellate jurisdiction, it exercises appellate jurisdiction hitherto exclusively vested in the Court of Appeal. It exercises a parallel or concurrent jurisdiction with the Court of Appeal. The High Court when it exercises appellate jurisdiction it is not subordinate to the Court of Appeal. That is the basis for conferring jurisdiction on the Supreme Court under section 9 of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 to hear appeals from the judgments of the High Court when it exercises appellate jurisdiction. I hold that the Accused Appellant–Petitioner should have filed a Special Leave to Appeal application against the judgment of the High Court exercising Appellate Jurisdiction to the Supreme Court in the first instance instead to the Court of Appeal. The Court of Appeal correctly upheld the preliminary objection and rejected the Appeal.”

Hence I hold that the Court of Appeal has no appellate jurisdiction to set aside Judgments or Orders of the High Court of Civil Appeal by way of final appeal, revision or restitutio in intergrum. That is vested exclusively in the Supreme Court.’

End of the Quotation.

There is also a case *Wanasinghe Pedige Sumanawathie vs. Richard Peris Finance Ltd., C. A. RII 10/22* dated 30.05.2022 in this regard.

That case decided on 30.05.2022 says nothing new, except timorously following the case of Gammeddage Nilanthi Munasinghe and the case decided by Salam J.

From the judgment of Salam J., there arises a question which is initially addressed.

(a) Has section 05A(1) of Act No. 54 of 2006 transferred the civil appellate jurisdiction of the Court of Appeal to the Provincial High Court?

Salam J., in the above quoted paragraph said,

> "This undoubtedly demonstrates beyond any iota of doubt that the scheme provided by Act No 54 of 2006 to facilitate an appeal being heard by the Provincial High Court **is nothing but a clear transfer of jurisdiction** and in effect could be said that as far as appeals are concerned both the High Court and the Court of Appeal rank equally and are placed on par with each other".

It is true that his lordship said, that, the two courts rank equally. But, at the same time it was said, "is nothing but a clear transfer of jurisdiction." The word "transfer" does not have an exact meaning. It can mean moving something from one place to another, in which case, it will no longer exist in the firstly said place. But it can also mean, change (the sense of a word or phrase) by extension or metaphor, for example, "between Latin and English, the sense was transferred from the inhabitants to the place." Denning L. J., said in *Seaford Court Estates Ld. Vs. Asher [1949] K. B. 481* at page 499 that **"The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were."**

But the other part of the statement that the Provincial High Court and the Court of Appeal rank equally [*as far as civil appellate jurisdiction is concerned*] is not ambiguous.

Section 5A says,

> "5A. (1) A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate

jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be".

This court considered an argument similar to that of the present 04A and 05th defendant in **Travel Data Tours and Travels (Pvt) Limited vs. Softlogic Finance PLC, CA No. RII/22/2017** dated 31.05.2022, one day after Sumanawathie's case.

In that case this court considered the case of "*Sharif And Others Vs. Wickramasuriya And Others (2010) 1 SLR 255*".

In Sharif's case, Eric Basnayake J., in the Court of Appeal considered the analogous situation in regard to the Provincial High Court created by Article 154P(3) of the Thirteenth Amendment to the Constitution.

It was said,

Beginning of the Quotation:-

"The Constitution

Article 138 of the Constitution gives jurisdiction to the Court of Appeal with regard to its revisionary powers.

Article 138 is as follows:

138 (1): The Court of Appeal shall have and exercise (subject to the provisions of the Constitution or of any law) an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any court of first instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all cases, suit, action, prosecutions matters and things of which such courts of First instance, tribunal or other institution may have taken cognizance (emphasis added).

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The sole jurisdiction given by Article 138 was expanded to High Courts by Article 154P (3) (b) under the 13th Amendment to the Constitution.

The Article is as follows:

154P (3) Every High Court shall (b) Notwithstanding anything in Article 138 . . . exercise, appellate and revisionary jurisdiction in respect of orders. . . by Magistrate Courts and Primary Courts within the province

In terms of Article 138 the Court of Appeal shall have and exercise. . . sole and exclusive cognizance by way of appeal; revision. . .

However Article 154(3) (b) has given the High Court appellate and revisionary jurisdiction in respect of orders by Magistrate Courts and Primary courts. Hence the Court of Appeal ceased to enjoy sole and exclusive jurisdiction. Article 154P did not take away the powers exercised by the Court of Appeal under Article 138.

However section 9 of the High Court of the Provinces (Special Provisions) Act appears to have caused a conflict with regard to the jurisdiction enjoyed by the Court of Appeal. According to this section an aggrieved person by a final order of a High Court in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P may appeal to the Supreme Court on a substantial question of law with leave first obtained from High Court.

Section 9 of High Court of the Provinces (Special Provisions) Act No. 19 of 1990 is as follows:

Subject to the provisions of this Act or any other law any person aggrieved by (a) a final order. . . of a High Court. . . in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P. . .

which involves a substantial question of law, may appeal there from to the Supreme Court if the Court grants leave to appeal to the Supreme Court. . .

High Court is vested with original jurisdiction and is placed lower to the Court of Appeal in the order of Courts on superiority. However when a party chooses to go to High Court with a right of appeal to the Supreme Court, one may argue that the appellate powers of the Court of Appeal have been removed.

Has the powers of the Court of Appeal with regard to its appellate and revisionary jurisdiction been removed? This is not so. Articles 138 and 154P give jurisdiction to Court of Appeal and High Court respectively to hear appeals and revision from the Magistrate's Court Against the orders of these courts appeal lie to the Supreme Court with leave first obtained from the Court of Appeal or the High Court as the case may be, on a question of law. This does not mean that the powers enjoyed by the Court of Appeal had been taken away. The powers of the High Court are limited to the Province. The Court of Appeal exercises its powers for the whole island".

End of the Quotation.

His Lordship Justice Eric Basnayake then considered the position with regard to the decentralization of civil appellate jurisdiction. His Lordship said,

Beginning of the Quotation:-

"Act No. 54 of 2006

This Act amended Act No. 19 of 1990 with the insertion of sections 5A, 5B, 5C and 5D. Section 5A(1) gives the appellate and the revisionary jurisdiction which is as follows:

5A (1) A High Court established by Article 154P of the Constitution for a province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by anv District Court or a Family Court within such a province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be (emphasis added).

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I am of the view that the jurisdiction enjoyed by the Court of Appeal through Article 138 remains intact. Through Article 138 one has the liberty to invoke the jurisdiction of the Court of Appeal or to resort to a Provincial High Court in terms of Article 154P (3) (b). If one chooses to go to the High Court, an appeal would lie to the Supreme Court with leave first obtained from the High Court (Section 9 of the Act 19 of 1990). If one invokes the jurisdiction of the Court of Appeal under Article 138 an appeal would lie from any final order or judgement of the Court of Appeal to the Supreme Court with leave of Court of Appeal first obtained (Article 128(1) of the Constitution). It is thus clear that both courts enjoy concurrent jurisdiction on matters referred to in Article 154P (3) (b). The jurisdiction enjoyed by the Court of Appeal had not been disturbed by Articles of the Constitution or by the Acts of Parliament.

Sharvananda C. J., Colin-Thome, Atukorale and Tambiah J. in the case of *In Re the Thirteenth Amendment to The Constitution and The Provincial Councils Bill* (7) at 323 in their determination held as follows:

"The Bill do not effect any change in the structure of the courts judicial power of the people. The Supreme Court and the Court of Appeal continued to exercise unimpaired several jurisdictions vested in them by the Constitution. There is only one Supreme

> **Court and one Court of Appeal for the whole Island.** The 13th Amendment Bill only seeks to give jurisdictions in respect of. . . Without prejudice to the executing jurisdictions of the Court of Appeal. Vesting of this additional jurisdiction in the High Court of each province only brings justice nearer home to the citizen and reduces delay and cost of litigation."

End of the Quotation.

Thus, **the decentralization, but not the transfer,** of appellate powers of the Court of Appeal in criminal matters (in regard to Magistrate's Courts and in the especial, sui generis jurisdiction of the Primary Courts) and in civil matters (in regard to the District Courts and Family Courts) by the above legislation has not affected the hierarchy of courts. **The Provincial High Court exercising some of the appellate powers of the Court of Appeal has not made it another Court of Appeal; neither had it reduced any such jurisdiction of the Court of Appeal.**

But this was addressed in detail, to make this discussion complete and neither to say that once a High Court established under section 5A(1) of Act No. 54 of 2006 [*commonly, but colloquially called "Civil Appellate High Court" or "High Court of Civil Appeal*"] exercises its appellate jurisdiction, either in full, or in part, the Court of Appeal also can exercise the similar power it has on that matter; and nor to say, that, once such High Court exercises its appellate power the Court of Appeal can exercise a superior appellate power on that matter. This is the objection of the 04A and 05th defendant.

But, appellate power is not the only jurisdiction the Court of Appeal has or it exercises on a matter. It has the power of revision and the power of restitutio in integrum. It is the last said jurisdiction which has been invoked by the plaintiff petitioners in this application.

(b) <u>The jurisdiction of restitutio in integrum:</u>

Mrs. Vivionne Gunawardena vs. Hector Perera, Officer in Charge, Police Station, Kollupitiya and others S.C. Application 20/1983 was an application filed in respect of an alleged violation of a fundamental right, where Mrs. Vivionne Gunawardena alleged, among other things, that she was unlawfully arrested by the OIC of Kollupiya Police Station. The IGP, the 02nd respondent filed an affidavit from one Vinayagam Ganeshananthem, Sub Inspector, to the effect that he and not the 01st respondent who arrested Mrs. Vivionne Gunawardena because she had no "permit" to go in a procession. Although Mrs. Vivionne Gunawardane countered this position, the Supreme Court consisting of a three Judge bench did not believe her, but believed the affidavit of Vinayagam Ganeshananthem and decided that the petitioner's fundamental rights have been violated as Vinayagam Ganeshananthem is "guilty" of unlawfully arresting her.

Vinayagam Ganeshananthem then petitioned to the Supreme Court requesting to set aside the said decision of the Supreme Court itself, as he was only a witness (on affidavit) and he was not informed before finding him "guilty" and therefore the rule audi alteram partem is violated. This second case was decided by a Seven Judge bench of the Supreme Court, including the incumbent learned Chief Justice. The decision was divided 05 to 02 and the majority decided against Vinayagam Ganeshananthem.

The learned Chief Justice, who wrote the lead judgment of the majority said,

> "He submits that this caption read with prayer (a) to the petition invokes a jurisdiction in revision which this Court does not have. One has to look at the legislation which created this Court to find an answer to this dispute. That legislation is to be found in the second Republican Constitution of 1978. **The Supreme Court which existed up to the time of the first Republican Constitution of 1972 and which continued to exist under that Constitution ceased to exist when the 1978 Constitution became operative.** (Vide Article 105 (2) of the Constitution).

Its place was taken by the Court of Appeal (Vide Article 169 (2) of the 1978 Constitution). A new Supreme Court has been constituted which is the highest and final Superior Court of Record. (Article 118 of the Constitution)."

The relevant portion of Article 169(2) says,

> **"Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal."**

Ranasinghe J., despite being in the minority of the 07 Judge bench judgment referred to a case decided by Dias S.P.J. in 1950 which was on restitutio in integrum and said,

> "**The real basis upon which relief is given and the precise nature of the relief so given by the Supreme Court upon an application made to it for relief against an earlier Order made by the Supreme Court itself was very lucidly and very effectively expressed by Dias S.P.J. way back in the year 1951 in the case of Menchinahamy v. Muniweera, (40).** In that case, about six weeks after an appeal to the Supreme Court from an interlocutory decree in the District Court was dismissed by the Supreme Court, an application was made to the Supreme Court, on 23.3.1949, " for revision or in the alternative for restitutio-in-integrum" by the heirs of a party defendant, who had died before the interlocutory decree was entered but whose heirs had not been substituted in his place before the interlocutory decree was so entered. It was contended on behalf of the respondents: that there was no merit in the application: **that if the relief sought is granted then the Supreme Court would in effect be sitting in judgment on a two-Judge decision of the Supreme Court which had passed the Seal of the Court that the Supreme Court cannot interfere with the orders of the Supreme Court itself.** In rejecting these

objections, Dias S.P.J., placed this matter in its proper setting quite convincingly in the following words:

> "In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. **We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice** which makes it incumbent on this Court, despite technical objections to the contrary, to do justice. "

Ranasinghe J., referring to the judgment of Menchinahamy vs. Muniweera (1950) 52 NLR 409, while being on the minority will not diminish its value. It shows how the then Supreme Court, exercised the power of restitutio in integrum, ***even*** against a judgment of its own. **Today, such a power is vested, hence, not only under Article 138 of the Constitution, but also on the hierarchical arrangement of courts and in the mode of exercise of the powers of Courts, referred to by the learned Chief Justice, in relation to Article 169(2) in the present Court of Appeal.**

Ranasinghe J., further said in the said judgment,

> "The Supreme Court, as constituted under the 1978 Constitution, is not vested with the revisionary powers as exercised by the Supreme Court which was created by the aforesaid Courts Ordinance (Chapter 6)".

Despite this view being expressed in a minority judgment in that case, the judgment of the learned Chief Justice in the majority, drew a similarity between the present Court of Appeal and the former Supreme Court, to say that the present Supreme Court does not have revisionary powers. The majority of the Supreme Court also decided that "there is no justification for exercising any of the inherent powers of the Court in this case."

Thus it appears, that, the Supreme Court newly established under the 1978 Constitution does not have revisionary powers. Under section 37 of the Courts and their Powers Ordinance of 1889 [*Courts Ordinance*] the then Supreme Court was vested with revisionary jurisdiction. The "side note" to that section said, "Powers in appeal or on revision". The former Supreme Court of Ceylon had not the jurisdiction of restitutio in integrum vested on it by a statute, but as Dias S. P. J., exercised it in Menchinahamy va. Muniweera in 1951, it was exercised on the strength of the Roman Dutch Common law which applies without being enacted by way of a statute. It is this jurisdiction of restitutio in integrum, which is presently vested in the Court of Appeal established under the 1978 Constitution by its Article 138.

Dias S.P.J. thus set aside a decree entered pursuant to a judgment given by two judges of the former Supreme Court (Supreme Court of Ceylon). He did so accompanied on the Bench with Gunasekera J., who agreed with him. Thus, even the decree of the same court was set aside exercising the power of restitutio in integrum.

The jurisdiction of restitutio in integrum is not limited to an alleged breach of the rule "audi alteram partem."

The above discussion also makes it clear, that,

(a) The power of restitutio in integrum, as exercised by Dias S.P.J. in Menchinahamy vs. Muniweera (1950) in the then Supreme Court is now vested in the present Court of Appeal,
(b) The power of revision is also vested with the present Court of Appeal,
(c) The present Supreme Court has, with respect, exercised its inherent powers very rarely (vide., the 07 Judge bench judgment referred to)

Thus this Court is not precluded from exercising its power of restitutio in integrum even if a High Court exercising civil appellate jurisdiction has given a judgment.

It may be noted, that, section 48(4)(a)(iv) and (d) says,

> "(a) **Whenever a party to a partition action-** (iv) **being a party who has duly filed his statement of claim and registered his address, fails to appeal at the trial,..."**

Under section 48(4)(a)(iv) and (d) when special leave is granted, the district court has the power to settle questions of fact and law arising from the pleadings and any further pleadings **which are relevant to the claim set up in the petition only.**

Hence, what the Court can consider is only the Statement of Claims of that party, or averments in any further pleading which is relevant to the claim set up in the petition only. Hence the scope of further pleadings, if any, is confined to the four corners of the petition. In the petition dated 03.11.1997 the 04th defendant pleaded no deed but only prescriptive title.

As per the Statement of Claims of the 04th defendant, which was referred to at the commencement of this judgment, only deed No. 2018 dated 17th May 1994 is pleaded.

The said deed is at page 714 of the Original case record. The first vendor is Mallika Arachchige Percy Perera. He claimed title by virtue of parental inheritance and upon a deed of declaration. He did not specify as to "parental inheritance" from whom. The second vendor is Kuruppu Arachchige Dona Rupawathie. She claimed title from prescriptive possession.

The Interlocutory Decree dated 24th February 1997, which could not be set aside by the learned district judge but only could be altered or modified under section 48(4)(d) gave Rupawathie an undivided 13/84 shares, which is therefore conveyed to the 04th defendant the only right accruable. **Hence there requires no change in the Interlocutory Decree.**

Except as provided under subsection (4) aforesaid, under subsection (1) the words, "**notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action;...**" applies. As the procedure followed by the district court on and after 18.11.1998 is not sanctioned by subsection (4) the aforesaid part in subsection (1) applies and therefore the Interlocutory Decree entered on 24.02.1997 is valid in law.

Hence exercising the power of Restitutio in Integrum this Court sets aside the judgment of the High Court which exercised civil appellate jurisdiction as well as the judgment given by the district court after its initial judgment and this Court restores the judgment dated 24th February 1997 delivered by Hon. Dammika Kitulgoda, District Judge and the Interlocutory Decree entered accordingly.

The learned district judge will enter Final Decree accordingly after executing the final scheme of partition.

The plaintiffs are entitled to claim cost of this application from the 04A and 05th defendants and the 09th defendant.

Judge of the Court of Appeal.

Hon. Neil Iddawala
I agree.

Judge of the Court of Appeal.