

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

In the matter of an application for Restitution,
in the nature of *Restitutio-In-Integrum* under
and in terms of Article 138 (1) of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

Court of Appeal

Case No: RII/0025/2025

DC Matara

Case No: 26480/P

Wijjarupage Baby alias Wijjarupage Desilatha
Calderamwatte Road, Pelena, Weligama

Plaintiff

VS

01. Wathudura Bandanage Wijitha
Of 'Anurasiri', Paluwatta, Pelena, Weligama.

02. Modara Nekathige Ivan
Wella Addarawatte, Pelena, Weligama
(since deceased)

03. Modara Nekathige Dickman
Wella Addarawatte, Pelena, Weligama

04. Wathudura Bandanage Gaminisiri
Of 'Gamini', Palliyawatte, Pelena, Weligama

Defendants

05. Modara Nekathige Yamuna

06. Modara Nekathige Gayanal *alias* Gayan

07. Modara Nekathige Molly

All of Wella Addarawatte, Pelena, Weligama

08. Hewa Lunuwilage Monali Madhushani
Gunasekara Place, Palliyawatte,
Kamburugamuwa.

09. Roka Rio (Pvt) Ltd
No. 10 Havelock Place, Colombo 05.

10. Modara Nekathige Gayan Anuradha
Prabhaswara alias Gayan Sameera
No. 05, Old Road, Pelena, Weligama.

11. Banakiyanage Somina
Ganga Addarawatte, Pelena, Weligama

12. Banakiyanage Dhanawathie
Ganga Modarawatte, Pelena, Weligama

13. Banakiyanage Sunith
No. 149, Sri Dharmarama Road,
Dematagoda, Colombo 09

14. Banakiyanage Ramani Yamuna
Linda Kumbura, Godamadewatte, Bibile

15. Pattiyadurage Susil
Modarawatte, Pelena, Weligama.

Added Defendants

AND BETWEEN

Wijjarupage Baby alias Wijjarupage Desilatha
Calderamwatte Road, Pelena, Weligama.

Plaintiff-Petitioner

Vs.

Modara Nekathige Gayan Anuradha
Prabhaswara alias Gayan Sameera
No. 05, Old Road, Pelena, Weligama

**The Respondent who is already cited as a
Defendant appearing as the Representative
of the Interim/Intervening Petitioner**

AND NOW BETWEEN

Roka Rio (Pvt) Ltd
No. 10, Havelock Place, Colombo 05

9th Defendant-Petitioner

Vs

Wijjarupage Baby Alias Wijjarupage Desilatha
Calderamawatte Road, Pelena, Weligama

Plaintiff-Petitioner-Respondent

Vs

Modara Nekathige Gayan Anuradha
Prabhaswara alias Gayan Sameera
No. 05, Old Road, Pelena, Wiligama

Added 10th Defendant-Respondent-

Respondent,

Before : R. Gurusinghe, J.
&
Dr. S. Premachandra, J.

Counsel : Gazahali Hussain with Ashiq Hassim,
Sumendra Fernando, Aneeraz Samahari and
Basura Rajapaksha instructed by
Tharushika Fernando
for the 9th Defendant-Petitioner

D.P.L.A. Kashyapa Perera, AAL with F. Shezza Zarook
Instructed by Shafi Hussain, AAL
For the Plaintiff-Petitioner-Respondent

Argued on: 29-01-2026

Decided on : 12-03-2026

JUDGMENT

R. Gurusinghe, J

Plaintiff-petitioner-respondent (Plaintiff) instituted an action in the District Court of Matara by the plaint dated 09-08-2018, seeking to partition a land called Lot 'B' of Wella Addarawatte, *alias* Midigahawatte, in extent of 01 Rood and 19 Perches, situated within the Pelana South Grama Niladhari division in Weligama. In the original plaint, there were four defendants named. Subsequently, additional parties were added to the action, and at present, there are fifteen defendants.

The 9th defendant, who is the petitioner in this application, filed its statement of claim along with those of the 3rd, 5th, 6th, and 8th defendants on 30-11-2021. They have admitted that the land sought to be partitioned is depicted as Lot 'B' in plan No. 3093 dated 07-02-2020, prepared by D.H. Chandrasena, Licensed Surveyor. They disputed the devolution of title (pedigree) described in the plaint.

By a petition dated 26-06-2024, the plaintiff made an application seeking an enjoining order, notice of injunction, an interim injunction, and a permanent injunction against the 10th defendant-respondent (the 10th Defendant). The plaintiff's position in that application was that the 10th defendant had erected a fence using concrete posts encroaching on a portion of the corpus from its Southern boundary. The plaintiff further pleaded that the 10th defendant had no rights in the corpus. However, the 10th defendant was claiming rights over the corpus after instituting the partition action by deed no. 477 dated 01-11-2023. The said application was supported on 27-06-2024, and the Learned Additional District Judge issued an enjoining order and notice of injunction against the 10th defendant as prayed for by the plaintiff. The 10th defendant filed objections to the plaintiff's application. Upon inquiry, the Learned Additional District Judge, by order dated 10-03-2025, decided that the plaintiff was entitled to the reliefs prayed for in the petition against the 10th defendant. He further ordered to remove the fence erected by the 10th defendant. The 10th defendant had not filed any appeal or revision application against the said order of the Learned Additional District Judge.

The 9th defendant-petitioner filed the present application for *restitutio in integrum* on 22-04-2025, seeking to set aside the order of the Learned Additional District Judge of Matara dated 10-03-2025, made against the 10th defendant. In the said application, the 9th defendant states that it is the owner of Lot 'C', which is adjoining to Lot 'B', the corpus of this action.

Relief by way of *Restitutio-in-Integrum* in respect of judgments of original courts may be sought:

- (a) Where judgments have been obtained by fraud by the production of false evidence, non-disclosure of material facts or by force; or
- (b) Where fresh evidence has cropped up since judgments, which was unknown earlier to the parties relying on it or which no diligence could have helped to disclose earlier, or
- (c) Where judgments have been pronounced by mistake and decrees entered thereon, provided, of course, it is an error which connotes a reasonable and excusable error.

Vide Sri Lanka Insurance Corporation Limited vs. Shanmugam and another [1995] 1 Sri LR 55.

In paragraph 17 of the petition, the 9th defendant set out the grounds on which they rely to invoke this *restitutio-in-integrum* application. They are as follows:

- a. The impugned order is contrary to law;
- b. The learned additional District Judge has misdirected himself in law in failing to appreciate that the impugned Order could not have been made without the 9th Defendant-Petitioner being a party to such Inquiry;
- c. The learned District Judge at pages 11 and 12 of the impugned Order, having addressed his mind to the title derived to Lot 'C' (situated adjacent to the subject matter of this action) by the 9th Defendant in terms of Deed No. 847 dated 22.03.2018 [10V2], had thereafter misdirected himself in failing to appreciate that the 9th Defendant was a necessary party to the proper and full adjudication of matters urged by the Plaintiff in her Petition dated 26.06.2024;
- d. The above is further evinced by the fact that the learned Additional District Judge at page 12 of the impugned Order had in fact doubted the capacity of the 10th Defendant to act as the Representative of the 9th Defendant, which by itself establishes the fact that the 9th Defendant is a necessary party for the proper, full and fair adjudication of matters urged by the Plaintiff in her Petition dated 26.06.2024;
- e. The learned additional District Judge, having arrived at a conclusion that there was no document before Court to establish that the 10th Defendant was a duly authorized representative of the 9th Defendant, could not have thereafter delivered the impugned Order without the participation of and/or hearing the 9th Defendant;
- f. The impugned Order is manifestly and palpably wrong, illegal and vitiated by the failure to take cognizance of the fact that, despite the 9th Defendant-Petitioner being a party to the main matter, the Plaintiff had failed to make the 9th Defendant-Petitioner a party to this Inquiry and thus had not been afforded a hearing prior to the making of the impugned Order;
- g. The aforesaid failure on the part of the Plaintiff was despite the fact that document produced, marked as 10V2 by the 10th Defendant categorically establishing that the 9th Defendant-Petitioner was the

owner of Lot 'C', situated immediately adjacent to Lot 'B', in respect of which the Plaintiff had filed this action;

- h. The interim relief sought by the Plaintiff has a direct effect on the rights of the 9th Defendant, who has not been heard prior to the issuance of the interim and mandatory injunctions;
- i. Thus, the learned Additional District Judge fell into further error in failing to appreciate that the Plaintiff had failed to establish a prima facie case to sustain the grant of the interim injunction prayed for in Petition dated 26.06.2024;
- j. The learned District Judge also failed to appreciate that the conduct of the Plaintiff did not warrant the grant of the interim or mandatory injunctions and that equitable consideration also did not favour the Plaintiff;
- k. The learned Additional District Judge failed to appreciate that the Plaintiff's action is misconceived and not properly constituted in law, and thus, the Plaintiff was not entitled to any relief by operation of law;
- l. Furthermore, it is the respectful position of the 9th Defendant that the boundary wall referred to by the Plaintiff has not been erected between Lots 'B' and 'C' but in fact has been erected separating Lots 'C' and 'D', depicted in Plan marked as 10V3, submitted by the 10th Defendant. The 9th Defendant has not been afforded the opportunity of placing such material before the learned Additional District Judge, so as to substantiate such position by reason of the Plaintiff's failure to make the 9th Defendant a party to such Application dated 26.06.2024 preferred by the Plaintiff.

One of the grounds of the 9th defendant-petitioner against the impugned order is that the 9th defendant-petitioner should have been made a party to the injunction proceedings. The 9th defendant was already a party to the main action. The plaintiff-respondent sought an injunction against the 10th defendant-respondent on the basis that the 10th defendant-respondent erected a fence encroaching upon the corpus of the action. If the 10th defendant was solely responsible for that act, there was no necessity for the plaintiff to make the 9th defendant a party to the injunction proceedings. In the present application, the 9th defendant does not state that the 10th

defendant acted on the instructions of the 9th defendant, or that the alleged new fence was erected by the 9th defendant. The 9th defendant is completely silent as to who erected the new fence. In the statement of claims, the 9th defendant has categorically admitted that the land sought to be partitioned is Lot 'B' of Welladerawatte *alias* Midigahawatte, which is depicted in the preliminary plan No. 3093 prepared by D.A. Chandrasena, Licenced Surveyor. Therefore, there cannot be any dispute regarding the identity of the corpus of the action. There is no order against the 9th defendant. The 9th defendant has failed to state that he suffered any damages as a result of the impugned order.

In the case of Phipps v. Bracegyrdle 35 NLR 302 Drieberg J. held that, "Restitution is not allowed unless the applicant can show that he had suffered actual damage." On behalf of the 9th defendant, it was submitted that the 9th defendant could not have made a Leave to Appeal application because he was not a party to the injunction proceedings. In the Sri Lanka Insurance Corporation Limited case (Supra), Dr Ranaraja J. stated as follows:

"The power of Restitution differs from the revisionary power of this Court in that the latter is exercised where legality or propriety of any Order or proceedings of a lower Court are questioned. Restitution reinstates a party to the original legal condition which he deprived of by the operation of law. Thus, it follows the remedy can be availed of only one who is actually a party to the legal proceedings in respect of which restitution is desired. (Perera vs Wijewickrama 15 NLR 411, Menchinahamy v. Munaweera 52 NLR 409)."

As the 9th defendant-petitioner is not a party to the injunction proceedings and as there was no order against the 9th defendant-petitioner, the 9th defendant-petitioner is not entitled to seek relief by way of restitution.

In the above circumstances, the application of the 9th defendant cannot succeed. Application is dismissed with costs.

Judge of the Court of Appeal.

Dr. S. Premachandra J.
I agree.

Judge of the Court of Appeal.