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

T. W. Mary Nona (Deceased) of Malbe, Pihimbuwa.
Petitioner

G. D. Sriyani Mallika Weerasinghe of Malbe, Pihimbuwa.
Substituted Petitioner

Case No. CA (Revision) 168/2007
D. C. Kurunegala Case No. 2163/P

Vs.

Sakkarapedige Gunapala of Mahawela, Pihimbuwa.
Plaintiff- Respondent

1. Galketiyahene Dewage Mania alias Lapia of Ogodapola, Pihimbuwa.

2. Do Malani Kusumawathi of Matalapitiya

3. Do Karunadewa (Deceased)

4. Wimalawathi (Deceased)
Both of Ogodapola

4A. Hapuwa Dewavalage Malani Kusumawathi of Ihala Ogodapola, Pihimbuwa.

4B. Do Samadara

4C. Do Mangala Devi

4D. Do Nanadawathie

4E. Do Malanie

4F. Do Sumanawathi

4G. Do Indrani Chandralatha

4H. Do Sarath Jayasundara
All of Ihala Ogodapola, Pihimbuwa.

5. Tikka Dewayalage Kirisanda of Malve, Madure Korale.

6. L. Balasuriya of Pahala Ogodapola in Madure Korale.

7. R. M. Loku Banda of Kandegedara in Madure Korale.

7A. R. S. Nalin Rathnayake

8. Galketi Newa Dewage Siridewa

9. R. D. Karunawathie

10. G. D. Dingiriya (Deceased)
All of Malbe in Madure Korale.

10A. G. D. Pincha of Malbe.

11. R. D. Nandawathie

12. Galaketiyahena Dewalage Tikiri
Both of Pussela in Hewavissa.

13. Do Tikira of Ihala Ogodapola in Madure Korale.

14. Pihimbuwa Dewayalage Sumanadewa of Ihala Ogodapola.

15. Galketiya Dewayalage Mali of Gallewa in Madure Korale.

16. Pihimbuwa Dewayalage Nandadewa of Ihala Ogodapola.

17. T. G. D. Nandadewa of Ogodapola.

18. Halliyandda Dhammananda Thero
Controlling Viharadhipathi of Malbe Temple

Defendants-Respondents

Before: K. K. Wickremasinghe, J.

Janak De Silva, J.

Counsel:

Mahanama De Silva with K.W.M. Dilrukshi for the Substituted Petitioner

M.S.A. Sahed with A.M. Hussein for the Substituted 4A Defendant-Respondent

Written Submissions tendered on:

Substituted Petitioner on 12.07.2018

Substituted 4A Defendant-Respondent 02.07.2018

Decided on: 31.01.2020

Janak De Silva, J.

The Petitioner filed this revision application by petition dated 14.02.2007 and sought *inter alia* to set aside the order of the learned Additional District Judge of Kurunegala confirming the final scheme of partition [Journal Entry No. 164 at Page 76 of the Brief marked 'X'] and the Final Decree dated 28.07.2005 [Page 166 of the Brief marked 'X'] in D.C. Kurunegala Case No. 2163/P.

The Petitioner averred in her petition that –

1. She is the widow and the legal heir of the 3rd Defendant in D.C. Kurunegala Case No. 2163/P;
2. She was completely unaware of the Case No. 2163/P and the judgment thereof until December 2006;
3. Her husband passed away on or about 23.12.2000 after a prolonged illness but neither was, she informed about the pending partition action in the District Court of Kurunegala nor she was not substituted in his place;
4. She has been in the continuous possession/occupation of the land called "Welendewatta" in Malbe (i.e the land sought be partitioned in Case No. 2163/P) since 1968;
5. In December 2006, she became aware that the land portion possessed/occupied by her (i.e. Lot 3 in Plan No. 2887 dated 25.07.2001 made by H. B. Abeyratne, Licensed Surveyor) has been allotted to the 4A Defendant-Respondent (4A Defendant);
6. The land portion possessed/occupied by her was never surveyed nor did she receive any notice of the survey;
7. The Preliminary Plan No. 1138/64 dated 15.08.1964 made by N. Allan Smith, Licensed Surveyor and the Report thereof clearly indicate that Lot D in the said Preliminary Plan (i.e. Lot 3 in the aforesaid Plan No. 2887) is claimed by the 3rd Defendant [Page 197 of the Brief marked 'X'];

8. The said Lot 3 contains 7 boutique rooms constructed by the deceased 3rd Defendant and her only income is the lease rental collected from the said boutique rooms.

The 4A Defendant, by her Statement of Objections dated 14.09.2007, took up the position that –

1. The Petitioner was well aware of the Case No. 2163/P from the very beginning since her deceased husband participated in the same prior to his death;
2. The finality conferred on the interlocutory decree and the final decree in a partition action is not affected due to the failure to substitute the heirs or legal representatives of a deceased party in terms of Section 48(1)(b) of the Partition Law;
3. The boutique rooms and/or the buildings alleged to have been constructed by the 3rd Defendants were not in existence at the time the said Preliminary Plan No. 1138/64 was prepared and they are illegal constructions;
4. The Petitioner has not shown any solid and material grounds and/or any exceptional circumstances to invoke the revisionary jurisdiction of this Court and is guilty of laches.

At the onset, the 4A Defendant raised a preliminary objection as to the maintainability of the revision application of the Petitioner on the ground that the Petitioner has failed to plead any exceptional circumstances which warrants the exercise of the revisionary jurisdiction of this Court. Another division of this Court overruled the said preliminary objection by the order dated 24.05.2016.

Thereafter, when this matter was taken up before the present bench for the first time, another preliminary objection was raised that the Petitioner has no *locus standi* to maintain this revision application as she has not established that she is the widow of the deceased 3rd Defendant. This Court overruled the preliminary objection raised by the 4A Defendant by the order dated 12.06.2018.

The Revisionary Jurisdiction of the Court of Appeal to set aside a Final Partition Decree

Section 48(3) of the Partition Law reads –

> *The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by Subsection (1) of this Section notwithstanding the provisions of Section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.*
>
> ***The powers of the Court of Appeal by way of revision and restitutio in integrum shall not be affected by the provisions of this Subsection.*** [emphasis added]

The wording of the Section 48(3) of the Partition Law and precedent makes it clear that the final and conclusive effect given to an interlocutory or a final decree by Section 48(1) of the said Law does not prevent the Court of Appeal from setting aside an interlocutory decree or a final decree in a partition action by way of revision and restitutio in integrum.

Section 48(1) of the Partition Law had not taken away the right of the Court of Appeal to set aside an interlocutory or even a final decree in a partition action by way of revision and/or restitutio in integrum [*Dissanayake v. Elisinahamy* (1978-79) 2 Sri.L.R. 118]. The finality attached to an interlocutory decree of partition under Section 48(1) of the Partition Law No. 21 of 1977 does not preclude an Appeal Court from interfering with such decree by way of revision or restitutio in integrum where a miscarriage of justice has occurred [*Piyasena Perera v. Margret Perera and Two Others* (1984) 1 Sri.L.R. 57]. The Appeal Court's revisionary powers remain unaffected by legislation stipulating finality and conclusiveness to decrees under the law relating to partition. Yet, the Court will intervene in revision only if there is fundamental vice and to avert a miscarriage of justice [*Koralage v. Marikkar Mohamed & Others* (1988) 2 Sri.L.R. 299]. Revisionary powers could be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated only where a strong case is made out amounting to a positive miscarriage of justice [*Senaratne and Another V. Wijelatha* (2005) 3 Sri.L.R. 76].

Accordingly, there is no doubt that this Court has power to set aside an interlocutory and/or a final decree in a partition action by way of revision where a miscarriage of justice has occurred. This power can be exercised even by a person who was not a party provided he has a right, title or interest in the subject matter.

A person who had right title or interest in the subject matter not being made a party to a partition action is a victim of a miscarriage of justice. He can always invoke the powers of revision and restitutio in integrum [*Somawathie v. Madawela and Others* (1983) 2 Sri.L.R. 15, *Maduluwawe Sobitha Thero v. Joslin and Others* (2005) 3 Sri.L.R. 25]. A glaring blemish which taints the proceedings in a partition action and results in a miscarriage of justice to a person not being a party to the action may appropriately be remedied by an application in revision [*Amarasinghe v. Wanigasuriya* (1994) 2 Sri.L.R. 203].

Therefore, it is necessary to see whether the Petitioner has made out a strong case to show that she is a victim of a miscarriage of justice.

The Petitioner claimed that she was not substituted in the place of her deceased husband who was the 3rd Defendant in the partition action bearing No. 2163/P. To establish that she is the widow and the legal heir of the deceased 3rd Defendant, the Petitioner produced the marriage certificate bearing No. 188 dated 27.02.1964 to this Court. The 4A Defendant has not challenged the contents or the validity of the said marriage certificate.

Also, the proceedings and the journal entries of the partition action bearing No. 2163/P show that even though most of the Defendants have filed their Statements of Claim, when the trial was taken up, all the Defendants were absent and unrepresented [Page 56 of the Brief marked 'X'].

Thus, I hold that the Petitioner is a victim of a miscarriage of justice and has the right to invoke the revisionary jurisdiction of this Court.

The Modification of the Commissioner's Scheme of Partition

Section 33 of the Partition Law reads –

> *"The Surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or of buildings erected thereon will, if that party is entitled to a share of the soil, be allotted, so far as is practicable, that portion of the land which has been so improved or built upon, as the case may be."*

A co-owner should be allotted the portion which contains his improvements whenever it is possible to do so [*Thevchanamoorthy et al v. Appakuddy et al* (51 N.L.R. 317)]. In terms of Section 33 of the Partition Law, the Surveyor is required to so partition the land that each party entitled to compensation in respect of improvements is allotted, as far as is practicable, the portion of the land which has been so improved. [*Albert v. Ratnayake* (1988) 2 Sri.L.R. 246]. Although, according to Section 33 of the Partition Law, a co-owner should ordinarily be given by the Commissioner an allotment which includes the improvements he has made, this rule need not be adhered to if, in doing so, a fair and equitable division is rendered impossible [*Sediris Perera v. Mary Nona* (75 N.L.R. 133)].

According to the aforesaid Preliminary Plan No. 1138/64 and the Report thereof, Lot D of the same and everything else standing thereon is claimed by the 3rd Defendant [Pages 199 and 200 of the Brief marked 'X']. Also, by the judgment dated 16.12.1999 and by the Interlocutory Decree dated 22.05.2000, the learned Additional District Judge has directed the land to be partitioned among the parties, as far as is practicable, according to the portions possessed and/or occupied by them. Further, he has directed to allot the improvements as per the Report marked 'X1' (i.e. the Report of the aforesaid Preliminary Plan No. 1138/64).

However, a careful perusal of the aforesaid Plan No. 2887 [Page 212 of the Brief marked 'X'] and the Report thereof shows that Lot 3 (i.e. Lot D in the aforesaid Preliminary Plan No. 1138/64) has been given to the 4A Defendant contrary to the direction of the learned Additional District Judge without giving any reasons. Even though the 4A Defendant has claimed that the boutique rooms and/or the buildings constructed on Lot 4 of the aforesaid Plan No. 2887 are illegal, she has not given any reason to substantiate her claim.

In the case of *Sediris Perera v. Mary Nona* (supra at page 134), Sirimane, J. observed –

> *"The mere fact that the judgment says that a particular building 'belongs' to a particular person (and the interlocutory decree based on that judgment, reflects that finding) does not follow that the Commissioner must in all circumstances allot a building to the particular co-owner who built it. A building put up under protest, as in this case, may fall into a lot given to a co-owner other than the person who built it, unless there is a specific direction to the contrary with the decree."*

However, it must be noted that, in the present application, the 4A Defendant has not produced any evidence to show that the buildings constructed on Lot 4 of the aforesaid Plan No. 2887 were put up under protest of the other co-owners. In the absence of such evidence, this Court is inclined to conclude that the said boutique rooms and/or the buildings were constructed by the 3rd Defendant with the consent of the other co-owners.

In view of the above, I hold that the learned Additional District Judge has erred in confirming the final scheme of partition and allotting the said Lot 4 of the aforesaid Plan No. 2887 to the 4A Defendant.

Therefore, I set aside the Scheme of Partition and Final Decree dated 28.07.2005 in D.C. Kurunegala Case No. 2163/P.

I further direct the learned Additional District Judge of Kurunegala to reissue a commission for the preparation of the scheme of partition and enter final decree after due inquiry.

Judge of the Court of Appeal

K. K. Wickremasinghe, J.

I agree.

Judge of the Court of Appeal