

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

In the matter of an application for Special Leave to Appeal in
terms of Article 128 of the Constitution of Sri Lanka.

Tyrone de Alwis

131, Gattuwana ,Kurunegala

Intervenient –Petitioner- Petitioner

SC Appeal No. 53/2005

SC SPL LA No. 138/2004

CA Writ 1797/2001

Vs.

1. Municipal Council of Kurunegala
2. E.M.P Ekanayake
Municipal Commissioner
Kurunegala

Petitioners- Respondents- Respondents

1. Hon Gen. Anuruddha Ratwatte,
Minister of Lands,
Irrigation & Power and Energy and Deputy Minister of
Defence,
No. 80, Flower Road,
Colombo-03.

2. Hon Salinda Dissanayake.
Former Minister of Land Development and Minor Exports
Agriculture,
No. 80/5, Govijana Mandiraya,
Rajamalwatte Lane,
Battaramulla.

3. Attorney General,
Attorney-General's Department,
Colombo-12.

1st, 2nd and 3rd Respondents-Respondents.

Hon. Rajitha Senaratne, Present Minister of Land,
No. 80/5, Govijana Mandiraya,
Rajamalwatte Lane,
Battaramulla.

Added Respondent

AND NOW BETWEEN

Tyrone de Alwis,
No.131, Gattuwana,
Kurunegala.

Intervient – Petitioner Petitioner

Vs.

1. Municipal Council of Kurunegala.
2. E.M.P. Ekanayake,
Municipal Commissioner,

Petitioners-Respondents-Respondents-Respondents.

1. Hon Gen. Anuruddha Ratwatte,
Minister of Lands.
Irrigation & Power and Energy and Deputy Minister of
Defence,
No. 80, Flower Road,
Colombo-03.
2. Hon Salinda Dissanayake.
Former Minister of Land Development and Minor Exports
Agriculture,
No. 80/5, Govijana Mandiraya,
Rajamalwatte Lane,
Battaramulla.
3. Attorney General,
Attorney-General's Department,
Colombo-12.

**1st, 2nd and 3rd Respondents-Respondents-
Respondents**

Hon. Rajitha Senaratne, Present Minister of Land,
No. 80/5, Govijana Mandiraya,
Rajamalwatte Lane,
Battaramulla.

Added Respondent-Respondent

Anura Dissanayake,
Present Minister of Lands,
No.80/5, Govijana Mandiraya,
Rajamalwatte Lane,
Battaramulla.

Added 2nd Respondent

Before: P.A. Ratnayake PC J
Chandra Ekanayake J
Sathya Hettige PC J

Counsel: Manohara de Silva P.C. with H Munasinghe for the petitioner
Shamil Perera with R Prematilake for 1st and 2nd petitioner- respondents-
respondents
Bimba Tilakaratne ASG with Ms Yuresha de Silva SC for Attorney General

Argued on : 27/01/2012

Authorities of the petitioner: Received on 10/02/2012

Written Submissions

of the 1st and 2nd respondents : Received on 06/06/12

Decided on : 27th July 2012

SATHYAA HETTIGE P C J

This is an appeal for re-listing of the Court of Appeal Writ application No. 1797/2001 which was allowed by quashing the divesting Order, for a fresh hearing on the basis that the petitioner was not made a party and no hearing was given to the petitioner and also on the ground that there is no provision in the Land Acquisition Act to cancel a Divesting Order. The Court of Appeal made order refusing the re-listing of the application on 26.04.2004. However, the petitioner has failed to annex a copy of the said Court of Appeal order dated 26.04.2004 to this appeal in compliance with the Supreme Court rules.

This court granted Special leave to appeal in the Special Leave to Appeal application no. SC Spl.LA 138/04 on 20/07/2005 on the questions of law set out in paragraph 12 (b), 12(c), 12 (d), 12 (e) and 12 (f) of the petition dated 29th May 2004.

The Municipal Council of Kurunegala and the Municipal Commissioner who are the Petitioner Respondents- Respondents in this appeal filed the Writ application bearing number 1797/2001 in the Court of Appeal seeking to have a divesting Order made by the second respondent on 26th July 2001 quashed by way of a Writ of Certiorari as set out in the petition to the Court of Appeal.

The facts as stated in the petition in the said application are that the aforesaid divesting Order had been made in respect of a land called 'Ulpothawatte' situated within the Municipal Council limits of Kurunegala Municipal Council which had been acquired by the State in 1907 under the Land Acquisition Ordinance of 1876 for a public

purpose namely, for preservation of the water supply from contamination. It had been stated in the petition that the decision to acquire the said land was taken by the Local Board of Kurunegala (now the Municipal Council of Kurunegala) which possessed the land after acquisition.

It further appears from the facts stated in the petition to the Court of Appeal that there had been two partition actions filed in 1978 in the District Court of Kurunegala for partitioning of the said land called "Ulpothawatte" to which neither the Municipal Council of Kurunegala nor the State had been made parties to the said partition actions. Accordingly the parties to the two partition actions had obtained partition decrees.

The petitioner states that the petitioner and members of his family were the co-owners of the said land called "Ulpothewatte" which was acquired by the Government in 1907 for a public purpose namely for preservation of water supply from contamination. Even though the land was acquired by the State the petitioner's predecessors in title continued to be in possession of the land according to the petitioner.

The petitioner further states that the petitioner's predecessors in title had continued in possession of the land and had acquired prescriptive title to the said land even after the acquisition of the land by the State. However, the petitioner- Respondents by virtue of the said acquisition Order attempted to take possession . Thereafter the petitioner and others made representations to the then Minister of Land Development and the Minister acting under section 39(1) of the Land Acquisition Act made order revoking the acquisition on 26th July 2001.

Thereafter the respondents filed the above mentioned Court of Appeal application No. 1797/2001 for a Mandate of Writ of Certiorari to quash the said divesting order which was published in Government Gazette dated 7th August 2001 marked P17.

The Court of Appeal made order on 29/11/2002 revoking the divesting order dated 26.7.1987 as the State informed court that the respondents will not be filing objections and had no objections to the granting of relief prayed for in paragraph 'b' of the prayer by the petitioner- respondents. The said Court of Appeal Order dated 29/11/2002 at page 311 of X1 granted relief to the petitioner respondents and by the said Order the Court of Appeal also restored the petitioner respondents (Municipal Council of Kurunegala and Municipal Commissioner Kurunegala) to possession of the said land. The petitioners-respondents thereafter withdrew the application. However, part of the Order made by the Court of Appeal on 29/11/2002 by restoring the petitioners- respondents to possession was set aside by the Court of Appeal on 26.04.2004 on the basis that Order dated 29/11/2002 was made per incuriam. However, the petitioner in this appeal has failed to

disclose clearly the fact that part of the Order restoring the respondents to possession had been set aside by the Court of Appeal on 26.04.2004 by annexing the Court Order . This court obtained the above information regarding the Court of Appeal Order dated 26.04.2004 after perusal of the Court of Appeal records in Writ Application no. CA 1797/2001.

On 12th May 2003 the petitioner filed an application to have the Court of application No. 1797/2001 re-listed on the basis that the Kurunegala Municipal Council failed to make the petitioner a party to the said Court of Appeal application . The Court of Appeal Order dated 26.04.2004 has not been annexed to this petition by the petitioner. The petitioner has not even stated in the petition any reason as to why the Court of Appeal Order has not been annexed to the petition. The failure to annex the Court of Appeal Order in compliance with the Rules of Supreme Court is fatal to the petitioner's case.

The question for determination before this Court is whether the Interveniēt-petitioner-petitioner has a right to have the Court of Appeal case re-listed for a fresh hearing after the case has been determined by the Court of Appeal.

The petitioner-respondents submitted that the interveniēt-petitioners claim title to the subject matter of this application bearing No. 1797/2001 based on prescriptive title and contended that the petitioner has no legal right to intervene in the case and is attempting to circumvent and or act in ignorance of the proper judicial recourse available to him in the proper forum seeking a declaratory relief on the prescriptive title he claims. The respondent also contended that there is no provision in the Court of Appeal rules for intervention of parties in a Writ application wherein the Court of Appeal has already made an Order and concluded the matter.

Counsel for the respondents further submitted that the interveniēt-petitioners' complaint that he was not heard before the divesting order was set aside warrants no merit. In paragraph 9 of the petition it is stated that the Hon. Minister made a divesting order revoking the acquisition order on the representations made by the interveniēt-petitioners and others to the Minister , without the Municipal Council of Kurunegala being heard. And now the petitioners complain that the revocation of the divesting order had been obtained without the petitioners being made parties. Therefore, It was submitted by the respondents that the interveniēt-petitioners were not necessary parties to the application since it was the Hon. Minister's order that was sought to be quashed.

The learned president's Counsel who appeared for the intervenient petitioners submitted that as a result of the fact that the original petitioners failed to make the present intervenient petitioner as a party to the writ application the rights of the present petitioners have been affected and cited several judgments in support of the arguments in the course of his submission.

One of the cases that was relied on by the petitioners was "**Sivaparthalingam Vs Sivasubramaniam 1990 1 SLR 378** wherein the court held that *a court whose act has caused injury to a suitor has an inherent power to make restitution. This power is exercised by a court of original jurisdiction as well as by a superior court.*"

However, it appears from the above judgment that the injury has been caused to a suitor consequent to a court's decision. I do not think that the above authority has any application to the present case since the intervenient-petitioners were never parties to the main writ application.

It should be noted that there is a catena of cases in Sri Lanka where there had been re-listing applications filed by the parties who were originally made parties to the case. The petitioners' counsel cited the following authorities in order to support the argument.

Perera v National Housing Authority 2001 3 SLR 50 was one judgment the petitioners' counsel relied on and where one of the parties to that case raised an objection that the necessary parties were not before court and not by a third party. The court upheld the objection and dismissed the application. That judgment cited by the petitioner is not one in relation to relisting and not relevant to the present case. The petitioners in this application were third parties who were not added as parties before the conclusion of the Court of Appeal case no. 1797/2001.

In the case namely **Kalawana Dhammadassi Thero v Mavella Dhammavissuddhi Thero 57 NLR 400** the court granted relief to rehear the case on the basis that the petitioner in that re-listing application was absent and unrepresented by a counsel and the petitioner satisfactorily explained the circumstances in which he was not represented at the hearing of the appeal.

Munasinghe and Another v Mohamed Jabir navaz Carim 1990 2 SLR 163 was a judgment wherein the judgment delivered by the Court of Appeal was a nullity as at that time no substitution has been made after the death of a party .

In the case of **Jinadasa and Another v Sam Silva and Others 1994 1 SLR 232** the court held that *"If the Attorney at Law who was entitled to appear had reasonable grounds for his absence the court would reinstate the matter on the basis that there was sufficient cause for his absence."* The court further held that *".....Where no sufficient cause is shown for the absence the attorney who was under a duty to appear, there are no grounds for an application ex debitor justitia of any inherent power to instate the matter . As much the petitioners would enjoy the fruits of the success of their attorneys endeavors they must take the consequences of his defaults and failures."*

Having carefully examined the above cases I think that all the judgments referred to above by the petitioners' counsel are not supportive and relevant to the case of the petitioners. I am not in agreement with the submissions of the learned president's counsel for the petitioners regarding the applicability of the above cases.

The applications for re-listing must be considered by court with great caution as the allowing of relisting may cause great prejudice to the interests of the parties who have already got reliefs in their favor after full hearing. Any third party has no legal right to canvass and seek reliefs in a matter that has been determined by court after full hearing the parties who were parties to the main application. I consider this as an attempt to re-argue the concluded matter.

As it was held in **Fernando Pulle v Premachandra de Silva 1996 1 Sri L. R. 70** I do not think that this court has jurisdiction under the Constitution or any other law to review , rehear or alter any decision already determined by the Court, and there is no power to be exercised by the Court to determine a matter involving an application for re-listing by a third party (intervenient-petitioner) which has already been determined as the decision is at end. The attempt of the petitioners in this application to invoke jurisdiction of this court in an appeal to re- list seems to be a backdoor method by the aggrieved third parties to seek relief by re- arguing the concluded matters and I think that this attempt to re-argue the matter may amount to abuse of court process. As such , I am of the opinion that this appeal must fail.

In the circumstances, I am not inclined to grant any relief to the petitioners and dismiss the appeal of the petitioners. No costs.

JUDGE OF THE SUPREME COURT

Ratnayake P.C J

I agree.

JUDGE OF THE SUPREME COURT

Ekanayake J

I agree.

JUDGE OF THE SUPREME COURT.