

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

Gode Withanage Ariyaratne alias
Ariyaratne Withanage of
Kadukkana, Thelijjawila.

And 3 others

C.A 2023/2001(Revision)
D.C Matara 1918/P

INTERVENIENT-PETITIONERS

Vs.

Gode Withanage Francina of
Polhindagoda, Godagama,
Matara.

PLAINTIFF-RESPONDENT

Gode Withanage Aralinahamy
Guruwalayawatte, Sulthanagoda,
Matara.

And 3 others.

DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: S.A.D.S. Suraweera for the Petitioner
S.N. Vijithsinghe for the 1A Defendant-Respondent
Rohan Sahabandu & R.M.S Bandara for the Plaintiff-Respondent

WRITTEN SUBMISSIONS FILED ON:

06.10.2010, 11.01.2012

DECIDED ON:

15.02.2011

GOONERATNE J.

This is a revision application filed by 4 Intervenant-Petitioners in a partition suit. The corpus called 'Guruwalayahena' is in extent of about 6 acres. Interlocutory decree and final decree had been entered by the District Court of Matara. According to the Petitioners the case had been taken up for trial on 03.03.2000. There been no contest and only Plaintiff-Respondent had given evidence. The learned District Judge had entered judgment on the same date. Land in question is a co-owned land shown in Surveyor Gunawardena's plan No. 718 (X) of 01.12.1998 as lots 1 & 2. According to the plaint (P1) there had been 4 Defendants. This land was originally a Crown land which was given on a crown grant on 09.04.1889 to one Godage Wathuhamy as described in paragraph 3 of the plaint. The devolution of tile (paragraph 3) and the evidence led at the trial (uncontested) indicates that by deed marked 1D1(101) of 26.6.1926 Godage Don Andiris became entitled to ½ of 69/109 share of the corpus.

The said Andiris had 6 children as disclosed in the plaint, 1st – 4th Defendants and Barnis and Denny who died issueless. The share as disclosed in the plaint and the evidence in favour of the 1st – 4th Defendants being 69/218 was the entitlement of the 1st – 4th Defendants by interlocutory and final decree. The Intervenient-Petitioners claim that Barnis did not die issueless but was married to Dayawathie and they had 4 children (the Petitioners in the revision application before this court).

The relief sought in this application are:

- (a) to set aside the interlocutory Judgment, the Decree and the Final Decree entered in this case,
- (b) to direct the Learned District Judge, Matara to add the Petitioners as parties to this case and for them to file their statements of claim

Perusal of the Docket I find that this is a matter which previously came up before this court on several occasions, but the case had not been argued and postponed for various reasons. All parties have filed Written Submissions, and the judgment in this application is delivered on the material placed before court by way of Written Submissions.

The Intervenient-Petitioners in their Written Submissions state inter alia the following:

1. The case of the Petitioners is that one child of Andiris Appu (Barnis Appu) who is alleged to have been died unmarried and issueless was in fact married

with issues who happen to be the Petitioners to the instant application and the Plaintiff as well as the Defendants have acted in collusion to deprive them of their lawful share of the land sought to be partitioned.

2. The Petitioners have produced the death certificate of the Barnis Appu marked 'P5' and the marriage certificate of said Barnis Appu marked 'P2' and the said documents will clearly depicts the names of Barnis Appu.
3. On perusal of document 'P2' it will be observed that the name of the father of the groom is given as Andiris Appu although in all the instances it is referred to as Vithanage Barnis Appu, Vithanage Andiris Appu minus the word 'Gode'.
4. It will also be observed that documents 'P3' and 'P4' being the birth certificates of the 1st and 2nd Petitioners also give the name of Barnis Appu to be the father of the Petitioners and 'P4' gives the name of the grand father to be Andiris Appu. In these instances too the word 'Gode' from the surname is not given for whatever the reason.
5. In any event the Plaintiff Respondent in filing her statement of objection had not denied the fact that the said documents relate to Barnis Appu or said Barnis Appu referred to in the said documents is not the eldest son of Andiris Appu who was a co-owner of the land in suit. All what she states in paragraph 7 of the statement of objection is that she was not aware of the whereabouts of Barnis Appu at the time of filing the action. This statement of the Respondent establishes the fact that she was not aware as to whether said Barnis Appu was alive or not and as to whether he was married with issues.

The Plaintiff-Respondent complains of a delay of 9 months from the date of judgment and failure to plead exceptional circumstances. Both grounds are relevant and important to disentitle the Petitioners' relief. There is no specific reference to exceptional circumstances pleaded by the

Petitioners. Delay is apparent. Plaintiff does not deny that Barnis Appu was not a child of the above named 'Andiris'. Plaintiff's position is that he was unaware of any marriage between Barnis and Dayawathie. Plaintiff-Respondent states that Plaintiff has no objection for the share that was allotted to the 1st – 4th Respondents 69/218 share, being allotted to 1st – 4th Respondents and Barnis Appu and Danny – 6 children of Andiris

The learned Counsel for the substituted 1st Defendant-Respondent also has no objection to Plaintiff's above suggestion as referred to in the Written Submissions.

I am also of the view that there is no proof that the land to the south of the corpus belongs to Andiris. Licenced Surveyor state that the land that was surveyed was the same land in the deed, with slight variation.

When I examine the Petition filed in this Court only the Birth Certificates of the 1st & 2nd Petitioners have been produced marked P3 & P4. The Birth Certificates of 3rd & 4th Petitioners were not made available before this court. Why is that?

However this court could intervene by way of revision to prevent a miscarriage of Justice. There is no specific denial of Barnis being a child of Andiris. Plaintiff and 1st Defendant (Intervenient) merely plead that they are unaware of any marriage between Barnis and Dayawathie. I do not

think legal entitlement of any party to property should be denied, merely on delay, and failure to specifically plead exceptional circumstances. Petitioners seems to have been kept out of the partition suit for some reason unknown to the original court.

In *Gnanapandithan vs. Balanayagam 1998(1) SLR 391*, Appeal to the Supreme Court G.P.S de Silva C.J heldThe circumstances were strongly indicative of a collusive action. In the result, there was a miscarriage of Justice in the case, and the Appellants were entitled to a revision of the judgment of the District Judge notwithstanding the delay in seeking relief. The question whether delay is fatal to an application in revision depends on the facts and circumstance of the case.

Appeal court could intervene by way of revision, to prevent a miscarriage of justice. The powers of revision and restitio in-integrum of the Appeal Court have survived all the legislation that has been enacted up to date. *Somawathie vs. Madawela 1983 (2) SLR 15*.

When I look at all the circumstances of this case I am only inclined to grant relief in terms of sub paragraph 'b' of the prayer to the petition, subject to conditions. (no statement of claim of them need be filed) The Original Court Judge need to be satisfied only on the question that the 4 Intervenient-Petitioners are the children of Barnis and Dayawathie. Only

two Birth Certificates are filed in this application. The learned District Judge is directed to inquire into this matter only. On being satisfied that the Interventient-Petitioners are children of Barnis, share of 69/218 already allotted to 1st - 4th Defendants could be allotted to the four Petitioners also, and necessary adjustments could be made, accordingly, by the District Judge.

Application allowed in terms of sub paragraph 'b' of the prayer to the petition subject to directions by this court. Registrar of this court is directed to forward this Judgment to the Registrar of the respective District Court forthwith.

Application allowed without costs.

JUDGE OF THE COURT OF APPEAL