

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

C.A.Revision No.1138/2006

**D.A.S.Dedigamuwa of No. 60/6, Pahala
Imbulgoda, Imbulgoda**

D.C.Gampaha No.38914/P

Plaintiff

Vs

G.A.G. Wijeratne

And 6 others

Defendants

Nalini Devanarayana

No. 72, D.S.Senanayake Street,

Ampara

Petitioner

Vs

D.A.S.Dedigamuwa

60/6 Pahala Imbulgoda.

Imbulgoda

Plaintiff Respondent

G.A.G. Wijeratne 95/1 Kandy

Kandy Road, Imbulgoda and

6 others

Defendant Respondents

Nalini Devanarayana

72 D.S.Senanayake Street, Ampara

Petitioner-Petitioner

Vs

D.A.S.Dedigamuwa

60/6 Pahala Imbulgoda, Imbulgoda

Plaintiff-Respondent-Respondentt

G.A.G.Wijeratne and 7 others

Defendant-Respondent-Respondents

BEFORE : Deepali Wijesundera J.,

M.M.A.Gaffoor, J,

COUNSEL : Ms. Saumya Amarasekera for the Petitioner-Petitioner

**S.F.A.Cooray and N.Nayanakantha for the 2nd Defendant
Respondent**

ARGUED ON: 11.03.2015

DECIDEDON: 14.08.2015

M.M.A.Gaffoor J,

This is an application inviting the Court , in exercising its power of Revision to set aside the interlocutory and final decree entered in this case on 5.10.2001 in the District Court of Gampaha in case No.38914/P and to allow the Petitioner to enter the said case.

The Plaintiff Respondent Respondent (hereinafter referred to as the "Plaintiff") filed the partition action by her Plaint dated 04.09.1995 to partition the land called "Kosgahalanda". The case was concluded without a contest on 31.09.2001 and thereafter judgment was entered on 05.10.2001 and the Interlocutory Decree on 12.06.2006 and the final decree for partition was entered on 23.03.2003.

The petitioner alleges that this partition action was filed in the District Court of Gampaha and the Petitioner and her family are living in Ampara. Due to the collusive action of the Plaintiff and the 2nd Defendant, the Petitioner was prevented from having notice of this action and she came to know about this action only in the latter part of 2005 by which time the final decree had already been entered. Upon becoming aware of this action the Petitioner sought to intervene in this action in 2005 but this application was disallowed by Court by its order dated 24.01.2006. Within 6 months from the date of the order the Petitioner, has filed this application and prayed inter alia that;

- a) the Petitioner be made a party to this action for partition;**

- (b) set aside all orders entered in this action for partition;**
- c) enter decree allotting 10 perches from the subject matter on Deed marked "X"**

The learned District Judge refused the application of the Petitioner stating that as the final stage of the action has been reached and the Petitioner has not intervened at the time the Notice was exhibited.

Being aggrieved by the said Judgment of the District Court the Petitioner has filed this Revision Application and sought the following reliefs :

- i) To set aside the order of 24.01.2006**
- ii) For a declaration that the Petitioner is entitled to an extent of 10 perches from the subject matter of this action and accordingly. alter and amend the Interlocutory Decree and judgment dated 05.10.2001;**
- iii) For a direction to issue fresh commission to allocate 10 perches from Lot 3 in Plan No.1665/P dated 29.08.2002 made by A.C.P. Gunasena L.S (Lot 3 was allotted to the 2nd Defendant)**
- iv) Alter and amend the final decree with regard to lot 3 in Plan No.1165/P by allocating 10 perches to the Petitioner or in the alternative to set aside the judgment dated 5.10.2001;**
- v) To set aside and cancel all proceedings after the stage where Section 12 Declaration marked P3 was filed and allow the Petitioner to file her Statement of Claim and to hear the case de novo;**

Counsel for the Petitioner submitted that the Revisionary powers of the Court is invoked to set aside the interlocutory and final decree entered in this case since serious irregularities and miscarriage of justice that had taken place during the course of the trial in this case.

- i) The action of the Plaintiff, has deprived the Petitioner from participating at the trial in violation of the Partition Act;**
- ii) There was no proper investigation of title and the land that was partitioned was larger than the land that is described and to be partitioned in the plaint;**

Counsel for the Respondent argued that the Petitioner is not entitled to any remedy under revisionary jurisdiction and her remedy was to claim damages in a separate action to be filed. The Petitioner is guilty of laches, that even after filing the application where the Petitioner has deliberately omitted to bring the necessary parties to her application and after the arguments have commenced in a Revision Application no party should be allowed to cure any defect taken up by way of a preliminary objection. In an application for revision, when necessary parties are not made parties initially, such error cannot be cured by a later application to add the said necessary parties after the Respondent has taken objections and therefore this application should be dismissed with costs.

Section 4(1)(c) of the Partition Law clearly states that names and addresses of all persons who are entitled to or claiming to be entitled to any right should be included in the Plaint.

Section 5 of the Partition Law makes it mandatory for the Plaintiff to include in the Plaint those who are in actual possession of the corpus or claiming to have rights in the corpus.

In the case of Somawathie vs Madawala and others (1983) 2 SLR 15 at 30 – Soza J., observed that any prudent Plaintiff should have caused a search to be made in the Land Registry before filing action.

Justice Udalagama in Umma vs Zubair & another – 2002 (3) SLR 170 held that :

- i) Section 48(4) could not bar a court from holding that in the event summons had not been even issued from coming to a finding that such non-issue was improper or that the court had no jurisdiction to proceed. Section 48(4) could not suppress the rights of parties to claim their due rights in partition actions which are decrees in rem;
- ii) There has also been blatant disregard to section 14(1) and deliberate non-compliance with section 12, even the registering of the lis pendens is not in the correct folio;
- iii) Notwithstanding section 48, the District Court is not precluded from giving effect to an unlawfully obtained interlocutory decree causing a grave miscarriage of justice;

Further Justice Udalagama in the above judgment has quoted Soza Judge's findings in Somawathie vs Madawala (Supra) that *“the immunity given to a partition decree from being assailed on the ground of omissions and defects or procedure as now broadly defined and failure to make persons concerned*

parties to the action should not be interpreted as a license to flout the provisions of the partition law. This court will not hesitate to use revisionary powers and give relief where a miscarriage of justice has occurred resulting from non-conformity with the specific provisions of the Partition Act.”

In this case it is clear that Section 12 of the Partition law has been violated. It states that L

“After a partition action is registered as a lispendens under the Registration of Documents Ordinance and after the return of the triplicate referred to in Section 11, the Plaintiff in the action shall file or caused to be filed in court a declaration under the hand of an Attorney at Law certifying that all such entries in the register maintained under that Ordinance as relate to the land constituting the subject matter of the action have been personally inspected by that Attorney at Law after the registration of the action as a lispendens , and containing a statement of the names of every person whom the Plaintiff is required by Section 5 to include in the plaint as a party to the action and also, if an address of that person is registered in the aforesaid register, that address”.

Section 12(3) states that where the Plaintiff fails to follow the procedure set out in Section 12(2) the court may dismiss the action.

In this case the declaration of the Plaintiff’s Attorney as required by the Partition Act has specifically stated that he has personally examined the extracts in the Land Registry and that there are no other parties than the Plaintiff and the Defendant who are entitled to receive notice under the Partition Act, which is not correct and must be rejected.

Further the 2nd Defendant has also violated Sections 19(1)©, 20(1)(b) 29(2)(b) of the Partition Law.

Counsel pointed out that there is no proper investigation of title and the land that was to be partitioned was larger than the land sought to be partitioned in the Plaint.

The land that was pointed out to the Surveyor at the Preliminary Survey and depicted in Plan No. 897/P was a land in extent A1.R1.P06(the increase in extent is R1.P35.21). The District Court is also in error for not adequately investigating the identity of land.

In *Somawathie vs Madawala (Supra)* case the Supreme Court came to a finding that where there had been no proper compliance with the imperative provisions of the partition law the Court of Appeal is vested with the power by way of Revision to intervene in order to prevent a miscarriage of justice.

In Induruwe Dhammananda vs Piyatissaq and another – 2001 (3) SLR 365 Udalgama J held : *“It is settled law the Revisionary powers of the Court of Appeal is unaffected even under partition law, the provisions of Section 48 notwithstanding – the power of revision and restitutio in integrum of the Court of Appeal have survived legislature that has been enacted uptodate”*.

In Gnanapandithen & another vs Balanayagam & another – 1998 – (1) SLR 391 it was held”

- a) That was a total want of investigation of title. The 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 Court notwithstanding delay in seeking relief;

- b) The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to the very special and exceptional circumstances of the case the appellants were entitled to the exercise of the revisionary powers of the Court of Appeal.”

(Civil Law Journal – Appeal Revision – page 208 & 209)

If summons is not served on a claimant it follows that he is deprived of an opportunity to establish his rights to the corpus. It is the duty of the Court to investigate the title of the parties. If a claimant is not added as a party, his title to the corpus cannot be established before court.

For the reasons stated above, I would hold that the interlocutory decree already entered should be set aside. This case is sent back to the District Court to issue summons on the Petitioner, to add him as a party and to file his statement of claim and the trial to proceed de novo.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL.