

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

In the matter of an application  
for Revision.

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

**Petitioner**

**Court of Appeal No:168/07**

DC Kurunegala No: 2163/P

G.D. Sriyani Mallika  
Weerasinghe,  
Malbe, Pihimbuwa.

**Substituted Petitioner**

***Vs.***

Sakkarapedige Gunapala of  
Mahawela, Pihimbuwa.

**Plaintiff – Respondent**

**01.** Galketiyahene Dewage  
Mania alias Lapia of  
Ogodapola, Pihimbuwa.

**02.** Do Malani Kusumawathi of  
Matalapitiya.

(Deceased)**03.** Do Karunadewa.

(Deceased)**04.** Wimalawathi, both of  
Ogodapola, aforesaid.

**04. A.** Hapuwa Dewavalage  
Malani Kusumawathi of Ihala  
Ogodapola, Pihimbuwa.

**04.B.** Do Samadara.

**04.C.** Do Mangala Devi

**04.D.** Do Nandawathie

**04.E.** Do Malanie

**04.F.** Do Sumanawathi .

**04.G.** Do Indrani Chandralatha

**04.H.** Do Sarath Jayasundara,  
all of Ihala Ogodapola.  
Pihimbuwa.

**05.** Tikka Dewayalage Kirisanda  
of Malve, Madure Korale.

**06.** L. Balasuriya of Pahala  
Ogodapola in Madure Karale.

**07.** R.M. Loku Banda of  
Kandedgara in Madure Korale.

**07.A.** R.S. Nalin Rathnayake

**08.** Galketi Newa Dewage  
Siridewa.

**09.** R.D. Karunawathie.

(Deceased)**10.** G.D. Dingiriya, all of Malbe  
in Madure Korale.

**10.A.** 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 Karale.

**16.** Pihimbuwa Dewayalage  
Nandadewa of Ihala Ogodapola.

**17.** T.G.D. Nanadadewa of  
Ogodapola.

**18.** Halliyandda Dhammananda  
Thero Controlling  
Viharadhipathi of Malbe  
Temple.

**Defendants – Respondents**

**Before : P.R.Walgama, J**

**Counsel : Mahanama de Silva with K.N.M. Dilrukshi for  
Substituted – Petitioner.**

**: M.S.A. Saheed with Mohamed Rafi for 4A  
Plaintiff – Respondent.**

**Argued on : 02.02.2016**

**Decided on : 24.05.2016**

CASE - NO - CA. 168/07 - ORDER - 24/05/ 2016

**P.R.Walgama, J**

The Petitioner has by this application invoked the Revisionary jurisdiction of this Court and moved for the following relief.

In that she moves to amend the final partition scheme in the case No. 2163/ P and moves for the allocation of lot 3 of the Final scheme of partition, to her as some valuable permanent buildings are within the said block of land.

It is submitted by the Petitioner that the 4<sup>th</sup> Respondent through the Fiscal had got the writ executed on 09.07.2008, although a copy of the revision application was sent to the 4<sup>th</sup> Respondent.

Further it is alleged by the Petitioner that the 4<sup>th</sup> Respondent, immediately after taking possession of the

said lot had erected a barbed wire fence right across the petitioner's buildings in which the petitioner and her son-in-law were carrying on business.

For the above application of the Petitioner, only the 4A Respondent has raised objection as stated below;

That the Petitioner made an application to Court on 16<sup>th</sup> February 2005 and had objected to the final partition scheme on the ground that there was no road frontage to Lot ~~3~~<sup>4</sup> allotted to her in the final partition plan 2887 dated 25.07.2001 made by B. Abeyratne the commissioner.

It is to be noted that the trial in this case has been decided without the parties and only in the presence of the Plaintiff. Further it is brought to the notice of Court that the lot No. 3 is allotted to the 4<sup>th</sup> Respondent in the Final Partition plan No. 2887. But the Petitioner is now claiming the buildings standing thereon. It is also contended by the 4<sup>th</sup> Respondent that the said purported buildings allegedly had been constructed by the 3<sup>rd</sup> Defendant were not in existence at the time of the preliminary survey.

In addition it is contended by the 4<sup>th</sup> Respondent that the petitioner cannot by this present application move this Court to set aside the final decree of the said partition action mentioned herein before.

The Counsel for the 4<sup>th</sup> Respondent has adverted this Court to the fact that although the Petitioner has made this application in revision has not shown any exceptional circumstances which warrants the exercise of the discretionary remedy.

Hence in the above setting 4<sup>th</sup> Respondent urges that a dismissal of the Petitioner's application, and the final plan No. 2887 dated 25.07.2001, which is already confirmed and the final decree entered by the Learned District Judge be affirmed.

In the said back drop the 4<sup>th</sup> Respondent had raised a preliminary objection as to the maintainability of the petitioner's application to set aside the Final Partition decree.

According to the final scheme of partition of the land sought to be partitioned and which is more fully depicted in the final partition plan No. 2887 Lot No. 3 had been allotted to the 4<sup>th</sup> Respondent, and the 3<sup>rd</sup> Defendant was allotted lot No 4 in the afore said final partition plan.

The gravamen of the 4<sup>th</sup> Respondent's argument is that the Petitioner has failed to aver exceptional circumstances which warrants the exercise of the revisionary powers of this Court to grant the relives which the petitioner has prayed for.

As a comprehensive response to the afore said contention Petitioner states thus;

That in partition action the revisionary powers are not exercised on the basis of 'exceptional circumstances' but when there is a substantive miscarriage of justice has occurred in the process, the Court could exercise the same.

Further it is been noted that Section 48 (4) of the Partition Law No. 21 of 1977 provides for the exercise of revisionary powers.

Section 48(4) states thus;

- (a) Whenever a party to a partition action;
  - (i) Has not been served with summons, or
  - (ii) Being a minor or a person of unsound mind, has not been duly represented by a guardian *ad litem*, or
  - (iii) Dies before judgment is entered and no substitution of his heirs or legal representatives has been made or no person has been appointed to represent the estate of the deceased party for the purpose of the action, or
  - (iv) Being a party who has duly filed his statement of claim and registered his address, fails to appear at the trial,

And in consequence thereof the right, title or interest of such party to or in the land which forms the subject - matter of the interlocutory decree entered in such action has been extinguished or such party has been otherwise prejudiced by the interlocutory decree, such party or where such party is a minor or a person of unsound mind, a person appointed as guardian *ad litem* of such party, or the heirs or the executor or administrator of such deceased party or any person duly appointed to represent the estate of the deceased party, may at any time, not later than thirty days after the date on which the return of the surveyor under section 32 or the return of the person responsible for the sale under section 42, as the case may be, is received by the court, apply to the court for special leave to establish the right, title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered.

In order to substantiate the said position the Petitioner has cited the case mentioned here under;

In SOMAWATHI .VS. MADAWELA- has expressed thus;

“the pronouncement of Sansoni C.J. in regard to the revisionary powers of the Court in Mariam Beebee .vs. Seyed Mohomed - therefore remains applicable even after the enactment of the Administration of justice (Amendment ) Law No. 25 of 1975 and Partition Law No 2i of 1977. The powers of revisions and



restitution in integrum have survived all the legislation that has been enacted up to date. These are the extraordinary powers and will be exercised only in a fit case to avert a miscarriage of justice. The immunity given to the partition decrees from being assailed on the grounds of omissions and defects of procedure as now broadly defined and of the failure to make persons concerned parties to the action should not be interpreted as a licence to flout the provisions of the Partition Law. The Court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred”.

The Petitioner has adverted the following facts which created irregularity in the procedure.

That the matter was taken up for trial and the 3<sup>rd</sup> Defendant had framed issues and case was postponed for 02.06.1978, on which date the case was taken off the trial due to the death of a party.

It is said that the 3<sup>rd</sup> Defendant was present through out and on 20.11.98 being the next date was to be called, was not called as there has been an opening ceremony and the cases that were to be called on that date was listed to be called on 26.02.1999.

On 26.02.1999 none of the parties were present and the trial was fixed for 07.09.1999, and the notice had been issued by way of substituted service.

On 07/09/1999 trial was held in the absence of the Defendants but the Plaintiff was present and the learned District Judge has entered the judgment on 16.12.1999.

Therefore it is alleged by the Petitioner that the procedure adopted by the Learned District Judge is a violation of the proper procedure, as the case was heard without proper notice to all parties

In addition it is said that the petitioner who is the wife of the deceased the 3<sup>rd</sup> defendant was substituted even after the final Partition plan was confirmed.

The Petitioner also contended that while the partition action was in progress the parties had entered in to a amicable settlement and had developed their respective lots accordingly. The purported judgment too has clearly stated the fact that as far as possible to allocate the shares to the parties the way in which they possessed. But it is alleged by the Petitioner that the surveyor has not carried out the said direction, by not allocating the land in which the Petitioner's buildings were, to the Petitioner.

The petitioner further averred that although the 4<sup>th</sup> Respondent had objected to the final scheme of partition, later had not objected as she became aware that all the valuable buildings were included to her lot No 3 by the final partition plan.

Hence in the afore said circumstances it<sup>is</sup> abundantly ✓  
clear that substantive miscarriage of justice has been  
caused to the petitioner which could be cured only  
by invoking the revisionary jurisdiction of this court.

Therefore in the said backdrop this court is of the  
view that the preliminary objection raised by the 4<sup>th</sup>  
Respondent is devoid of merits and should stand  
overruled.

Objection is overruled.

**JUDGE OF THE COURT OF APPEAL**