

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

In the matter of an application for
Revision and Restitutio-in-Intergrum
under Article 138 of the Constitution.

W.Don Alfred Cyril Wijetunga
No. 113/1, Enderamulla,
Wattala.

PLAINTIFF

C.A. Application No. 241/2011 (Rev.)

D.C. Gampaha Case No. 40579/P

Vs

1. W.Don Joslin Freda Wijetunga
2. Algama Appuhamilage Don Joseph
Both of No.113, Enderamulla,
Wattala.
3. W.Dona Elizabeth Meraya Wijetunga
4. W.Dona Regina Winifred Wijetunga
Both of No. 113/1, Enderamulla,
Wattala.

DEFENDENTS

AND

- 1 K.A. Shelton Perera
No. 114/1, Enderamulla,
Wattala.

2. K.A. Shiroma Perera nee
Perera
No. 190, Negombo Road,
Kandana.
3. K.A. Dilani Perera nee Perera
No. 95, Lorreto, Inditiya,
Ja Ela.
4. K.A. Shashika Perera
Both of No. 114, Enderamulla,
Wattala.

PETITIONERS

Vs

W.Don Alfred Cyril Wijetunga
No. 113/1, Enderamulla,
Wattala.

PLAINTIFF - RESPONDENT

2. W.Don Joslin Freda Wijetunga
3. Algama Appuhamilage Don
Joseph
Both of No. 113, Enderamulla,
Wattala.
4. W. Dona Elizabeth Meraya
Wijetunga.
5. W.Dona Regina Winifred
Wijetunga
Both of No. 113/1,
Enderamulla, Wattala.

DEFENDANTS - RESPONDENTS

BEFORE : Deepali Wijesundera J.
: M.M.A. Gaffoor J.
COUNSEL : S.N. Wijithsingh with C.G. Liyanage
For the Petitioner.
Priyantha Rajapaksha and Aravinda
Athurupana for the Respondents.
ARGUED ON : 05th October, 2015
DECIDED ON : 30th May, 2016

Deepali Wijesundera

The petitioner has filed this application for Revision and Restitution in Intergrum stating that the judgment, Interlocutory decree and the final decree with writ of possession are contrary to law and null and void. The petitioner states that a portion of the petitioner's land had been partitioned without making him a party to the said partition action. The petitioner submits that the surveyor's report on the preliminary plan revealed that part of the petitioner's land had been included in the corpus to the partition action, but still he was not added as a party to the partition action by the plaintiff respondent or the District Court. The petitioner stated the dispute was on the southern boundary of the corpus.

The plaintiff respondent has filed a partition action in 1997 to partition the land described in the plaint. A preliminary plan bearing no. 1637 was

submitted to court on a commission issued by court, on an application of the plaintiff this plan had been returned. Another commission was issued to a new surveyor and his plan no. 1630 dated 12/05/2003 had been submitted to court. The surveyor's report stated that one Shelton Perera objected to him entering his land to survey the corpus. According to this report the petitioner has encroached the southern boundary of the corpus. The petitioner stated that the plaintiff respondent failed to make him a party to the said action and proceeded to partition the land.

The petitioner's counsel submitted that the petitioner made the instant application to prevent the demolition of his garage which had been wrongfully included in the corpus to the partition case without including him as a party. The petitioner stated that the parties to the partition action have acted collusively and deprived the petitioner a portion of his land.

The counsel for the respondents submitted that the petitioner is guilty of undue and unexplained delay. The respondents stated that the petitioner obstructed the preliminary survey in 2003 which shows that he was aware of the partition action. The respondents argued that the final partition was done in 2009 but the petitioner has waited till 2011 to file the instant application. The respondents further stated that the petitioner who is seeking relief in Restitutio-in-Intergrum has not acted in utmost promptitude which is mandatory.

The respondents further stated that the petitioner has not complied with rule 3 of the Court of Appeal rules by not filing the relevant documents with the petition. The respondents further stated that the petitioner has misrepresented facts to court, and that the petitioner has not sought leave of

court to tender plan no. 3346 which has been referred to in the District Court judgment.

The petitioner who claims a part of his land was included in the land which was partitioned had been aware of the said partition action since the first survey of the said land. The second survey which was done in 2006 too refers to the petitioner. According to the two surveyors the petitioner has encroached the land which was partitioned. The petitioner who had the right to intervene in the partition action did not do so until the writ of possession was executed. The petitioner now can not make an application to vacate the partition decree after sleeping over his rights.

The petitioner failed to disclose fraud or collusion in keeping with section 48 of the Partition Act. A final decree can only be set aside if fraud or collusion is proved.

The petitioner has also failed to explain the delay in filing the instant application. The mere statement that he could not get the certified copies of the proceedings from court is hard to believe. A party who has been sleeping over his rights does not get the privilege to invoke the discretionary jurisdiction of this court.

Since the petitioner is not entitled to the remedy by way of Restitution the appropriate remedy would have been to act under section 49 of the Partition Act. In **Menchinahamy vs Muniveera** the Supreme Court has decided that Restitution in Intergrum would not be available to a party if that party had another remedy available

For the afore stated reasons I decide to refuse the application of the petitioner with costs fixed at Rs. 25,000/=.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor J.

I agree.

JUDGE OF THE COURT OF APPEAL