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

In the matter of an application for Revision and/or *Restitutio in Integrum*

C.A. Case No. 1213/2002

D.C. Matara Case No. 19202/P

Abdul Rasheed Nilam

of Pelawatta, Denipitiya.

3rd Defendant-Petitioner

-Vs-

Mohamed Mushin Larif

of Maduragoda, Denipitiya, Weligama.

Plaintiff-Respondent

1. **Mohamed Siddin Mohammadu Aruf**
   alias Alhaj Mohammadu Aruf,
   of Maduragoda, Denipitiya, Weligama.
2. **Sali Mohammed Nazeera,**
   No. 78, Station Lane,
   Batuta Road, Matara.
4. **Hewa Pattinige Wimalawathie**
   of Denipitiya, Weligama.
5. **Abdul Rasheed Sitty Patumma,**
   No. 246/2, Denipitiya,
   Weligama.

Defendant-Respondents

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Rohan Sahabandu, PC for the 3rd Defendant-Petitioner. A.M.J. Hemantha for the 5th Defendant-Respondent. Saman Galappatti for the Plaintiff-Respondent.
Argued on	:	25.05.2017
Decided on	:	06.09.2017

A.H.M.D. NAWAZ, J.

The 3rd Defendant-Petitioner has filed this revisionary application, *inter alia*, to

a) set aside the judgment dated 13.03.2011 and interlocutory decree entered in the case;

b) to allow the Petitioner to file his statement of claim:

c) to direct the learned District Judge to hear the case *de novo.*

When the argument in this matter was taken up on 24.05.2017, both counsel who appeared for the 3rd Defendant-Petitioner and 5th Defendant-Respondent respectively agreed to a settlement as the argument developed and in the course of the judgment I would presently set out the settlement which is also the necessary corollary that this Court reaches having regard to the facts and circumstances of this case. Even so I would sum up the factual matrix to the partition action. The Plaintiff-Respondent instituted this partition action to partition a land called ***Punchi Madampege Watta*** *alias* ***Pelawatta*** which is more fully described in paragraph 2 of the plaint, among himself and the 1st Defendant-Respondent. In terms of the plaint, the Plaintiff claimed 499/627 shares for him and allotted 173/627 shares for the 1st Defendant. A commission was thereafter issued to one D.D.Y. Abeywardene Licensed Surveyor to prepare a

preliminary plan and the said surveyor surveyed the corpus on 23.03.1999 and submitted the preliminary plan No. 990315 and the accompanying report

At the survey, the 2nd Defendant-Respondent, 3rd Defendant-Petitioner, 4th and 5th Defendant-Respondents claimed before the surveyor and they were mentioned as new claimants by the surveyor. Subsequently they were added as 2nd to 5th Defendants to the case. Four of the new Defendants including the 5th Defendant-Respondent filed a joint proxy through their attorney-at-law on 04.03.1999 -see J.E No. 5.

On 18.11.1999, the 5th Defendant-Respondent who had filed a joint proxy along with 3rd and 4th Respondents filed her statement of claim through a new attorney-at-law. In other words, the 5th Defendant-Respondent filed a statement of claim through an attorney-at-law, when there was already an attorney-at-law on record for her and 3rd and 4th Defendant-Respondents -see J.E No. 12.

In this statement of claim which came into the record through the above irregular procedure, the 5th Defendant-Respondent stated *inter alia:-*

1) she accepted the correctness of the preliminary plan and the report;
2) one Deen Bawa Abdul Rasheed was the owner of 10 perches of the corpus and *she by long possession had acquired prescriptive rights* to the said portion of the corpus;
3) the buildings E, F, G, H, and I in that Lot No.3 of the preliminary plan belong to her.

The 5th Defendant-Respondent thus sought that the said portion in an extent of 10 perches be allotted to her. It is quite curious to observe that this was a Defendant who had previously filed a joint proxy along with the 3rd and 4th Defendant-Respondents but she chose to file a statement of claim on her own through a new recognized agent. The joint interest she displayed in the proxy was nonexistent when it came to the question of filing a statement of claim on her own and through a different attorney-at-law. It has to be noted that the 5th Defendant had not revoked the proxy given to the original proxy holder, before she proceeded to file a statement of claim through the new attorney-at-law. It is trite law that a party litigant cannot

have at one and the same time two registered attorneys-at-law in a civil suit and I had occasion in ***Kodagoda Sirisena Serasundara vs. Payagala Gunapala Gunawardena*** (CA Case No 1423/1999F decided on 24.06.2016) to indulge in an analysis of some precedents inclusive of the SC decision of ***Meerasaibo Mohamed Haniffa and Others vs. Athambawa Mohamed Idroos*** (2015) Bar Association Law Reports 24 which highlighted the distilled *ratio* that a court cannot recognize two registered attorneys for a party in the same cause. Section 27 of the Civil Procedure Code clearly enunciates the principle that 'whilst a proxy given to an attorney–at-law is in force or not revoked, it is wrong to file another proxy in the same case'. There cannot be two registered attorneys to function at the same time for a party in an action. This principle was also laid down in the case of ***Silva vs. Cumaratunga*** 40 N.L.R 139 where it was held that a petition of appeal must be signed by the proctor, whose proxy is on the record at the date on which the petition is filed.

The exception to this rule would be a proxy in favour of several attorneys-at-law trading in partnership or a firm -see ***Times of Ceylon v Low***16 N.L.R 434. This is however not the situation in this case.

So the statement of claim which was filed by the 5th Defendant-Respondent through the different attorney-at-law came into the record in express violation of the aforesaid prohibition against two registered attorneys for one party and quite contrary to the provisions of Section 27(2) of the Civil Procedure Code. Illegality would thus attach to the statement of claim as a result of its illegal reception and it would stand liable to be rejected in the circumstances. The learned District Judge of Matara could not have acted on this statement of claim which was brought into the record through what I perceive to be a stratagem of the 5th Respondent who for obvious reasons might have concealed the existence of an original proxy holder to the second attorney-at-law whom she engaged to file the statement of claim. I would also venture to state that the second attorney-at-law ought to have known that there was already in existence a proxy for the 5th Defendant-Respondent. Thus the learned District Judge began with

a statement of claim which contained an admission of the preliminary plan, report and a plea of prescription. The 5th Defendant-Respondent disclosed nary a word about the other heirs of Deen Bawa Abdul Rasheed through whom she claimed the portion of the corpus in the extent of 10 perches. It has to be remembered that she had filed the joint proxy along with the other heirs of her father Deen Bawa Abdul Rasheed but she abandoned the heirs with such gay abandon when she came to claim prescription in her statement of claim to the ten perch portion of the corpus.

As for the 1st Defendant-Respondent, he filed his statement of claim on 13.07.2000 and by the said statement of claim accepted the pedigree set out by the Plaintiff and sought the partition of the land.

When the matter came up for trial on 13.03.2001, both the Plaintiff-Respondent and 5th Defendant-Respondent arrived at a consensual settlement and the plaintiff's evidence was led subsequently. This testimony was uncontested. The terms of the compromise between the Plaintiff-Respondent and the 5th Defendant-Respondent were as follows:-

a) The Plaintiff agreed to give the buildings marked E, F, G, H, and I and the land covered by the said building to the 5th Defendant-Respondent.
b) The Plaintiff further agreed to extend the northern boundary of the buildings marked E and F, up to the western boundary of the corpus, and the southern boundary of the buildings marked H, up to the western boundary of the corpus, and leave the land covered by the said boundaries to the 5th Defendant-Respondent.

Even the Plaintiff asserts in his testimony that the 5th Defendant-Respondent has prescribed to the portion that she had claimed. It is worthy of note that the 5th Defendant-Respondent herself has not given evidence on her prescriptive claim in the case but her case was put forward by the Plaintiff who had reached the aforesaid settlement with her just before he began his testimony.

Mr. Rohan Sahabandu, PC who appeared for the 3rd Defendant-Petitioner (the brother of the 5th Defendant-Respondent) contended that though his client had not filed a statement of claim, the Court should have investigated the title of the 5th Defendant-Respondent before it proceeded to allot all that was agreed upon in the settlement to the 5th Defendant-Respondent.

It has to be stated that Lareef-the Plaintiff-Respondent produced deeds and marked them as **P1** to **P4** but in the judgment dated 13.03.2001 no reference has been made to these deeds. If deeds are produced in evidence by a party, it is not sufficient just to itemize them or narrate them by their marking and just leave it at that but there must be a conscious evaluation of the deeds on the part of the learned District Judge. It gives this Court the indicia to assess whether the learned District Judge has gone through the deeds and brought to bear his mind upon the title and interest claimed by a particular party. The judgment dated 13.03.2001 is devoid of all this important ingredient. No doubt the 3rd Defendant-Petitioner did not file a statement of claim in this matter but this lapse on the part of the 3rd Defendant-Petitioner does not absolve the learned District Judge from his paramount duly to investigate title in a partition suit that eventually results in a judgment *in rem*. This Court poses the question whether the learned District Judge has based his judgment on evidence that has been satisfactorily established before Court before he proceeded to allot the shares as he did in his judgment dated 13.03.2001. The judgment fails to take cognizance of a salient aspect of investigation that the learned District Judge must have engaged in namely investigation of title. Besides here was a 5th Defendant-Respondent who filed a joint proxy along with 3rd Defendant-Petitioner and 4th Defendant-Respondent but the fact that the 5th Defendant-Petitioner left out them out whilst filing a solitary statement of claim calls in question her *bona fides* in claiming the portion in an extent of 10 perches on her own to the exclusion of others.

The 5th Defendant-Respondent claims the ten perch portion of the corpus through Deen Bawa Abdul Rasheed-her father. Are there any other heirs of the said Deen

Bawa? In fact the 3rd Defendant-Petitioner who is a brother of the 5th Defendant-Respondent naturally claims to be an heir of Deen Bawa. If the 5th Defendant-Respondent claims the land through Deen Bawa Abdul Rasheed, the question arises as to why the other child of Deen Bawa namely the 3rd Defendant-Petitioner is not a co-owner of the self-same 10 perches? The learned District Judge must have posed these questions and investigated as to how 5th Defendant alone would claim prescription to the land.

This investigation is sadly lacking in the judgment dated 13.03.2001. Instead the fact that the 5th Defendant reached a compromise behind the back of the other heirs of Deen Bawa raises suspicious circumstances. The fact that the Plaintiff took advantage of the opportunity that was presented on an irregularly received statement of claim in order to reach a settlement with the 5th Defendant-Respondent is another item of evidence that this Court takes into account in not viewing this application for revision, albeit belated, with disfavor. The force of the President Counsel's argument that the District Judge allotted the 10 perches to a sister on an irregularly received statement of claim while the brothers were left out without any interrogation of title of the sister is apparent. That the learned District Judge did so on the mere *ipse dixit* of the Plaintiff who had reached a settlement with the 5th Defendant-Respondent shocks the conscience of court, because the trial Judge has completely failed to examine the title and satisfy himself that the 5th Defendant-Respondent made out a title to the share of the corpus she claimed from the corpus sought to be partitioned.

It is not repugnant to Section 25 of the Partition Law as amended to arrive at a settlement on the part of parties to a partition suit but the Court must take steps to safeguard the interests of others who will be, though not parties to the suit, bound by the decree -see ***Banda vs. Dasanayake*** (2006) 2 Sri.LR 87. In this case no evidence was led by the 5th Defendant-Respondent but the learned District Judge accepted the evidence of the Plaintiff and the terms of settlement between them to conclude that the 5th Defendant-Respondent should be entitled to apportion of the corpus. The

obligation of court under Section 25 of the Partition Law is not discharged unless the trial Judge indulges in a due evaluation of all points of contest quite independently of what parties may or may not do -see ***Somasiri vs. Faleela*** (2005) 2 Sri.LR 121.

As G.P.S. De Silva J (as he then was) observed in ***Gnanapandithen and Another vs. Balanayagam and Another*** (1998) 1 Sri.LR 391, there was a total want of investigation of title in this case. Though delay was put forward as a defence to this application for revision, the pertinent observation of G.P.S. De Silva J (as he then was) is quite germane to the issue of laches that the Plaintiff-Respondent has raised against the 3rd Defendant-Petitioner. It is quite clear that the 3rd Defendant-Petitioner took one year and five months from the date of the interlocutory decree to file this revision application. As was stated by G.P.S. De Silva J (as he then was) in ***Gnanapandithen*** (supra), if there was a miscarriage of justice a Petitioner should be entitled to a revision of a judgment of the District Judge notwithstanding delay in seeking relief. The learned Lordship further declared that the question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to special circumstances of the case before me I take the view that the Petitioner is entitled to invoke the revisionary power of the Court of Appeal despite the delay.

In the objections filed by the Plaintiff-Respondent before this Court which is dated 05.11.2002, it would appear all that the 5th Defendant-Respondent has been allotted is demarcated as Lot No. 7 in Plan No. 020762 marked as "**PR3A**" to the statement of objection. Since this allotment has been effected by the learned District Judge of Matara in his judgment dated 13.03.2001 without any kind of evaluation as I have pointed out above, I take the view that this allotment has to be set aside as I find that no satisfactory evidence of title has been led on the part of the 5th Defendant-Respondent to the share allotted.

In the course of the argument on 24.05.2017, both the 3rd Defendant-Petitioner and the 5th Defendant-Respondent reached an agreement before this Court in regard to lot

7. It was to the effect that the learned District Judge could go into the title, interest of each party in regard to lot 7 which the Petitioner alleges to be co-owned along with his sister 5th Defendant-Respondent. This compromise was conveyed to this Court by counsel subject to the caveat that the title and rights declared in favour of the Plaintiff-Respondent and 1st Defendant-Respondent have to be preserved in the event this Court remands this case back to the District Court of Matara for further trial. Having regard to the argument of Rohan Sahabandu, PC on the erroneous allotment of lot No. 7 to the 5th Defendant-Respondent and considering the totality of facts and circumstances disclosed in this case, I must observe that this compromise between the brother and sister (the 3rd Defendant-Petitioner and 5th Defendant-Respondent) was rightly reached in this Court and I therefore proceed to set aside the judgment dated 13.03.2001 and interlocutory decree entered in the court *a quo*.

Since the contest is only in regard to lot 7 in Plan No. 020762, I remand this case back to the District Court of Matara for further trial only in regard to lot 7. As the 3rd Defendant-Petitioner has alleged that lot 7 is co-owned, those alleging co-ownership are permitted to file their statements of claim and be given an opportunity to establish their title if any to this lot. In other words the 3rd Defendant-Petitioner is permitted to file a statement of claim only in regard to lot 7 (which are also allotments erroneously made by the learned District Judge in his impugned judgment to the 5th Defendant-Respondent). If there are other heirs who have already filed proxies in this matter they are permitted to file their statements of claim and establish their right to the lot 7 in question.

I have already held that the statement of claim filed by the 5th Defendant-Respondent was received into the record illegally as a result of a new attorney-at-law taking steps on her behalf. In other words I hold the view that the proxy filed by the second attorney-at-law on behalf of the 5th Defendant-Respondent should be rejected. It would then follow that only the joint proxy filed initially in the case would stand valid. But in the event that the 5th Defendant-Respondent wishes to assert her claim

to lot 7 through another attorney-at-law, it is open to her to do so provided the leave of court is obtained for revocation of her original proxy. It is only thereafter her statement of claim could be entertained. After these steps are taken, the learned District Judge of Matara is directed to conduct a further trial by investigating title only in regard to lot 7 and determine as to who is entitled to lot 7. In the process of doing so, the learned District judge is directed not to interfere with the rights of parties that have already been determined in regard to the other portions of the corpus. After having conducted the inquiry in regard to lot 7, the learned District Judge has to pronounce a comprehensive judgment and enter decree but the Plaintiff-Respondent and the 1st Defendant-Respondent have to be given the same rights and shares that have been allotted to them in the judgment dated 13.03.2001. In the final analysis the new judgment to be entered by the learned District Judge will determine who will be entitled to lot 7 in addition to the rights and shares that have already been allotted to the Plaintiff-Respondent and 1st Defendant-Respondent in the judgment dated 13.03.2001.

Subject to this variation this revision application of the 3rd Defendant-Petitioner is allowed and the case is remitted back to the District Court of Matara for further trial.

JUDGE OF THE COURT OF APPEAL

Case sent back for further trial.