

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
intergrum in terms of Article 138
of the Constitution.

C.A. Revision No. 1210/2002

D.C. Kuliypitiya Case No.7404/P

Kasi Lebbe Abdul Hameedu of
Yagamwela, Dummalasuriya.
5th Defendant-Petitioner

Vs.

Uduma Lebbe Gurunnelage Seinul
Yagamwela, Dummalasuriya.

Plaintiff-Respondent

And others

Respondents

Before : Mahinda Samayawardhena, J.

Counsel : Shantha Karunadhara for the 5th
Defendant-Petitioner.

A.L.N. Mohamed for the 1st Substituted-
Respondent.

Argued &

Decided on : 18.10.2018

Mahinda Samayawardhena, J.

The 5th defendant-petitioner has filed this revision application seeking to set aside (a) the Judgment of the learned District Judge dated 31.01.2001 and (b) the order of the learned District Judge dated 21.05.2002.

The 5th defendant has not preferred an appeal against the Judgment. After the Judgment, the Interlocutory Decree has been entered, and Final Partition Plan has been prepared.

At the Scheme Inquiry, the learned District Judge has refused the 5th defendant to participate on the basis that the said defendant has not been allocated any shares in the Judgment.

Further the learned District Judge, *ex mero motu*, has set aside some parts of the Judgment delivered by his predecessor which are in favour of the 5th defendant on the basis of *per incuriam*.

This in my view is unwarranted. Everybody was satisfied with the Judgment until that time. Had the learned District Judge allowed the 5th defendant to participate at the Scheme Inquiry, the 5th defendant would not have come before this Court challenging the Judgment. On that basis, I refuse to grant the first relief of the 5th defendant-petitioner, i.e. to set aside the Judgment of the District Court.

The learned District Judge in the Judgment has given undivided 72/3456 shares to the 5th defendant subject to establishing the entitlement to that share later. Even though that finding is contradictory *per se*, grave injustice would occur to all the parties, if this Court is to set aside the Judgment and order trial *de novo* on that lapse on the part of the learned Judge.

In any event, such an order cannot be made by this Court unless all the parties are before this Court. The 5th defendant-petitioner has not taken steps to see that all the parties are properly noticed before the case is taken up for argument finally for today.

It is also relevant to note that in the proposed Final Partition Plan No. 4299, the 5th defendant's said share has been identified and left unallotted on behalf of the 5th defendant- vide Lot 6 of the said Plan. Therefore, whatever it is worth, the 5th defendant had a right to participate at the Scheme Inquiry.

For the aforesaid reasons, I set aside the order of the learned District Judge dated 21.05.2002, and direct the learned District Judge first to hold the Inquiry into the question whether the 5th defendant is entitled to the undivided 72/3456 share and then to hold the Scheme Inquiry on the aforementioned proposed Final Partition Plan.

Application of the 5th defendant-petitioner is partly allowed. No costs.

JUDGE OF THE COURT OF APPEAL