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

Wijeratne Mudiyanselage Dona
Theresa Jayawardena,
No. 22, Heyyanthuduwa.
More correctly
No. 22C, Sapugaskanda,
Makola.
1st Defendant-Petitioner

CA Case No: CA/RI/6/2017
DC Gampaha Case No: 35998/P

Vs.

Kaluthanthrige Dona
Madurawathie,
No. 22, Sapugaskanda,
Makola.
Substituted Plaintiff-Respondent

2B. Egodawatta Arachchige Don
Frank Desmon,
No. 21A, Sapugaskanda,
Makola.

3. Wijeratne Mudiyanselage Don
Simon Singho Jayawardena,
No. 158, Dalupitiya,
Kadawatha.

3. Wijeratne Mudiyanselage Don
Lillie Liyanora Jayawardena,
Thuduwegedara,
Ragama.
Defendant-Respondents

5. Divisional Secretary,
Divisional Secretariat,
Biyagama.
Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Jacob Joseph for the 1st Defendant-Petitioner.
S.N. Wijithsingh for the Plaintiff-Respondent.
Nayomi Kahawita, S.C., for the 5th Respondent.

Argued
& Decided on: 21.11.2018

Samayawardhena, J.

The 1st defendant filed this application of *restitutio in integrum* dated 05.04.2017 seeking to set aside the Judgment, Interlocutory Decree and Final Decree entered by the District Court of Gampaha in Partition Case No. 35998/P.

In the plaint it was disclosed that the plaintiff is entitled to 23/48 shares and the 1st defendant is entitled to 25/48 shares

of the land to be partitioned. The 1st defendant accepted that position and did not contest the case.

There is no dispute that out of the land described in the 2nd schedule to the plaint, which is in extent 1 Acre 1Rood and 12.60 Perches, 72.50 Perches have been acquired by the State. This has been accepted by the plaintiff in his evidence and also produced the relevant Gazette as P4.

The Preliminary Plan is the Plan No.189 prepared by Meril Perera, L.S. marked X. However, the plaintiff has got another commission issued to show the acquired portion by the State with precision. That commission has been issued to Piyasiri Ranasinghe, L.S., even though the correct course of action would have been to issue that commission also to the first commissioner, Meril Perera, L.S. The second Plan No. 1330 has been marked as P1.

The learned District Judge in the Judgment has identified the land to be partitioned as Lot 1 in Plan No. 1330 in extent 3 Roods and 35.19 Perches.

One of the arguments of the learned counsel for the 1st defendant is that 15 Perches (out of 72.50 Perches acquired by the State) is still included in Lot 1 in Plan No. 1330 and that has to be excluded. The argument of the learned counsel is simple and straightforward. That is, as I said earlier, there is no dispute that, out of this land, 72.50 Perches were acquired by the State; and the surveyor by Lot 2 in Plan No.1330 has excluded only 57.50 Perches thereby including balance 15 Perches in Lot 1.

This is disputed by the learned counsel for the plaintiff, who says that it is not clear whether the entire 57.50 Perches acquired by the State has been excluded. The State was not a party to the Partition action, but the 1st defendant has, at a later stage of the case, informed this inclusion to the District Court—vide documents marked C, D and F with the present petition. In my view, the plaintiff should have made the State a party to the partition action for the purpose of proper identification of the portion acquired by the State. However, the 1st defendant-petitioner made the Divisional Secretary of Biyagama a party to this application, but unfortunately, the State has informed this Court that they do not file objections to this application and kept silent without making use of this opportunity to put an end to that matter—vide Journal Entry of this Court dated 13.12.2017.

Hence this Court cannot grant any relief to the State, who has failed to identify with certainty, by way of a survey or otherwise, whether the land acquired by the State in extent 72.50 Perches has properly been excluded by Plan No. 1330.

Nevertheless, as the parties and the learned District Judge in the Judgment have in express terms accepted that 72.50 Perches out of the land to be partitioned were acquired by the State, the State is at liberty to take any steps in that regard, if so advised, and this Judgment will not be binding upon the State.

Therefore I take the view that the Judgment and the Interlocutory Decree cannot and need not be set aside on that basis.

The next argument of the learned counsel for the 1st defendant is that the Final Scheme of Partition has not been prepared according to the Judgment and the Interlocutory Decree.

This is *prima facie* a valid argument.

According to the Preliminary Plan marked X and the Report thereto marked X1, the land, buildings and plantations in Lot 1 are possessed by the plaintiff and the land, buildings and plantations in Lot 2 are possessed by the 1st defendant. In the Judgment, and in the Interlocutory Decree prepared in terms of the Judgment, it has clearly been stated that the land, plantation and improvements shall be apportioned, as far as possible, according to the Report X1.

Nevertheless, according the Final Partition Plan No. 796 prepared by some other surveyor (not the one who prepared the Preliminary Plan No. 189 and the Superimposed Plan No. 1330 due to the reason that both of them were not in the Panel at that time), the division between the two Lots has apparently been made in an unjustifiable manner forcing the 1st defendant to demolish a part of her house, the water tank, lavatories etc. for no apparent reason.

The 1st defendant says that she was bed ridden after a surgery when the final survey was done and the surveyor obtained her signature to a letter stating that it was to conclude the matter expeditiously. Thankfully, the plaintiff produced that letter marked X2 with his objections to say that the 1st defendant consented to demolish a part of her own house. That letter has been written by the surveyor or some other person on his behalf

and obtained the signature of the 1st defendant. It is dated 02.01.2015 and the Final Plan No.796 is dated 03.01.2015. That letter says that, as a portion of the land to be given to the plaintiff was not to be found on the ground, the 1st defendant agrees to give that portion by demolishing a part of her house!

"පැමිණිලිකරුට අංක 22C දරණ නිවසෙන් කොටසක්
කඩා ඉවත්කර ඔහුගේ අයිතිය ලබාදෙන බවට ප්‍රකාශය

ගම්පහ දිසා අධිකරණයේ අංක 35998/බෙදුම් දරණ නඩුවට අදාලව 2015-01-02 අද දින ලියාපදිංචි බලයලත් මිනින්දෝරු සෙ.මු.බ. මුදියන්සේ මහතා ඉඩම මැනීමට පැමිණි අතර එහිදී පැමිණිලිකරුට යම් ඉඩම් ප්‍රමාණයක් මදි වූ අතර එම කොටස ඉඩමේ පිහිටි අංක 22C දරණ නිවසෙන් කඩා ඔහුට අවශ්‍ය ප්‍රමාණය ලබාදීමට මෙයින් කැමැත්ත ලබාදෙන බව ප්‍රකාශ කරමි."

This is a misleading letter. To give the portion of land, which the plaintiff is entitled to have in terms of the Interlocutory Decree, as I see from the Plan 796 (at page 226 of the Brief), there is no necessity to demolish the 1st defendant's house or demolish the water tank and lavatories or demarcate the boundary preventing the 1st defendant allegedly from opening the windows of her house. According to Plan No.796, subject to correction, there is enough vacant land available from the northern portion of the corpus.

Section 33 of the Partition Law, No.21 of 1977, as amended, reads as follows: "*The surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or of buildings erected thereon will, if that party is entitled to a share of the soil, be allotted, so far as is practicable,*

that portion of the land which has been so improved or built upon, as the case may be."

"*The policy of the law has been to allot to a co-owner the portion which contains his improvements whenever it is possible to do so*"[1] unless "*in doing so a fair and equitable division is rendered impossible*"[2].

If there was a difficulty to demarcate the boundary line without demolishing a part of the house, the water tank, lavatory etc. of the 1st defendant, the surveyor would have reported it to the Court and obtained further instructions. Otherwise, the surveyor could have shown the division in such irregular manner along the western boundary of Lot 2 (as presently shown in the Plan 796), without obtaining the signature of the 1st respondent to a letter consenting to such division, which the 1st defendant now says was obtained by misleading her. Such a consent is not necessary to prepare the Final Scheme of Partition. All what the surveyor is expected to do is to prepare the Plan in terms of the Interlocutory Decree and send it to Court for the Court to take the final decision. Taking the signature to a prepared letter from a party who is feeble, gives the impression that the surveyor was bias in preparing the Final Scheme of Partition.

According to section 31(1) of the Partition Law, No.21 of 1977, as amended, "*The surveyor shall, on the date or altered date fixed for partitioning the land, proceed to the land and prepare a*

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[1] Thevchanamoorthy v. Appakuddy (1950) 51 NLR 317 at 321

[2] Sediris Perera v. Mary Nona (1971) 75 NLR 133 at 134

scheme of partition in conformity with interlocutory decree and with any special directions contained in this commission".

"*The surveyor to whom a commission is issued under section 27(2) must act within the ambit of the interlocutory decree and any special directions contained in his commission. Section 31 so enacts and he is not free to travel outside the authority given to him and arrogate to himself any functions or powers not contained in the decree or commission.*"[3]

The learned counsel for the plaintiff informs Court that there was no objection to the scheme of partition proposed by the surveyor. That may be due to the purported consent letter obtained by the surveyor from the 1st defendant. The confirmation of the scheme of partition with or without modification is an important step in a Partition Case. The learned District Judge as a matter of routine has confirmed the final scheme of partition assuming that it is in conformity with the Interlocutory Decree whereas it is not.

After the Final Decree was entered, the plaintiff has taken steps to execute the writ. The first attempt to execute the writ has, as seen from the Fiscal's Report dated 07.02.2017 marked E, failed. Thereafter the 1st defendant has, as seen from the application marked F, *inter alia*, moved the Court to recall the writ. Then, as seen from the Fiscal's Report dated 17.02.2017 marked G, boundaries of Lot 1 as per the Final Plan No.796 has been

[3] Sardiris Perera v. David Perera (1963) 67 CLW 108 per Basnayake CJ

demarcated. The Fiscal in that Report *inter alia* states as follows:

"ඒ අනුව ඉඩමේ මායිම් මැන ලකුණු කිරීමේදී මෙම නඩුවේ පලවන විත්තිකාරිය වන විජේරත්න මුදියන්සේලාගේ දෝන තෙරිසා ජයවර්ධන යන අයගේ නිවසේ උතුරු දෙසට වන්නට ඇති කුස්සියට යාබද තාවකාලිකව ටකරන් සෙවිලි වහල සහිත බ්ලොක් ගලින් බදින ලද අඩි 10x10 ප්‍රමාණයේ ඉදිකිරීම් කොටසක් ආදේශිත පැමිණිලිකාරියට භුක්තිය භාරදීමට ඇති ඉඩම් කොටසට අයත් වන අතර ඊට අමතරව වතුර ටැංකිය සහිත ඉදිකිරීම් කොටස සම්පූර්ණයෙන්මද ආදේශිත පැමිණිලිකාරියට භුක්තිය භාරදීමට ඇති ඉඩම් කොටසට අයත් වේ. ඊට අමතරව එකී නිවසේ පිටුපස ඇති වැසිකිළියද ඊට අදාල වැසිකිළි වලද අපද්‍රව්‍ය ගලායන වලද ආදේශිත පැමිණිලිකාරියට භුක්තිය භාරදීම ඇති ඉඩම් කොටසට අයත් වේ. ඊට අමතරව ඉඩමේ නැගෙනහිර දිසාවේ ආදේශිත පැමිණිලිකාරියට භුක්තිය භාරදීමට ඇති ඉඩම් කොටසේ මායිමට ආසන්නයේම නිවාස ඉදිකර ඇති ලියනගේ නන්දන පෙරේරා සහ ආර්.ඩී.ඩබ්ලිව්. සේවික්‍රම් යන අයවලුන්ගේ නිවාස වලින් වැසිකිළි අපද්‍රව්‍ය බැහැර කිරීමට කොන්ක්‍රීට් දමා වසා ඇති අපද්‍රව්‍ය වලවල් දෙකක්ද ආදේශිත පැමිණිලිකාරියට භුක්තිය භාරදීමට ඇති ඉඩම් කොටසට ඇතුලත්වේ. මේ අවස්ථාවේ ආදේශිත පැමිණිලිකාරිය දන්වා සිටින්නේ අංක 796 දරණ පිඹුරේ අංක 01 කොටසේ සම්පුර්ණ භුක්තිය අද දින භාරගන්නා අතර ඉහතින් සඳහන්කල නිවසේ පිටුපස තාවකාලිකව තනා ඇති ඉදිකිරීම් කොටස සහ වතුර ටැංකිය සහිත ඉදිකිරීම් කොටස කඩා ඉවත් කිරීමට අවශ්‍ය නොවන බවයි. ඒ අනුව එම ඉදිකිරීම් අද දින කඩා ඉවත් නොකරන ලදී."

Thereafter the 1st defendant has filed a revision application before the High Court of Civil Appeal of Gampaha and later withdrawn. Subsequently, the 1st defendant has filed this application for *restitutio in integrum*.

Article 138(1) of the Constitution vests this Court with jurisdiction to grant relief by way of *restitutio in integrum*. This jurisdiction cannot be invoked as a matter of right, but as a

matter of grace and discretion to be exercised in unique facts and circumstances of each individual case. If the Court decides to grant the relief, it reinstates a party to his original legal condition which he has been deprived of by the operation of law. I think this is a fit and proper case to exercise that jurisdiction to grant the limited relief to the 1st defendant to minimize the damage.

In the result, whilst keeping the Judgment and the Interlocutory Decree intact, I set aside the order of the learned District Judge dated 13.10.2015 confirming the Final Partition Plan No. 796 and the orders made thereafter based on it. I direct the learned District Judge to issue a fresh commission to another surveyor of the Panel to prepare the Final Scheme of Partition according to the Interlocutory Decree and take follow up steps according to law. This does not in any manner take to mean that the new surveyor shall necessarily divide the land giving all the buildings, plantations, improvements in Lot 2 of the Preliminary Plan No. 189 and the Report thereof to the 1st defendant. If the new surveyor thinks the scheme suggested in Plan No.796 is the most practical one, he can prepare the Plan in the same manner. Let the learned District Judge decide the matter afresh after a proper inquiry.

Application is partly allowed. No costs.

Judge of the court of Appeal