

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

Liyanage Sarath Gamini
Hemachandra Perera,
Putupagala,
Mandawala.
2nd Defendant-Petitioner

CA Case No: CA/RI/382/2013

DC Pugoda Case No: 339/P

Vs.

Liyanage Jeewanie Perera,
Putupagala,
Mandawala.
Plaintiff-Respondent

1. Liyanage Chandrasiri Perera,
Putupagala,
Mandawala.
3. Samarasinghe Arachchige
Priyantha Chandani
Samarasinghe,
Putupagala,
Mandawala.
4. The Secretary of the Provident
Fund,
Ceylon Transport Board,
Narahenpita.

5. Ranjani Kanakalatha Ranasinghe,
No. 419/2,
Makola South,
Makola.

6. Ranasinghe Kankanamlage Dona
Malani Padmalatha Ranasinghe,
No. 419/3,
Makola South,
Makola.

1st & 3rd to 6th Defendant-
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Parakrama Agalawatta for the 2nd Defendant-
Petitioner.

H. Withanachchi for the 5th and 6th Defendant-
Respondents.

Argued &

Decided on: 26.11.2018

Samayawardhena, J.

The 2nd defendant-petitioner has filed this application dated 07.11.2013 for *restitutio in integrum* seeking to set aside the Judgment dated 14.10.2002 and the order dated 16.09.2011 delivered by the learned District Judge of Pugoda in Partition Case No.339/P.

By the said Judgment the learned District Judge has left $\frac{1}{4}$ of the corpus, which was entitled to Engalthina Perera (after the execution of the Deed marked P1) unallotted. This has been accepted by the 2nd defendant, and no appeal has been preferred against the Judgment.

Several years after the said Judgment, the two children of Engalthina Perera has made an application to the District Court claiming the Engalthina's $\frac{1}{4}$ share left unallotted. They have been added as the 5th and 6th defendants. After a formal inquiry, the learned District Judge has allowed that application by order dated 16.09.2011. No appeal with leave obtained has been filed against that order.

The 2nd defendant-petitioner has filed this application, more than 11 years after the Judgment and more than 2 years after the said order, challenging the finding of the learned District Judge leaving $\frac{1}{4}$ share of the land unallotted as Engalthina's balance share.

The 2nd defendant now produces the Deed No. 21703 dated 15.11.1942 to convince that Engalthina conveyed all her rights by Deed P1 to Alis Nona, and after the execution of the Deed P1, there was nothing left for Engalthina.

The Deed No. 21703 was not produced at the trial. At the trial the position taken up by the 2nd defendant was that Engalthina owned $\frac{1}{2}$ share of the corpus. But according to Deed No. 21703, Engalthina owned only $\frac{1}{4}$ share of the corpus. The 2nd defendant did not produce Deed No. 21703 in order to claim a larger share of the corpus. Having successfully done so, he now produces the

Deed No. 21703 in order to defeat the claim of the 5th and 6th defendants.

The 2nd defendant cannot approbate and reprobate to have the best of both worlds.

Restitutio in integrum is a discretionary remedy. A party who seeks a discretionary remedy shall come to Court with clean hands. He must also act with promptitude. The facts and circumstances of this case clearly militate against using that discretion in favour of the 2nd defendant.

As Chief Justice Sansoni stated in *Cassim v. Government Agent, Batticaloa*¹ “*There must be finality in litigation, even if incorrect orders have to go unreversed.*”

Application of the 2nd defendant is dismissed. No costs.

Judge of the Court of Appeal

¹ (1966) 69 NLR 403 at 404