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

1. Abdul Raheem Fathima
   Zaharana,
   No. 158/2A,
   Marrikkar Veediya,
   Dharga Town.
2. Mohomed Mowjoode
   Mansoorathal Adawiya,
   No. 158/2C,
   Marrikkar Veediya,
   Dharga Town.

   Intervenient Petitioners

CA Case No: CA/RI/4/2016

DC Kalutara Case No: 5265/P

Vs.

Marikkar Dale,
No. 164,
Main Street,
Dhrga Town.

Substituted Plaintiff-Respondent

& Several Other Defendant Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Sanjeewa Dassanayake for the Intervenient Petitioners.
Asthika Devendra for the Substituted Plaintiff-Respondent.
Nuwan Bopage for the 3rd/10th Defendant-Respondent.

Decided on: 26.11.2018

Samayawardhena, J.

The two petitioners filed this application for revision and/or *restitutio in integrum* seeking to set aside the Judgment entered about 20 years ago, and the Interlocutory Decree and the amended Interlocutory Decree entered thereafter.

This is a partition action. The petitioners in paragraph 22 of their petition and paragraph 23 of their affidavit stated that: "*We specifically state that we and/or our predecessors were not made parties to the action.*"

This is the only point the learned counsel for the petitioners stressed when successfully supporting the application *ex parte* for notice and stay of proceedings of the District Court—vide the Journal Entry of this Court dated 25.04.2016. This stay order is still in operation.

This fact was proved by the plaintiff to be a falsehood, who said that the grandmother of the 1st petitioner and the mother of the 2nd petitioner was the 9th defendant of the partition action.

This was later accepted by the petitioners, who in their written submissions stated that: "*Further they (the respondents) took up the position that as the petitioners parents were parties to the action, the petitioners are not entitled to prefer the present action as instituted. It is respectfully submitted that the petitioners by their petition have clearly demonstrated as to why their parents did not participate at the trial.*" That means, the petitioners now accept that their parents were parties to the action, but they did not participate in the trial.

This (the fact that the petitioners or their predecessors were not parties to the case) is a blatant suppression of a very material fact, which warrants dismissal of this application *in limine* without going into the merits.

There is no necessity to overstate the utmost importance of being truthful to Court when invoking the discretionary jurisdiction of the Court by way of revision, *restitutio in integrum*, writ etc. If it is later found that the applicant was lacking in *uberrima fides* (utmost good faith) when he successfully supported the application *ex parte*, and "*if there is anything like deception practiced on the Court, the Court ought not to go into the merits of the case, but simply say—We will not listen to your application because of what you have done.*"[1]

In that backdrop, even though there is absolutely no necessity to go into the merits of the matter, I will nevertheless briefly

[1] Collettes Ltd v. Commissioner of Labour [1989] 2 Sri LR 6 at 17 per Gunawardana J. citing Lord Cozens-Hardy M.R. in King v. The General Commissioner of the Purpose of the Income Tax Acts for the District of Kensington-ex parte Princes Edmond de Poignac (1917) KBD 486

consider the merits of the application to convince that the petitioners cannot succeed on merits as well.

The petitioners' complaint is that the land to be partitioned has not been correctly identified and therefore the plaintiff's action shall fail. This is the point which the 3rd to 10th defendant-appellants took in the appeal preferred against the Judgment of the District Court. This argument was rejected by this Court by the Judgment dated 18.07.2008. The Special Leave to Appeal sought against that Judgment was also refused by the Supreme Court by order dated 08.02.2010.

Once the appeal of the 9th defendant (together with that of the other appellants) was so rejected, her daughters cannot challenge the same Judgment on the same point by way of an application in revision. That is plain law. If that is allowed, there will not be an end to litigation.

The petitioners also challenge the amended Interlocutory Decree. The Preliminary Plan is Plan No.211. This has been marked as X1 through the evidence of the surveyor. Thereafter the same surveyor, upon an inquiry from the Court, has sent another Plan of the same number, without changing the boundary lines and the extent, but only amending or rather adding the names of the boundaries to tally with those of the land described in the plaint. This second Plan has been marked as X3 through the evidence of the surveyor. There is no dispute that the premises No. 158/2A & C claimed by the petitioners fall within the Preliminary Plan from the very beginning. After the Judgments of the aforesaid Court of Appeal and the Supreme Court cases, I

see nothing wrong in amending the Interlocutory Decree in reference to the Plan X3 for clarity. Amendment of the Interlocutory Decree to fall in line with the Judgment (in its proper context) is permissible.[2] It shall be borne in mind that "*The entering of the decree is a purely ministerial act and the Interlocutory Decree when entered relates back to the date of judgment.*"[3]

Finally, "*the petitioner was not before Court at any stage of the proceedings before judgment, restitutio in integrum will not lie.*"[4] *Restitutio in integrum* is available only to a party to the action.

Application is dismissed with costs.

Judge of the Court of Appeal

[2] Wimalawathie v. Jayawardene [2004] 2 Sri LR 110
[3] Koralage v. Marikkar Mohomed [1988] 2 Sri LR 299 at 305
[4] Dissanayake v. Elisinahamy [1978-79] 2 Sri LR 118 at 122