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

In the matter of an application for *Restitutio in Integrum* or Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. R.I. Case No.382/2014 (REV)

D.C. Horana Case No.3438/P

10A. Kankanamage Chandana Geetha Priya

No.92, MDH Pura Pelawatte,

Battaramulla.

Presently at: No.530/29, Darshana Place,

Thalangama North, Battaramulla.

Substituted 10A DEFENDANT-PETITIONER

-Vs-

1. Don Martin Amarasinghe

No.237/1, Sampathuayana,

Kithulhena,

Mattegoda.

Presently at: Mattegoda Road, Siddamulla North, Polgasowita.

2A. Sumith Gunendra Edirisinghe

No.237/1, Sampathuayana,

Kithulhena,

Mattegoda.

PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENTS

1. **Athukoralage Jayanthi** C/O **Athukoralage Milton**
   Rerukana Chandrawimala Mawatha,
   Meemana,
   Pokunawita.

2A. **Nagahawatta Mudiyanselage Gunasekera**
   No.158, Karunasena Jayalath Mawatha,
   Wiligampitiya,
   Pokunawita.

3. **Nagahawatta Mudiyanselage Gunasekera**
   No.158, Karunasena Jayalath Mawatha,
   Wiligampitiya,
   Pokunawita.

4B. **Wajirapani Dhammika Jayalath**
   No. 115/A, Glanigama Road,
   Kubuka North, Gonapola.

5. **Doluwattage Wijayalatha**
   No. 147/1, Karunasena Jayalath Mawatha,
   Weligampitiya,
   Pokunawita.

6. **Weliwitage Dona Babanona**
   of Pokunawita, Horana.
   Presently at: Karunasena Jayalath Mawatha,
   Weligampitiya,
   Pokunawita.

1A. **Alujjage Don Mangala Pushpakumara**
   No.241/A, Weligampitiya,
   Pokunawita.

8. **Aluthge Dona Babanona**
   of Lassakanda, Erathna.

9. Galpayage Dharshani Swarnakanthi
C/O Galpayage Doan Pushpa Premakanthi
No.65, Kubuka North,
Gonapola Junction.

11A. Thotupitiyage Karunawathie Perera
of Kubuka, Gonapola Junction.

11B. Rasika Ayomi Dasanayake
of Kubuka, Gonapola Junction.

12A. Galpayage Doan Pushpa Premakanthi
No.65, Kubuka North,
Gonapola Junction.

13A. Galpayage Doan Pushpa Premakanthi
No.65, Kubuka North,
Gonapola Junction.

14A. Aluthge Dona Sumanawathie
No.241, Weligampitiya, Pokunawita.

15. Aluthge Dona Sumanawathie
No.241, Weligampitiya, Pokunawita.

16. Aluthge Dona Nimalawathie
No.241, Weligampitiya, Pokunawita.

DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

Counsel : Rohan Sahabandu, P.C. with Surekha Vithanage for the Defendant-Petitioner.
Respondents absent and unrepresented.

Decided on : 07.05.2019

A.H.M.D. Nawaz, J.

The Petitioner seeks by way of this application *restitutio integrum* or revision to have the judgment of the District Court of *Horana* dated 22.06.1998 set aside. The complaint of the Petitioner is that the learned District Judge of *Horana* had overlooked a Deed bearing No.173 in deciding the shares to be allotted to each party and thus he has failed to recognize the clear paper title of the 10th Defendant to 3/4th acres of the corpus. In fact no party has disputed the share that the 10th Defendant derives by virtue of Deed No.173 which was produced and marked at the trial as **10V2.** If one traces the history of the case the Petitioner is the son of the deceased 10th Defendant in the partition case and the Petitioner was substituted in place of his father the 10th Defendant-Appellant in the case bearing No.3438 on 05.07.2013.

The original Plaintiffs had instituted the action in the District Court of *Horana* seeking to partition a land called "*Kahatagahapitiya*" morefully described in the schedule to the plaint.

According to the pedigree set up in the plaint, as stated in paragraph 25 of the amended plaint, the two Plaintiffs had transferred 3/4th acres by Deed No.173 dated 03.05.1986 attested by P.D.N. Premachandra Notary Public and another ¼ acres by Deed No.172 dated 22.03.1986 attested by the said Notary Public, to the deceased 10th Defendant.

In the statement of claim filed by the 10th Defendant, he claimed title to the said extent of the corpus based on the aforementioned two deeds.

In the composite pedigree submitted by the 3rd, 4th and 5th Defendants, the 10th Defendant's entitlement has been admitted.

There was no contest between the parties as regards the division of the corpus and all the parties concerned accepted the said composite pedigree filed by the 3rd, 4th and 5th Defendants. Only the 1st Plaintiff's evidence was led on 22.06.1992 and in respect of the entitlement of the 10th Defendant, Deed No.172 by which the Plaintiff had purchased ½ acre was produced marked **10V1.** By an omission, Deed No. 172 conferring ownership of 3/4th acres on the 10th Defendant had not been marked.

The 10th Defendant filed an affidavit dated 19.02.1994 stating that the said Deed bearing No.173 has not been marked due to an omission and moved Court to accept the said deed and to grant his entitlement according to the said deed.

On 10.07.1994, the Attorney-at-Law for the 10th Defendant made an application to re-summon the Plaintiff to produce the said deed and to testify in respect of the same. The Court allowed the said application as the same was not objected to by any of the parties concerned and accordingly the Plaintiff on 30.08.1994 once again testified before Court and produced the said Deed No. 173 marked **10V2.**

In the share schedule dated 28.03.1995 filed by the Attorney-at-Law for the Plaintiffs, the 10th Defendant's entitlement had been specified as an extent of 200 perches out of the corpus.

In the judgment of the District Court that was delivered on 22.06.1998, the 10th Defendant had been given rights accruing to him by virtue of Deed No.172 produced marked **10V1** only and thereby what he would get by virtue of Deed No.173 **(10V2)** has been completely shut out of consideration.

Being aggrieved by the judgment of the District Court dated 22.06.1998, the 10th Defendant preferred an appeal to the Court of Appeal but the said appeal was rejected on 15.03.2012 for nonpayment of brief fees.

The Petitioner by his petition addressed to the Court of Appeal dated 06.07.2012 moved for an order reinstating the appeal. However the Petitioner had to withdraw the same as he did not have sufficient standing owing to the fact that he had not been substituted in the room of his deceased father in the District Court of *Horana*. It was in these circumstances that the Petitioner was substituted on 05.07.2013.

The Petitioner after having been substituted in the room of the deceased 10th Defendant-Appellant, filed a fresh relisting application in the Court of Appeal and moved that the appeal be relisted on the grounds adverted to therein and urged that his father was seriously ill and became an inmate of both the *Sri Jayawardenapura* Teaching Hospital and Cancer Hospital, *Maharagama* frequently and that his father passed away on 28.11.2011

while he had been under treatment at the Cancer Hospital, *Maharagama.* The Petitioner stated that he only came to know about the dismissal of the action owing to the nonpayment of brief fees when he had perused the docket during the first week of April 2012.

The Court of Appeal *though* by its judgment dated 02.07.2014 refused the application for relisting.

The Petitioner being aggrieved by the judgment of the Court of Appeal preferred a Special Leave to Appeal application bearing No.149/14 to the Supreme Court and the application had been listed for support on 10.11.2014. It was whilst the special leave to appeal application was pending in the Supreme Court that the Petitioner instituted this *restitutio in integrum* or revision application. The special leave to appeal application to the Supreme Court failed as the Supreme Court was not satisfied with the reasons given by the Petitioner before this Court as to why he could not collect the brief in the Court of Appeal. It would then appear that the matter before the Supreme Court was only a matter of relisting and not a matter where merits of the case were canvassed.

Thus it is clear that the appeals filed by the 10th Defendant (the Petitioner's father) were both dismissed in the Court of Appeal and Supreme Court on technical grounds namely he could not furnish reasonable cause as to why he could not pay the brief fees.

In this application before this Court the learned President's Counsel for the Petitioner submitted that the learned District Judge of *Horana* had overlooked the deed marked as **10V2** in deciding the shares to be allotted to each party and thereby failed to recognize the clear paper title of the 10th Defendant to 3/4th acre, which was not even disputed by any party to this action.

Thus this Court finds that the judgment of the learned District Judge is contrary to the evidence led and the documents placed before Court. In the said judgment, having stated that the court accepts the evidence of the 1st Plaintiff and that the entitlement of each party should be according to the pedigree submitted by the 3rd, 4th and 5th Defendants, the learned District Judge fails to grant the proper extent of the corpus due to the 10th

Defendant which ought to be 200 perches and not 80 perches as he has granted upon considering Deed No.172 only.

The learned President's Counsel who appeared for the Petitioner pointed out that the judgment in this case was delivered nearly after 6 years had lapsed from the date on which the 1st Plaintiff's evidence was led and nearly after 4 years from the date on which the 1st Plaintiff was re-summoned to give evidence on Deed No.173.

The delay in invoking the extraordinary jurisdiction of *restitutio in integrum* or revision has been attributed to the fact that there was an appeal pending in the Court of Appeal. When this application under Article 138 was filed in this Court, there was already pending in the Supreme Court a leave to appeal application against the order of the Court of Appeal that had rejected a relisting application of the Petitioner.

In the end the pith and substance of the contention of the Petitioner in this application is that an extent of 120 perches due to the Petitioner has been lost because of the misdirection on the facts that emerged in the case. What the deceased 10th Defendant should get by way of Deed No.173 **(10V2)** has not been given due consideration by the learned District Judge of *Horana* when all parties had agreed upon devolution of share by way of Deed No.173. Even the Plaintiff was recalled to give evidence and there was no cross-examination disputing the devolution.

In the circumstances I hold the view that the Petitioner has made out exceptional circumstances that necessitate the intervention of this Court. The mistake made by Court in not considering Deed No.173 is palpable. This is a fit and proper case that justifies review and restitution.

It is axiomatic that the revisionary jurisdiction of this Court is available to rectify manifest error or perversity. This principle was explained by this Court succinctly in ***Chandraguptha v. Gunadasa Suwandaratne*** C.A.L.A 508/2005 (CA minutes of 12.09.2017). In ***Sinnathangam v. Meeramohaideen*** 60 N.L.R 394-T.S. Fernando, J. (with Weerasooriya, J. agreeing) opined that the Court possesses the power to set right, in revision, an erroneous decision in an appropriate case even though an appeal has abated on

the ground of non-compliance with technical requirements. Jayawickrama, J. (with De Silva, J. agreeing) followed ***Sinnathangam v. Meeramohaideen*** *(supra)* in ***Soysa v. Silva and Others*** (2000) 2 Sri.LR 235 and considered the case of a revision application that had been filed in the Court of Appeal 10 years after the pronouncement of the judgment in the District Court. In fact the appeal filed against the said judgment had failed in the Court of Appeal on a technicality namely the appellant had signed the notice of appeal on his own when there was a registered Attorney on record. The appeal was rejected as it was preferred contrary to Section 754 of the Civil Procedure Code. Not to be outdone, the appellant in the case preferred a revisionary application. The argument was raised that the petitioner could not move by way of revision after the appeal was rejected by the Court of Appeal. The revisionary application was also resisted on the ground of long delay in that it was after a lapse of 10 years from the pronouncement of the judgment that the petitioner moved by way of revision. It was in those circumstances that this Court observed that the power given to a superior court by way of revision is wide enough to give it the right to revise any order made by an original court. Its object is the due administration of justice and the correction of errors sometimes committed by the Court itself in order to avoid miscarriage of justice.

In the instant application before me for *restitutio in integrum* or revision, the appeal was rejected for non-payment of brief fees on 15.03.2012. The relisting application was rejected by the Court of Appeal on 02.07.2014. Whilst the special leave to appeal to the Supreme Court was pending in the apex court, this application for *restitutio in integrum* or revision was filed in this Court on 5th November 2014. The judgment of the District Court was pronounced as far back as 22.06.1998. It is after a lapse of 16 years from the date of the judgment of the District Court that this application was filed. It is apparent that neither the Court of Appeal nor the Supreme Court went into the merit of the judgment of the District Court when the respective Courts rejected the Petitioner's attempts to impugn the judgment of the original court dated 22.06.1998. But it is as plain as a pikestaff that there is manifest error in the judgment of the District Court dated 22.06.1998. Revisionary jurisdiction of this Court under Article 138 of the Constitution is untrammeled by delay in

its invocation provided there is irreparable damage, miscarriage of justice or perversity in the judgment of the court *a quo*.

The underlying theory behind revisionary jurisdiction is that there must be a manifest error-*see* ***Saheeda Umma and Another v. Haniffa*** (1999) 1 Sri.LR 150 wherein J.A.N. de Silva, J. (as His Lordship then was) held that the Court of Appeal should act in revision, when there is a grave irregularity or a miscarriage of justice, even in a case where revisionary powers have not been invoked by the Petitioner. In my view this case merits intervention by revision and restitution-the two extraordinary remedies bestowed on this Court by virtue of Article 138 of the Constitution. It is trite that in applications for revision, there must be circumstances that shock the conscience of court-***Wijesinghe v. Tharmaratnam*** IV Sris.LR 47.

For the reasons stated above I proceed to set aside the judgment of the District Court of *Horana* dated 22.06.1998 and direct the learned District Judge of *Horana* to enter judgment as per evidence led and accepted by the trial court.

JUDGE OF THE COURT OF APPEAL