

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

Fathima Rilaya,
No.423/6,
Jiffry Mowlana Mawatha,
Kaluthara South.
2nd Defendant-Petitioner

CASE NO: CA/RI/146/2013

DC KALUTARA CASE NO: 7908/P

Vs.

Mohomad Udumam Fouzulul
Amees,
No. 56/03,
Hill Street,
Kalutara South.
Plaintiff-Respondent
And Another

Before: A.L. Shiran Gooneratne, J.
 Mahinda Samayawardhena, J.

Counsel: H. Withanachchi for the Petitioner.
 E. Thambiah for the Respondents.

Argued on: 28.05.2019

Decided on: 03.06.2019

Mahinda Samayawardhena, J.

The petitioner filed this application for *restitutio in integrum* seeking to set aside the Judgment, Interlocutory Decree and Final Decree entered by the District Judge of Kalutara in Partition Case No. 7908/P.

The plaintiff-respondent filed the partition action to partition the land described in the schedule to the plaint between the plaintiff-respondent and the 1st defendant-respondent. At the preliminary survey, the petitioner made a claim before the surveyor. As seen from Journal Entry No.12 of the District Court case record, notice has been served on the petitioner by registered post. As the petitioner did not come to Court, as seen from Journal Entry No. 17, notice has again been served through Fiscal. As the petitioner still did not respond to notice, the Court has named the petitioner as the 2nd defendant and proceeded with the action. After trial Judgment has been delivered and Interlocutory Decree has been entered.

Before the partition action was filed by the plaintiff-respondent, his predecessor, the 1st defendant in the partition action, had filed a Land Case No.5515 against the petitioner regarding the same land. That case has, as seen from P14, been withdrawn on account of the entering of the Interlocutory Decree in the partition case.

Thereafter the petitioner has made an application in the partition case for intervention. At the inquiry into that application, as seen from P20, the petitioner, whilst giving evidence under oath, has withdrawn that application, on the premise that “*the petitioner, the plaintiff and the 1st defendant*

entered into an Agreement to purchase the subject matter of the partition action”.

Thereafter Court has issued a commission to prepare the final scheme of partition and confirmed the Final Plan before entering the Final Decree.

It is in that backdrop, the petitioner has come before this Court, more than one year after the aforesaid withdrawal of the application for intervention, seeking restoration on the ground that the partition action was a collusive action between the plaintiff and the 1st defendant. This allegation, in the above facts and circumstances, is baseless. If the petitioner thinks that the plaintiff and the 1st defendant violated the alleged Agreement, the remedy lies elsewhere.

There is no merit in this application. Hence the same is dismissed with costs.

Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Court of Appeal