

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

Yoga Weerawickrema,
No.243/8, Rohanapura Sri
Somananda Mawatha,
Thelawala,
Mt.Lavinia.
Petitioner

CASE NO: CA/REV/369/2003

DC MATARA CASE NO: 18299/P

Vs.

Kandauda Arachchige Premasiri,
No.2/16, Dharmapala Mawatha,
Matara.

Original Plaintiff-Respondent

Thalpe Samanayake Sunil alias
Chandrasiri,

No.23/5,

Kalidasa Road,

Matara.

Substituted Plaintiff-Respondent

(Formerly 16th Defendant-
Respondent)

And Several Other Defendant-

Respondents

Before: Mahinda Samayawardhena, J.
Counsel: Ranjan Suwandarathne, P.C., with Anil
Rajakaruna for the Petitioner.
Respondents are absent and unrepresented.
Decided on: 10.06.2019

Mahinda Samayawardhena, J.

This is a partition action. After the Judgment was pronounced and the interlocutory decree entered, the petitioner filed an application in the District Court seeking intervention of the action to have a trial *de novo*. This was rightly rejected by the District Judge. Thereafter the petitioner came before this Court by way of revision and/or *restitutio in integrum* seeking the same relief.

The only reason given by the petitioner for being unable to become a party to the partition action was his residence being about 100 miles away from the land to be partitioned. This cannot be a good ground to allow the petitioner's application. The explanation is manifestly unacceptable.

Be that as it may, the petitioner's application as presented in the petition is obviously devoid of merits.

The petitioner in the petition claims $\frac{1}{4}$ share of the corpus on a different pedigree. He does not in the petition connect his pedigree to the plaintiff's pedigree accepted by Court. According that pedigree (as seen from paragraphs 15-18 of the petition), one Bodaragamage Ebrahim Gunasekera was entitled to $\frac{1}{4}$

share of the corpus by a Testamentary Case No.6195 of the District Court of Colombo; and after his death his rights were devolved on his four children; and the said four children transferred those rights to Ariyasinghe; and Ariyasinghe transferred them to the father of the petitioner; and the petitioner succeeded to the father's rights.

The said Testamentary Case record (filed in 1918) has been tendered marked L1, and according to that case record: (a) there is no mention about Bodaragamage Ebrahim Gunasekera and (b) there is no reference that he received any interest from the land to be partitioned. Hence there is no necessity to consider the alleged subsequent transactions as one cannot transfer what one does not have. In my view, this application should have been dismissed without issuing notice.

When this was pointed out at the argument, the petitioner has filed written submissions dated 14.12.2006 to say that in the Fiscal Conveyance dated 10.05.1937 marked at the trial by the plaintiff P1, Gunasekera's entitlement through the Testamentary Case for $\frac{1}{4}$ share has been established; and according to P1, only $\frac{4}{7}$ out of $\frac{1}{4}$ share of Gunasekera has been sold in execution of a writ; and the petitioner shall therefore be entitled to the balance share out of $\frac{1}{4}$ share.

This goes to show that the petitioner changes his position as he goes along to suit the occasion, and he has not acted with *uberimma fides* when he first filed this application. That itself warrants dismissal of the petitioner's application.

It is clear that the petitioner has filed this belated application seeking to set aside the partition Judgment on conjectures. He

does not have a clear idea of his entitlement to the land.
Revision is a discretionary remedy.

I dismiss the application of the petitioner. No costs.

Judge of the Court of Appeal