

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

Duwange Chandra Irangani Perera,
of No. 54, Dediawala, Waskaduwa.

12th Defendant
Substituted Plaintiff Petitioner

C.A. Case No. 275/2014

D.C. Kalutara 4238/P

V.

1. Duwage Neris Perera of Bogahawatta,
Dediawala, Waskaduwa.
2. Michal Perera of Bogahawatta,
Dediawala, Waskaduwa. (Deceased).
- 2A. Loku Liyanage Nandawathie
Alwis of Dediawala, Waskaduwa.
3. Eron Perera of Beruwalagewatta,
Dediawala, Waskaduwa. (Deceased).
- 3A. Duwage Chandrasena Perera,
Dediawala, Waskaduwa.
4. Duwage Mendis Perera of Bogahawatta,
Dediawala, Waskaduwa. (Deceased).
- 4A. Yakupitiyage Gnanawathie of
Bogahawatta, Dediawala, Waskaduwa.
5. Duwage Alis Nona Perera of C/o Eron
Perera, Dediawala, Waskaduwa.

5A. Amarathungaghe Leni Perera of
Hewawatta, Dediawala, Waskaduwa.

6. Duwage Sili Nona Perera (Deceased).

7. Duwage Lili Nona Perera (Deceased).

8. Duwage Lili Nona Perera all C/o Eron
Perera, Dediawala, Waskaduwa
(Deceased).

8A. Duwage Michal Perera of
Beruwalagewatta, Dediawala,
Waskaduwa.

8B. Loku Liyanage Nandawathie Alwis of
Dediawala, Waskaduwa.

9. Duwage Luvu Nona Perera of
Thalgahawatta, Dediawala, Waskaduwa.
(Deceased).

9A. Duwage Hemachandra Lakshman
Perera of No. 228, kandekumburawatta,
Dediawala, Waskaduwa.

10. Duwage Nanda Gunawathie Perera
of "Nanda Sewana" Obawatta,
Dediawala, Waskaduwa.

10A. Ranasinha Arachchige Pramukhanari
Ranasinha of "Nanda Sewana,
Obawatta, Dediawala, Waskaduwa.

11. Duwage Pathma Alan Perera.

13. Duwage Hemachandra Lakshman Perera

14. Duwage Jayathissa Perera.

15. Duwage Siriwardena Perera.

16. Duwage Indrani Perera.

17. Duwage Ariyalatha Perera.

18. Duwage Kanthi Perera
all of No.228, Kandekumburawatta,
Dediyawala, Waskaduwa.

20. U.D. Hendrik all of Dediyawala,
Waskaduwa (Dead).

Defendants Respondents

BEFORE

: **JANAK DE SILVA, J**
K. PRIYANTHA FERNANDO, J

COUNSEL

: Athula Perera with Vindya Divulwewa for
the Plaintiff Petitioner.
Saliya Ahangama for the 9th, 11th, and 13th to
18th Defendants Respondents.

ARGUED ON

: 02.05.2019

WRITTEN SUBMISSIONS
FILED ON

: 29.05.2019 by the Plaintiff Petitioner.
31.05.2019 by the 9th, 11th, and 13th -18th
Defendants Respondents

JUDGMENT ON

: 27.06.2019

K. PRIYANTHA FERNANDO, J.

01. The Plaintiff instituted the above partition action in the District Court of Kalutara to partition the land called 'Hewawatta alias Mahawatte' among the Plaintiff and 1st to 18th Defendants. On the commission issued by the learned District Judge Kalutara, licensed surveyor W. Seneviratne upon surveying the land, prepared the preliminary plan No.2948. After trial, on 08.05.1985 the learned District Judge delivered the judgment and, on the commission issued by the learned District Judge, the final plan No.6622 was prepared by licensed surveyor A.G.C. Sirisoma.
02. The substituted plaintiff, for the given reasons objected to the final plan No. 6622 and the Court fixed the case for scheme inquiry. The substituted Plaintiff submitted the alternative plan No. 5/2007, and after having heard the counsel for the substituted Plaintiff, the learned District Judge on 14.05.2007 made order on the commissioner Sirisoma to amend the final plan as suggested in the alternative plan No. 5/2007. The Defendants were not present although that day was fixed for scheme inquiry or settlement.
03. Commissioner Sirisoma returned the commission stating that he was unwell and therefore, the commission was issued to licensed surveyor L.W. Perera

to comply with the order dated 14.05.2007. Accordingly, commissioner Perera submitted the final plan No. 2409. 10th Defendant objected to the plan for the reasons stated and it was fixed for inquiry by way of written submissions for 09.03.2011. On that day counsel appeared for the 10th Defendant and the Plaintiff. According to the proceedings on 09.03.2011 on the objections filed by the 10th Defendant, Plaintiff and 9th, 10th and 11th Defendants came to a settlement on their respective lots and agreed to accept the original final plan No. 6622 of commissioner Sirisoma. Learned District Judge ordered to enter the final decree accordingly.

04. Being aggrieved by the said order the substituted Plaintiff Petitioner (the Petitioner) preferred this application for relief by way of *restitutio in integrum* seeking to set aside the order of the learned District Judge dated 09.03.2011, to set aside the final decree entered, to set aside all other steps taken after 09.03.2011 and for an order to approve the final plan 2409 of licensed surveyor L.W.Perera, subject to the insertion of the name of the 10th Defendant in place of 9th Defendant in respect of lot 02 in the said plan and inserting the name of the 9th Defendant in place of the 10th Defendant in respect of lot 01 in the same plan. 10th Defendant Respondent filed objections to the above application.
05. I carefully considered the application of the Petitioner, objections made by the 10th Defendant, submissions made by the Petitioner, 9th, 11th, and 13th - 18th Defendants Respondents and the submissions made by counsel at the argument.
06. The remedy of *restitutio in integrum* cannot, unlike an appeal, be claimed by a party as of right. Power of this court to grant such relief is a matter of grace and discretion. (*Usoof V. Nadarajah Chettiar, 61 N.L.R. 173*). It is a

remedy which is granted under exceptional circumstances and the power of Court should be most cautiously and sparingly exercised. (*Perera V. Wijewikrema 15 N.L.R. 411*). Party seeking restitution must act with utmost promptitude. (*BabunAppu V. Simon Appu 11 N.L.R. 115*).

07. In case of *Sri Lanka Insurance Corporation Ltd. V. Shanmugam and Another [1995] 1 Sri L.R. page 55*, citing the above line of authorities held;

“... It is an extra ordinary remedy and will be granted under exceptional circumstances. The remedy can be availed of only by one who is actually a party to the legal proceeding. He cannot claim damages but he should have suffered damages. A party seeking restitution must act with the utmost promptitude. The Court will not relieve parties of the consequences of their own folly, negligence or laches.

08. 9th, 11th, 13th to 18th and the 7th Defendants Respondents made submissions agreeing with the Plaintiff Petitioner and, the 10th Defendant Respondent has filed objections to this application.
09. Contention of the Petitioner is that the learned District Judge could not have accepted plan 6622 as the final plan. The case was called on 09.03.2011 for a different purpose, that is to consider objections to plan 2409. Except Petitioner and the 10th Respondent, all other parties who have the rights from the corpus were absent on 09.03.2011.
10. Counsel for 9th, 11th, 13th-18th Respondents filing written submissions on behalf of them on 31st May 2019, in paragraph 32 submitted that the Petitioner has already agreed to withdraw the affidavit marked as ‘A’ along with the petition given by 9th Defendant by misunderstanding of the correct

facts of the case. This shows that the 9th Respondent now sailing with the other above-mentioned Respondents, is changing his stance, according to the counsel.

11. Attention of this Court is drawn by the counsel for the Petitioner to the case of *Thevchanamoorthy V. Appakuddy*, reported in 51 N.L.R. at page 317. It is submitted that the Supreme Court had held that, not only at the consideration of the final plan but also when considering any amended final plan Court should give notices in terms of section 06 of the Partition ordinance. He further submitted that although that decision was on section 06 of the Partition Ordinance, and that there is no similar provision in section 36(1) of the present Partition Act, the Court should have issued notices in terms of the Partition Ordinance.
12. This argument is untenable. This is not the correct position of the law as at date. Section 06 of the Partition Ordinance No.10 of 1986 is not similar to section 36(1) of the present Act No. 21 of 1977. For the purpose of clarity, I may reproduce the relevant sections.
13. Section 06 of the Partition Ordinance No. 10 of 1863:

“... On the receipt of the return of such commission the Court shall fix a day, of which notice shall be issued to all the parties and which said notice shall be served in the same way as the original summons for considering the return; and on that day or such other day as the Court shall then appoint, the Court after summarily hearing the parties, and if need be, making such further reference as the Court shall deem necessary, shall either confirm or modify the

partition proposed by the commissioner and enter final judgment accordingly in the cause.”

14. The Law as at now, sections 35 and 36 of the Partition Act No. 21 of 1977 as amended by Act No.17 of 1997;

“35. After surveyor make a return to the commission, Court shall call the case in open Court and shall fix a date for the consideration of the scheme of partition proposed by the surveyor. The date so fixed shall be a date not earlier than 30 days after the receipt of such return by the Court.”

“36(1). On the date fixed under section 35 or on any later date which the Court may fix for the purpose, the Court may, after summary inquiry: ...”

15. Therefore, it is clear that the legislature has removed the portion ***‘Court shall fix a day, of which notice shall be issued to all the parties and which said notice shall be served in the same way as the original summons for considering the return;’*** which was in section 06 of the Partition Ordinance No. 10 of 1863, when the Partition Act No. 21 of 1977 was enacted and also when it was amended by Act No. 17 of 1997. It is also pertinent to note that when the Partition Ordinance was first repealed and Partition Act No. 16 of 1951 was enacted, even in that Act, the provision to issue notices to all parties again for the scheme inquiry was removed.
16. Hence, the argument that the learned District Judge should have issued notice to all parties for the scheme inquiry cannot be accepted. It was the obligation of the parties concerned to be present for the inquiry. As I

mentioned before, Court will not relieve the parties of the consequences of their own folly or negligence in applications of *restitutio in integrum*.

17. Petitioner was represented by counsel on 09.03.2011 when the settlement was entered in open Court. Therefore, Petitioner cannot say that she did not know about the proceedings dated 09.03.2011. This application is made on 12th August 2014, more than 3 years after the order on settlement was made. No acceptable reason for the delay of more than 3 years to invoke the jurisdiction of this court is submitted by the petitioner. It was entirely due to the lack of diligence on the part of the Petitioner that has caused more than 03 years delay to come to court. Hence, the Petitioner is not entitled to the relief sought in this application.

Application is refused with costs.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL