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

In the matter of an application for *restitution in integrum* and/or revision in terms of Article 138 of the constitution of the Republic of Sri Lanka.

Application No: *Resti*
CA/RII/0001/2020
District Court of
Pugoda Case No: 747/P

01. Rankiri Pathirage Yasaseeli Uparanjani
02. Rankiri Pathirage Hemasiri Dayananda (deceased)

02(a). Rankiri Pathirage Yasaseeli Uparanajni

03. Singappuli Arachchige Mary Nona

03(a). Rankiri Pathirage Yasaseeli Uparanjani

All are at
No. 109/03, Malinda,
Kapugoda.

**Plaintiffs**

Vs.

01. Rankiri Pathirage Nancy Nona
02. Rankiri Pathirage Auwdin Singho

02(a). Rankiri Pathirage Thushara Neil Prasanna

03. Rankiri Pathirage Domiyal Singho

All are at
Malinda, Kapugoda.

04. Rankiri Pathirage Kithsiri
05. Rankiri Pathirage Champa Ranjani
06. Rankiri Pathirage Badra Suwarnakanthi
07. Rankiri Pathirage Darma Sandaseeli

All are at
No. 109/03, Malinda,
Kapugoda.

08. I.M. Chandradasa
No. 109/02, Malinda,
Kapugoda.

09. Rankiri Pathirage Piyasena

111/A, Malinda,
Kapugoda.

**Defendants**

**AND NOW**

01. Lokuthambugala Ralalage Somawathi
02. Rankiri Pathirannehalage Saman Nilantha
Both are at
No.112/1, Malinda,
Kapugoda.
03. Rankiri Pathirannehalage Thushari Nilmini
No.112/1, Malinda,
Kapugoda.
04. Rankiri Pathirannehalage Punchi Nona
Palugama, Dompe.
05. Rankiri Pathirannehalage Jepin Nona
Dangalla, Papiliyawala.

**Petitioners**

Vs.

01. Rankiri Pathirage Yasaseeli Uparanjani

02. Rankiri Pathirage Hemasiri Dayananda
(deceased)
02(a). Rankiri Pathirage Yasaseeli
Uparanjani
03. Singappuli Arachchige Mary Nona
03(a). Rankiri Pathirage Yasaseeli
Uparanjani

All are at
No.109/03, Malinda,
Kapugoda.

**Plaintiff – Respondents**

01. Rankiri Pathirage Nancy Nona
02. Rankiri Pathirage Auwdin Singho
02(a). Rankiri Pathirage Thushara Neil
Prasanna
03. Rankiri Pathirage Domiyal Singho
All are
Malinda, Kapugoda
04. Rankiri Pathirage Kithsiri
05. Rankiri Pathirage Champa Ranjani
06. Rankiri Pathirage Badra Suwarnakanthi
07. Rankiri Pathirage Darma Sandaseeli
All are at
No.109/03, Malinda,
Kapugoda.
08. I.M. Chadradasa
No.109/2, Malinda,
Kapugoda
09. Rankiri Pathirage Piyasena
No.111/A, Malinda,
Kapugoda.

**Defendant – Respondents**

Before: D.N. Samarakoon – J
C.P. Kirtisinghe – J

Counsel: Dr. Wijedasa Rajapaksha PC with Dasun Nagashena
Rakitha Rajapaksha
Madawa Jayawardena and Harsha Liyanaguruge for the petitioners
Romesh Samarakkody for the 1st and 3a plaintiff – Respondents

Argued On :23/02/2021
Decided On :29/04/2021

C.P. Kirtisinghe – J

The petitioners have made this application for revision and/ or *restitutio in integrum* to set aside the judgement, interlocutory decree and final decree entered in case no. 747P in the District Court of Pugoda, to direct the District Judge of Pugoda to exclude the lot no. 01 of the preliminary plan no. 2005P from the corpus in favor of the petitioners and for other relief and interim relief prayed for in the prayer to the petition.

It is the case of the petitioners that the aforesaid lot no. 01 depicted in the preliminary plan which is claimed by the petitioners had been wrongly included in to the corpus of this partition action without notice to the petitioners and their predecessor in title.

The plaintiffs – respondents had instituted this partition action to partition the land called lot no. 10 of Galabodawatta depicted in plan no. 5257 filed of record in the case no. 2966 ෙඛ in the District Court of Gampaha. The aforesaid lot no. 10 which is the corpus in this case is a block of land partitioned in an earlier partition action no. 2966 ෙඛ. The commissioner in this case A.C.P. Gunasena LS has shown the aforesaid disputed lot no. 01 as a part of the aforesaid lot no. 10 in his preliminary plan no. 2005P. According to the final decree entered in case no. 2966P, marked ළැ 01 the adjoining lot no. 08 had been allotted to Rankiri Pathirage Daniel who was the 11th defendant in that case. There is no dispute that the aforesaid Daniel is the predecessor in title of the petitioners. According to the final plan in the earlier case

marked පැ 02 it is apparent that the aforesaid lot no. 08 adjoins lot no. 10 which is the corpus in this case. According to the judgement marked X 02 there had been an earlier action – no. 17128 ඉඩම් between Daniel and the owners of the aforesaid lot 10 – the corpus in this case and it had been decided in that case that the aforesaid Daniel had prescribed to a portion of lot 10 namely lot no. 10A which was in dispute in that case. The Court had dismissed that action instituted by the owners of the corpus against Daniel, on that basis. The Court had come to the conclusion that Daniel had been in possession of the aforesaid lot no. 10A and prescribed to that lot against Simon who became the owner of lot no. 10 under the final decree in the earlier partition action.

Although the petitioners had failed to superimpose the plan marked පැ 01 filed of record in 17128 ඉඩම් on the preliminary plan in this case and on the final scheme of partition in the earlier action to show that the disputed lot no. 10A in case no. 17128 ඉඩම් is identical to lot no. 01 depicted in the preliminary plan in this case which is in dispute, (the petitioners will obviously face practical difficulties in doing so) on a balance of probability of the evidence one can come to the conclusion that lot no. 10A which was in dispute in case no. 17128 ඉඩම් is the same portion of land which is shown as lot 01 in the preliminary plan, for the following reasons.

When one examines the preliminary plan no. 2005P marked X at the trial it is apparent that there is a physical demarcation of the common boundary between the disputed lot 01 and the balance portion of the corpus. There is a live fence separating lot 01 from the adjoining lot 02 which is a portion of the corpus. That shows that the disputed lot no. 01 was not possessed as a part of the corpus in this case and it was possessed as a separate lot. The commissioner in his report marked X 01 had reported to court that the disputed lot 01 was annexed to the adjoining lot 08 which means that it remained as a portion of the adjoining land lot 08. Therefore it is obvious that the disputed lot no. 01 was possessed as a portion of the adjoining lot no. 08. The petitioners who are the heirs of Daniel do not claim any other portion of the corpus. Therefore on a balance of probability of evidence one can come to the conclusion that lot no. 01 in the preliminary plan which is in dispute in this case is the same portion of land which was in dispute in the earlier case 17128 ඉඩම්.

According to the judgement in case no. 17128 ඉඩම් marked X 02 the court had decided that Daniel the Predecessor of the petitioners had prescribed to this portion of land against simon who got title to corpus under the partition decree in the earlier partition case. The physical demarcation that existed on the common boundary between lot 01 and 02 shows that lot no. 01 was not possessed as a part of the corpus at the time of the preliminary survey and it was possessed as a part of the adjoining land lot no. 08. However the plaintiffs in this case have included lot 01 into the corpus and not thought it fit to exclude it from the corpus. In such a situation the plaintiffs should have included Daniel's heirs in the plaint as parties. Section 05 of the partition law no. 21 of 1977 reads as follows;

05. The plaintiff in a partition action shall include in his plaint as parties to the action all persons who, whether in actual possession or not, to his knowledge are entitled or claim to be entitled –

(a) to any right, share or interest to, of, or in the land to which the action relates, whether vested or contingent, and whether by way of mortgage, lease, usufruct, servitude, trust, life interest, or otherwise, or

(b) to any improvements made or effected on or to the land:

The plaintiffs in this case had failed to include Daniel's heirs as parties to this partition action and therefore the plaintiffs had failed to comply with the imperative requirements contained in section 05 of the partition act.

The petitioners state that neither they nor their predecessor in title received any notice or summons in respect of this case. The petitioners further state that the plaintiffs and the defendants acted in collusion illegally and wrongfully to deprive the petitioners' title to lot 01 when they suppressed the fact that the court had held earlier that Daniel had prescribed to this lot. The petitioners further state that the plaintiffs and the defendants have committed a fraud and misled court in obtaining this partition decree. There is merit in this allegation.

While very well knowing that the court had decided earlier in case no. 17128 ඉඩම් that Daniel had prescribed to this disputed portion of land and very well knowing that this disputed lot was possessed as a part of the land to which Daniel became entitled under the earlier partition decree the plaintiffs had failed to include Daniel's heirs as parties to this partition action. That itself amounts to fraud and

collusion. On 12.07.2011 the court had directed the plaintiff to take steps to notice the parties who were in possession of lots 01, 10, 11 13 and 16. Thereafter the Fiscal had reported that Eraman Singho (a son of Daniel and the predecessor in title of 1st, 2nd and 3rd petitioners) had passed away. Sometime later it was reported that Eraman Singho was living and the Fiscal had reported that he had handed over the notice to Eraman Singho. According to journal entry no. 86 it is recorded that Eraman Singho had appeared in court on 25.05.2015. It appears from the journal entry that Eraman Singho was not represented by an Attorney -at – Law on that day and the court had failed to check the identity of the person who appeared on that day as Eraman Singho. According to what is recorded in that journal entry the person who had appeared as Eraman Singho had mentioned the court that he was not contesting the plaintiff's case and he had signed the record. It is the case of the petitioners that Eraman Singho never went to court to participate in this case as he was seriously ill at that time. When applying the test of probability it is highly improbable that Eraman Singho would have made such a statement to court to give up the portion of land in which he was in possession and to which he had litigated earlier and to which he was declared a prescriptive right. Therefore one can accept the version of the petitioners that their predecessor in title Eraman Singho who was a son of Daniel was never noticed by court. According to the journal entries it is obvious the other heirs of Daniel also had not been noticed by court although the court had directed the plaintiffs to take steps to notice the parties who are in possession of lot 01. The Plaintiffs had failed to comply with that direction. Therefore it is obvious that the plaintiffs had acted in collusion to deprive the rights of the petitioners to lot 01.

Proper identification of the corpus is of paramount importance in a partition action. As observed by Saleem Marsoof – J in **Sopinona Vs Pitipana Arachchi** 2010 (1) SLR 87 without proper identification of the corpus it would be impossible to conduct a proper investigation of title because clarity in regard to identity of the corpus is fundamental to the investigation of title in a partition case. As the District Court had decided in a previous action that the predecessor in title of the petitioners had prescribed to the disputed lot no. 01 it cannot form a part of the corpus. The decision in the earlier case becomes *Res Judicata* between the parties to that action and the plaintiffs who are the successors in title to the plaintiffs in that case are bound by that decision.

Section 48 (3) of the partition act reads as follows;

48 (3) The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.

The powers of the Court of Appeal by way of revision and *restitutio in integrum* shall not be affected by the provisions of this subsection.

Section 48 (1) and 48 (3) of the partition act provides that an interlocutory decree and a final decree of a partition action is final and conclusive but it also provides that the powers of this court by way of revision and *restitutio in integrum* shall not be affected by the provisions of the subsection. In the case of **Piyasena Perera Vs Magrette Perera and two others** 1984 (1) SLR 57 H.A.G. De Silva – J held that the finality attached to an interlocutory decree of partition under section 48 (1) of the partition law no. 21 of 1977 does not preclude an Appeal Court from interfering with such a decree by way of revision or *restitutio in integrum* where a miscarriage of justice has occurred. In the case of **Somawathi Vs Madawala and others** reported in 1983 (2) SLR 15 Justice Soza expressed the same view.

In the case of **Sajith Dilhan Vs Victor** reported in 2012 (2) SLR 286 Sathya Hettige – PC J held that the Court of Appeal has retained the power to exercise the *restitutio in integrum* jurisdiction under article 138 of the constitution and that jurisdiction is solely vested in the Court of Appeal whereas the revisionary jurisdiction is concurrent. However the petitioners to this application were not parties in the partition action. It is settled law that an application for *restitutio in integrum* can only be filed by a party to a case (**Perera Vs Wijewickrama** 15 NLR 411, **Dissanayake Vs Elisinahami** 1978/79 – (2) SLR 118, **Ranasinghe Vs Gunasekara** 2006 – (2) SLR 393, **Sri Lanka Insurance Corporation Ltd Vs Shanmugam** 1995 – (1) SLR 55). But this is not only an application for *restitutio in integrum* but also an application for revision and this court can exercise its extra ordinary revisionary jurisdiction to remedy the injustice caused to the petitioners.

In the case of **Maduluwawe Sobhitha Thero Vs. Joslin** reported in 2005 (3) SLR 25 the petitioner who was not a party to a partition action had filed a revision application to set aside the judgement, interlocutory decree and the final decree. In the circumstances of that case Justice Wimalachandra held that if the Court of

Appeal fails to invoke its power of revision grave injustice will result to the petitioner and permitted the petitioner to intervene in the partition action and to file a statement of claim.

In the case of **Gnanapandithen and another Vs. Balanayagam and another** 1998 (1) SLR 391 the petitioner appellants had filed an application in the Court of Appeal to set aside the judgement and the interlocutory decree entered in a partition case. They were not parties to the partition action and they had further sought an order directing the District Court to add them as party defendants to the partition action and to permit them to file a statement of claim and participate at the trial. The Court of Appeal had refused the application of the petitioners. G.P.S. De Silva CJ held as follows;
*"I am accordingly of the view that the Court of Appeal was in serious error when it declined to exercise its revisionary powers having regard to the very special and exceptional circumstances of this partition case".*

In the case of **Somawathi Vs. Madawala and others** 1983 (2) SLR 15 also a petitioner who was not a party to a partition action had moved the Court of Appeal in revision and the Supreme Court held that the intervention should be allowed. Soza J held as follows;

*"The court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred . . .* ***Indeed the facts of this case cry aloud for the intervention of this court to prevent what otherwise would be a miscarriage of justice****".*

In the case of **Amarasinghe Vs Wanigasooriya** reported in 1994 (2) SLR 203 S.N. Silva – J (as he then was) stated thus "it is settled law that a glaring blemish which taints the proceedings in a partition action and results in a miscarriage of justice to a person not being a party to the action may appropriately be remedied by an application in revision".

Therefore this court can intervene in the exercise of its revisionary powers to set aside the judgement, interlocutory decree and final decree entered in this case to avert the miscarriage of justice caused to the petitioners and exceptional circumstances have arisen in this case for this court to exercise its extra ordinary revisionary jurisdiction. But in the circumstances of this case it is not necessary to set aside the entire proceedings in the District Court which would cause

unnecessary hardship to the parties. There is no pedigree dispute in this case. The petitioners are not challenging the pedigree of the plaintiffs and they are not claiming for undivided rights in the corpus. They are only asking for an exclusion of the disputed lot no. 01. The District Court had decided that the predecessor in title of the petitioners had prescribed to this disputed portion of land and at the time of the preliminary survey there was a well - established live fence separating the disputed lot 01 from the rest of the corpus. The commissioner has reported to court that the disputed lot 01 is annexed to the adjoining land to which the predecessor in title of the petitioners became entitled under the final decree in the earlier partition action which means that the disputed lot is possessed as a portion of that adjoining land and not as a part of the corpus. There is no evidence to show that the possession had changed into a third party. No one other than the petitioners have come forward to claim for this disputed lot which means the possession had not changed into a third party. Therefore on a balance of probability one can come to the conclusion that Daniel's heirs continued to be in possession in this disputed lot after the death of Daniel. In those circumstances it is not necessary to direct the learned District Judge to hold an inquiry to see whether the possession had changed during the course of a very long period of time since the judgement in case no. 17128 ඉඩම් pronounced in 1975. Such a course would cause delay and unnecessary hardship to all the parties. Accordingly it would meet the ends of justice if without setting aside the interlocutory decree it is only amended by excluding from the corpus the disputed lot no. 01 in the preliminary plan no. 2005P. Therefore I make order excluding the disputed lot 01 from the corpus and direct the learned District Judge to amend the interlocutory decree accordingly. The final decree and the proceedings leading up to it from the stage of the interlocutory decree are set aside. The application for revision is allowed and the plaintiffs - respondents shall pay the petitioners Rs. 31,500.00 as the cost of this application.

Judge of the Court of Appeal

D.N. Samarakoon – J
I agree

Judge of the Court of Appeal