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

In the matter of an Application for Revision or *restitutio integrum* in terms of Article 138 and 145 of the Constitution of Sri Lanka against the Judgement dated 13.09.2006, Interlocutory Decree dated 26.06.2015 and order dated 27.01.2017 of the Learned District Judge of Matugama in Case No 3284/P

CA/RI: 05/2018

WP/HCCA/KAL No: 07/2017

DC Matugama: 3284/P

Udugama Koralalage Dayasena

Uduwawaththa, Meegama

Vs Plaintiff

Udugama Koralalage Piyasena

Hospital Front, Iththepana

Defendant

AND BETWEEN

1. Punchinona Habakkalahewa
   Hospital Front, Iththepana
2. Wadduwa Palliya Gurunnanselage Don Deepthi Rathnapriya Senanayake
   Hospital Front, Iththepana

Petitioners

Vs

1. Udugama Koralalage Dayasena
   Uduwawaththa, Meegama

Plaintiff-Respondent

2. Udugama Koralalage Piyasena

Hospital Front, Iththepana

Defendant- Respondent

AND BETWEEN

1. Punchinona Habakkalahewa
   Hospital Front, Iththepana
2. Wadduwa Palliya Gurunnanselage Don Deepthi
   Rathnapriya Senanayake
   Hospital Front, Iththepana

Petitioners-Petitioner

Vs

1. Udugama Koralalage Dayasena
   Uduwawaththa, Meegama

Plaintiff-Respondent-Respondent

2. Udugama Koralalage Piyasena
   Hospital Front, Iththepana

Defendant-Respondent-Respondent

AND NOW BETWEEN

1. **Punchinona Habakkalahewa**
   Hospital Front, Iththepana

2. **Wadduwa Palliya Gurunnanselage Don Deepthi**
   Rathnapriya Senanayake
   Hospital Front, Iththepana

Petitioners-Petitioner-Petitioners

Vs

1. Udugama Koralalage Dayasena
   Uduwawaththa, Meegama

   Plaintiff-Respondent-Respondent-Respondent

2. Udugama Koralalage Piyasena
   Hospital Front, Iththepana

   Defendant-Respondent-Respondent-Respondent

Before: D.N. Samarakoon - J

C.P. Kirtisinghe - J

Counsel: J.M. Wijebandara with Y.S. Shahani for Petitioner-Petitioner-Petitioner

Sudharshani Cooray for Plaintiff-Respondent-Respondent-Respondent

Buddhika Gamage for Defendant- Respondent- Respondent

Agued on :01.02.2021

Decided on :25.02.2021

C.P. Kirtisinghe - J

01 and 02 petitioners- petitioners- petitioners (hereinafter referred to as petitioners) are seeking to revise/ set aside the judgement and interlocutory decree entered in this case, to set aside the order dated 27.01.2018, for a direction to add the petitioners as defendants and to allow them to tender their statements of claim, for a direction to the learned District Judge to issue a fresh commission to the surveyor or the Surveyor General to ascertain the boundaries of the corpus, to dismiss the partition action and to restore the status quo.

The plaintiff-respondent-respondent-respondent (herein after referred to as the plaintiff) had instituted this partition action to partition the corpus in this case namely "Lot 04 of Lot 08 of Maanagoda Kurunduwatta" which is morefully described in the schedule to the plaint. It is common ground that it is a sub division of a larger land which was partitioned in an earlier partition action bearing no. 30701P in DC Kalutara. In the final plan marked X3 it is shown as Lot 04. In the earlier partition action this lot had been allotted to the predecessors of the plaintiff and the defendant and the adjoining Lot no. 03 had been allotted to the 01st petitioner.

The corpus in this case is depicted as lots no. 01,02,03 in the preliminary plan no. 2133 prepared by surveyor Jayasuriya. The judgement in this case was pronounced on 13.09.2006 and the interlocutory decree was entered accordingly. Thereafter the surveyor had surveyed the land to prepare the final scheme of partition. The petitioners state that the plaintiff attempted to show the boundaries of the corpus within Lot 03 claimed by the petitioners. There after the petitioners had made an application to the District Court under section 839 of the civil procedure code seeking relief and the court after holding an inquiry had dismissed this application on 27.01.2017.

The learned counsel for the defendant respondent submitted that there is a long delay on the part of the petitioners which is not explained. He submitted that the preliminary plan had been prepared in 1993 and the judgement had been entered on 13.09.2006. The learned District Judge had refused the application of the petitioners on 27.01.2017. But the petitioners had made this application to this court on 20.03.2018. The Petitioners have explained the delay. The petitioners say that the surveyor did not erect or identified any boundaries at the preliminary survey. Therefore the petitioners could not have come to know that a portion of their land had come into the corpus in this case and the petitioners had no cause to complain at the stage. It is only at the final survey that the petitioners came to know that a portion of their land had been included into the corpus. Therefore the delay is explained up to that point. There after the petitioners had made an attempt to intervene into the partition action which was refused. The leave to appeal application which was filed against that order in the Provincial High Court was withdrawn on 05.03.2018.

In the case of **Rathnayake Vs Sarath, Divisional Secretary Thihagoda** reported in (2004) 3 SLR 95 the petitioner had made an unsuccessful application in the Provincial High Court of Matara causing delay and it was held that in those circumstances the period during which the proceedings were pending in the Provincial High Court is neither undue delay nor is it unexplained. In the case of **Bisomanika Vs Cyril De Alwis** (1982) 1 SLR 368 it was held that if the petitioner had been seeking relief elsewhere in a manner provided by law he cannot be guilty of culpable delay. Therefore in this case the petitioners have explained the delay and they are not guilty of laches.

Identification of the Corpus

Identification of the corpus is of paramount importance in a partition action. In the case of **Sopinona Vs. Pitipana Arachchi 2010 (1) SLR 87** where the parties had admitted the corpus shown in the preliminary plan Marsoof, PCJ observed as follows;

"Before dealing with the first substantial question of law on which special leave had been granted by this Court in this appeal, it is necessary to deal with the question of identity of the land sought to be partitioned, which is a matter of vital importance in any partition case. Without proper identification of the corpus it would be impossible to conduct a proper investigation of title. ……. This is because clarity in regard to identity of the corpus is fundamental to the investigation of title in a partition case."

It is only after the identification of the corpus that the District Judge is embarked upon the task of investigation of title of the corpus. Without proper identification of the corpus it would be impossible to conduct a proper investigation of title.

In the schedule to the plaint the corpus in this case is described as follows,

බස්නාහිර පළාතේ කළුතර දිස්ත්‍රික්කයේ, බස්නාහිර පස්දුන් කොරළේ, වලල්ලාවිට පත්තුවේ, ඉත්තෑපාන මඩවිට පිහිටි, කළුතර දිසා අධිකරණයේ අංක 30701 දරණ බෙදුම් නඩු තීන්දුවට බැඳී, ස්ටැන්ලි එන් ද සිල්වා මිනින්දෝරු මහතා විසින් මැන සාදන ලද අංක

283 සහ 1957.05.16 දින දරණ පිඹුරේ දැක්වෙන “ මානන්ගොඩ කුරුදුවත්ත” හෙවත් මානගොඩකුරුදුවත්ත අංක 8 (8) කට්ටියේ 4 (හතර) කට්ටිය නැමැති,

උතුරු නැගෙනහිරට - මෙහි 3 කට්ටියද, නැගෙනහිරට - ගලගාව උඩුමුල්ල ද, දකුණු - බස්නාහිරට - මෙහි අංක 9 (නවය) කට්ටියද,

උතුරු - බස්නාහිරට -පාරද මායිම් වූ අක්කර එකකුත් රෑඩ් දෙකකුත් පර්-වස් හතකුත් දශම තුනයි තුනයි තුන (අක්.1 රූ.2 පර්.7.33) ක් විශාල ඉඩමින් පවර්ස් හත (අක්.0 රූ.0 පර්.7) ක් එස්.පී. ඉලංකෝන් මිනින්දෝරු මහතා විසින් අංක 976 සහ 1989.02.27 දින දරණ පිඹුරෙන් මැන වෙන් කිරීමෙන් පසු ඉතිරි වූ,

මානන්ගොඩකුරුදුවත්ත හෙවත් මානගොඩකුරුදුවත්ත අංක 8 (අට) කට්ටියේ 4 (හතර) කට්ටියේ ඉතුරු කට්ටිය නැමැති,

උතුරු - නැගෙනහිර - මෙම ඉඩමෙන් බෙදා වෙන් කළ අංක 1 (එක) කට්ටිය සහ මානගොඩකුරුදුවත්තේ 8 (අට) කට්ටියේ 3 (තුන) කට්ටියද,

නැගෙනහිරට - ගලගාවඋඩුමුල්ල සහ මුල් ඉඩමෙන් 8(අට) කට්ටියේ 3(තුන) කට්ටියද,

දකුණට - මෙහි මුල් ඉඩමේ 9 (නවය) කට්ටියද,

උතුරු - බස්නාහිරට - හොරවල්තොට ලෙව්වන්දුව මහපාරද, මායිම් වූ අක්කර එකකුත් රූඩ් දෙකකුත් පර්-වස් දශම තුනයි තුන (අක්.1 රූ.2 පර්.0.33) ක් විශාල ඉඩමේ බිම සහ එහි ඇති රටඋළු සෙවිලි කළ නිවසද, පැරණි රබර් වගාවද, අනෙකුත් ගහකොළ පළතුරු ආදී සියළු දේත් වේ.

The corpus in this case is a sub division of lot no. 4 of the final plan no. 283 of DC Kalutara case no. 30701. The adjoining lot no. 3 of the same plan claimed by the petitioners was also a lot partitioned in the same partition action. The preliminary plan in this case shows that lot no. 3 borders the corpus to the East. It is the case of the petitioners that a strip of land from lot no. 3 had been included into the corpus at the final survey. It is apparent from the preliminary plan that

there are no physical demarcations of the boundaries of the corpus except on a very small portion of the Eastern and Western boundaries towards the Northern end where there is a wire fence and a wall in a comparatively very small extent in those two boundaries. In the common boundary between the corpus and lot 3 which is in dispute there is no clear physical demarcation of the boundary such as a wall, a wire fence or a live fence. The learned counsel for the plaintiff respondent submitted that the ditch shown in the preliminary plan is a physical demarcation of the common boundary. We cannot agree with that submission. One cannot come to the definite conclusion that it is a physical demarcation of the common boundary as it can be a ditch formed by the natural flow of rain water and one cannot come to the definite conclusion that the drain lies along the common boundary. In the absence of such physical demarcations the plaintiff is not in a position to show the exact boundary to the surveyor. In such a situation it is difficult to demarcate the common boundary without superimposing, on the boundaries surveyed, the earlier plans depicting the corpus. The schedule to the plaint refers to two earlier plans. One is the final plan filed of record in the partition action no. 30701 upon which lots 3 and 4 were partitioned. The other is the plan no. 976 upon which the lot no. 4 was sub divided. The plaintiff had not made use of any of those plans to identify the corpus. Superimposing the earlier partition plan no. 283 on the boundaries surveyed in the preliminary plan was the best evidence to establish the identity of the corpus and to demarcate the boundaries. That plan was available to the plaintiff. But the plaintiff had not thought it fit to produce that plan to the commissioner to identify the corpus properly. Therefore it can be presumed under section 114-F of the evidence ordinance that if that plan was superimposed it would be unfavorable to the plaintiff who withheld it. Therefore it appears that

there is some merit in what the petitioners say and they should be given an opportunity to establish their case. The learned counsel for the plaintiff respondent and the defendant respondent submitted that the petitioners had not satisfied court that there is an encroachment and there is no evidence to show that there is an encroachment. Further the learned counsel for the plaintiff respondent submitted that the petitioners did not complain to the surveyor about an encroachment at the time of the preliminary survey. It is the case of the petitioners that the surveyor did not demarcate the common boundary at the preliminary survey. Therefore the petitioners could not have known at that stage that there is an encroachment. As the petitioners were not parties to the partition action they did not have an opportunity to show the encroachment in a plan. Had the surveyor demarcated the boundary at the preliminary survey the petitioners could have intervened at the preliminary survey as new claimants and shown the encroachment in the preliminary plan. The petitioners had lost that opportunity. A copy of the plaint is annexed to the commission for the preliminary survey. In the schedule to the plaint the corpus is described as a sub division of lot no. 4 of the final plan no. 283. Although a copy of the commission is not before us for perusal the commissioner in his report had mentioned that the plan referred to in the schedule to the plaint was not given to him by the plaintiff or the defendant. That shows that the commissioner was conscious about his duty to identify the corpus according to the earlier plan and depict in the preliminary plan the land described in the schedule to the plaint which is described with reference to the earlier partition plan. In such a situation the commissioner should have informed that fact to court and sought further instructions from court before proceedings to

commence the preliminary survey. In the case of **Uberis Vs. Jayawardhana 62 NLR 217 Basnayake**, CJ held as follows;

"It is the duty of a Surveyor to whom the Commission is issued to adhere strictly to its terms and locate and survey the land which is commissioned to survey. It is not open to him to survey the land pointed out by one or more of the parties and prepare and submit to Court the plan and report of such a survey. If he is unable to locate the land he is commissioned to survey, he should so report to the Court and ask for further instructions."

The Commissioner in this case had surveyed the corpus according to the boundaries shown by the plaintiff and the plaintiff had not made any attempt to give him a copy of the earlier partition plan. In the absence of physically ascertainable boundaries and in the absence of the earlier partition plan the Surveyor should have reported that to court and ask for further instructions before surveying the land. Had he done so this litigation would not have arisen.

Citing the judgement of **Paulis Vs. Joseph and Others** reported in 2005 (3) SLR 162 the learned counsel for the plaintiff respondent submitted that as the petitioners were not parties to the partition action the remedy of Restitutio – in – integrum is not available to the petitioners. The ratio decidendi in that case will not apply to this case. In that case the petitioner was a party to the action although she did not participate in the trial and following the judgement of **Kusumawathi Vs. Wijesinghe** 2001 (1) SLR 238 the Court of Appeal held that it had power to grant the relief of Restitutio – In – Integrum. However 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 it is also an application for revision. In the caption of the application it is stated thus *"In the matter of an Application for Revision or Restitutio integrum in terms of Article 138 and 145 of the Constitution of Sri Lanka……."*

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****".*

Therefore this court can intervene in the exercise of its revisionary powers to set aside the judgement and interlocutory 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 and they are not claiming for undivided rights in the corpus. The dispute relates to the identification of the corpus. Therefore we set aside the findings of the learned District Judge relating to the identification of the corpus and direct the learned District Judge to permit the petitioners to intervene in the partition action as added defendants, to permit them to file a statement of claim and participate at the trial. We direct the learned District Judge to amend the interlocutory decree accordingly after holding an inquiry regarding the identification of the corpus.

The application of the petitioners is allowed. The plaintiff respondent and the defendant respondent each shall pay a sum of Rs. 10,500.00 as costs to the petitioners.

Judge of the Court of Appeal

D.N. Samarakoon – J

I agree

Judge of the Court of Appeal