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

C.A Case No: CA 412/95 (F)

D.C. Kuliyapitiya Case No: 7742/P

In the matter of an Appeal.

1. J.M.S. Bandarawathie Jayasinghe
2. J.M.W. Bandawathie Jayasinghe

Both of Gallehamulla Watta,
Welipennagahamulla

Plaintiffs

Vs.

1. B. L.Ariadasa Gallehamulla Watta,
Welipennagahamulla and 19 others

Defendants

And between

K. A. Chandradasa,
Gallehamulla,
Welipennagahamulla

20th Defendant-Appellant

Vs.

1. J.M.S. Bandarawathie Jayasinghe

1st Plaintiff-Respondent

1A. E M. Anoma Tamarakumari Amithirigala
1B. E M. Damayanthi Pushpakumari Amithirigala
All of Gallehamulla Watta,
Welipennagahamulla

1A and 1B Substituted Plaintiff-Respondents

2. J. M. W. Bandarawathie Jayasinghe

2nd Plaintiff-Respondent

2A. E. M. Anoma Tamarakumari Amithirigala
2B. E. M. Damayanthi Amithirigala
both of Gallehamulla Watta, Welipennagahamulla

2A and 2B Substituted Plaintiff-Respondents

1. B. L. Ariyadasa, Gallehamulla Watta, Welipennagahamulla

1A. Pushpa Udaya Kanthi, Gallehamulla Watta, Welipennagahamulla

2. J. M. Leelawathie, Welipennagahamulla, Pannara
3. J. M. Jayasundara, Welipennagahamulla, Gallehemulla
4. T. M. Telisinghe, Wadumunnegedara, Nawasegahawatte.
5. J. M. Nandana, Welipennagahamulla, Gallehemullawatte
6. J. M. Jagath, Welipennagahamulla, Gallehemullawatte
7. J. A. Piyarathne, Welipennagahamulla, Gallehemullawatte
8. J. A. Karunarathne, Welipennagahamulla, Gallehemullawatte
9. K. A. L. Gunawardhane, Welipennagahamulla, Gallehemullawatte
10. J. M. Emonona (Deceased)

10A. S. M. Seelawathie, Gallehemulla, Welipennagahamulla

11. M. A. Ranmenika, Welipennagahamulla, Gallehemullawatte
12. S. M. Dhanawathie Manika, Welipennagahamulla , Gallehemullawatte.
13. M. N. De Silva, Mahawewa, Ihala Mahawewa
14. S. M. Suripala, Welipennagahamulla, Gallehemullawatte

15. S. M. Wijesinghe, Welipennagahamulla, Gallehemullawatte
16. S. M. A. Dayananda, Welipennagahamulla, Gallehemullawatte
17. S. M. A. Gamini Wasantha, Welipennagahamulla, Gallehemullawatte
18. S. M. A. Chandana, Subasinghe Welipennagahamulla, Gallehemullawatte
19. S. M. A. Dhanawathie Manike, Welipennagahamulla, Gallehemullawatte

Defendant-Respondents

Before: M.T. Mohammed Laffar J.

S. U. B. Karalliyadde, J.

Counsel:

Rohan Sahabandu, PC for the 20th Defendant-Appellant.

M.C. Jayaratne, PC with Ms. H.A. Nishani Hettiarachchi instructed by M.D.J. Bandara for the 1A, 1B, 2A and 2B Substituted Plaintiff-Respondents.

L.M.C.D. Bandara with Ms. M. Namali L, Perera for the 1A and 13th Defendant - Respondents.

P.P. Gunasena for the 9A and 9B Substituted Defendant-Respondents.

Argued on: 12.11.2021

Decided on: 01.02.2022

S.U.B. Karalliyadde, J.

This Appeal is against the judgment dated 30.08.1995 of the learned District Judge of Kuliyapitiya in the partition action bearing No. P/7742. The Appellant who is cited as

the "20th Defendant-Appellant" (the Appellant) in the caption to the Petition of Appeal was not a party to the partition action. The 1st and 2nd Plaintiff-Respondents instituted the partition action for partitioning the land known as Davatagahahena which is morefully described in the schedule to the plaint. After the statements of claim of the Defendant-Respondents were tendered to the Court, the case had been fixed for trial and upon conclusion of the trial on 10.10.1994, a date has given to tender the documents marked at the trial and the list of shares which the parties were entitled. When the case was called before the open court on 23.11.1994 for that purpose, the Appellant made an application to add him as a party to the action. The Court allowed that application, subject to a pre-payment of costs to the parties to the action and given a date to pay the pre-paid costs. On the date which the pre-paid costs had to be paid, the Appellant did not pay it and the Court, therefore, did not add him as a party to the action. Thereafter, the learned District Judge delivered the judgment allotting shares to the parties to the action and the Appellant did not get any share/right in the land sought to be partitioned. Then he preferred this Appeal against the judgment seeking reliefs, *inter alia*, to set aside the judgment of the District Court and an order for a re-trial.

After hearing the Appeal, this Court concluded that the Attorney-at-Law who filed the proxy for the 1st and 2nd Plaintiff-Respondents in the District Court had failed to file the Declaration under section 12 of the Partition Act, No. 21 of 1977 (the Partition Act). On that basis the judgment of the District Court was set aside ordering a trial *de novo*. The 1st and 2nd Plaintiff-Respondents sought special leave to appeal from the Supreme Court against that judgment of this Court dated 07.01.2019. Before the Supreme Court, the learned Counsel appeared for the parties submitted to Court that even though, the learned Counsel had inadvertently made submissions at the hearing of the Appeal before this Court on the basis that the section 12 Declaration had not been filed, in fact it had been filed. Accordingly, the Supreme Court set aside the judgment dated 07.01.2019 of this Court and the case record had been sent back to this Court to consider the matters set out in the Petition of Appeal dated 27.10.1995 on the merits.

When the Appeal was taken up for hearing, the learned President's Counsel appearing for the Appellant, admitting that the Appellant who was not a party to the partition action is not entitle to invoke appellate jurisdiction of this Court and that the appeal is misconceived in law, invited the Court to consider the Appeal as a Revision Application and grant reliefs prayed for in the Petition of Appeal.

The matters which a court should consider when exercising its revisionary jurisdiction were discussed in series of judgments both by the Court of Appeal as well as by the Supreme Court. In the case of *Maiam Beebee vs. Seyed Mohamed*[1], Sansoni C. J. observed that;

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this (**Supreme**) (emphasis added) court. Object of the revisionary power is the due administration of justice and the correction of errors, sometimes committed by the court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a judge of his own motion, when an aggrieved person who may not be a party to the action is brought to his notice the fact that, unless the power is exercised, injustice will result. The partition act has not, I conceive, made any changes in this respect, and the power can still be exercised in respect of any order or decree of a lower court."

In the instant case, the learned President's Counsel appearing for the Appellant argued that when a person who is not a party to a partition action makes a claim before the Surveyor, he is deemed to be a party to the action and he should add to the case as a party by the court itself. According to the learned President's Counsel, non-addition of the Appellant as a party to the action, though, he had preferred a claim to the land sought to be partitioned before the Surveyor, is a miscarriage of justice and this Court, therefore, should exercise its revisionary jurisdiction and set aside the judgment of the

[1] (1965) 68 NLR 36.

District Court, allow the Appellant to tender his statement of claim and order for a re-trial.

It is borne out from the case record in the District Court that the Appellant whose name is mentioned in the Surveyor's report as a claimant has been served with a notice in terms of section 16 (4) and thereafter, on the direction of the Court by the Fiscal in term of section 20 (1) (a) of the Partition Act (as amended).

Sub-section (1) of section 20 states thus;

"The court shall order notice of a partition action to be sent by registered post-

(a) to every claimant (not being a party to the action) who is mentioned in the report of the surveyor under subsection (1) of section 18, and

(b) to every person disclosed under paragraph (c) of subsection (1) of section 19 by a defendant in the action".

Section 20 (3) provides that;

"Any person receiving notice under subsection (1) of this section shall not be added as a party to the action unless he applies by motion in writing to be added on or before the date specified in the notice".

Therefore, it is clear that the Partition Act provides that a claimant before the Surveyor or a person to whom a notice was issued in terms of section 20, could be added only if such party applies by way of a motion in writing to add him as a party to the action. Hence, the Court cannot accept the argument of the learned President's Counsel that when a person (who is not a party to a partition action) makes a claim before the Surveyor, he is deemed to be a party to the action and he should be added to the case.

Even though, the notices have been served on the Appellant by the Surveyor and through the Court he has not honoured the notices. Furthermore, the learned District Court Judge has allowed the Appellant's belated application to add him as a party to

the action subject to a prepayment of costs. But he has failed to act according to that order of the Court either. Under the said circumstances, this Court can be satisfied that the District Court has followed the procedure laid down in the Partition Act correctly. Therefore, it can be concluded that the Appellant has failed to satisfy the Court that a positive miscarriage of justice had been caused to him.

It was decided in the case of *Vanik Incorporation Ltd vs. Jayasekare*[2] that "revisionary powers should be exercised where a miscarriage of justice has occurred due to the fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."

Even though, the learned District Judge has made the order on 30.01.1995 refusing to add the Appellant as a party to the action due to non-payment of pre-paid costs, the Appellant has not taken any step against that order for more than 7 months until he preferred this appeal on 14.09.1995 against the judgment of the District Court. Therefore, it is evident that the Appellant had slept over his rights. In the case of *Don Lewis vs Dissanayake*[3] the Supreme Court held that; "it was not the function of the Supreme Court, in the exercise of the jurisdiction now invoked, to relieve parties of the consequences of their own folly, negligence and laches. The maxim *vigilantibus, non dormientibus, jura subveniunt* provided a sufficient answer to the petitioner's application."

Revision is a discretionary remedy and will not be available unless the application discloses exceptional circumstances which shocks the conscience of the court. In the case of *Cadermenpulle vs. Ceylon Pazer Sacks Ltd*[4] it was held that: "The existence of exceptional circumstances is a pre-condition for the exercise of the powers of revision;

[2] (1997) 2 Sri.L.R.365.

[3] 70 NLR 8.

[4] (2001) 3 SRI. L.R. 112.

and absence of exceptional circumstances in any given situation results in refusal of remedies."

In *Dharmarathne & Another vs. Palm Paradis Cahanas Ltd. & Others*[5], Gamini Amaratunga J. emphasised the importance of establishing the existence of exceptional circumstances as follows:

*"*Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted. If such a selection process is not there, the revisionary jurisdiction of the Court will become a gateway of every litigant to make a second appeal in the garb of revision application or to make an appeal in situations where the legislature has not given a right of appeal. The practice of the court is to insist on the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed"

The decision of *Bank of Ceylon vs. Kaleel and Others*[6] enunciates the grounds upon which courts usually exercise its discretion in revision applications as follows:

"The court to exercise revisionary jurisdiction, the order challenged must have occasioned a failure of justice and manifestly erroneous which go beyond an error, defect or irregularity that an ordinary person would instantly react to it. In other words, the order complained of is of such a nature which would have shocked the conscience of the court."

In the case in hand, neither stated in the Petition of Appeal nor in the submissions of the learned President's Counsel the manner in which the impugned judgment of the District Court shocks the conscience of the Court and the exceptional circumstances for this Court to exercise its revisionary jurisdiction.

---

[5] (2003) 3 Sri.L.R. 34.

[6] (2004) 1 Sri.L.R 284.

The position of the learned President's Counsel appeared for the Appellant is that the Appellant is a co-owner of the land sought be partitioned and his title deed to the land should have been considered by the learned District Judge. Nevertheless, that deed has not been tendered to the Court at the trial. Therefore, the learned District Judge had no opportunity to consider that deed. Considering the documentary and oral evidence of the case placed before the Court at the trail, the learned District Judge has decided the rights of the parties.

When considering all the above stated facts and circumstances, this Court cannot be satisfied that a miscarriage of justice has been caused to the Appellant and a situation which shocks the conscience of the Court has been arisen to interfere with the proceedings and/or the judgment of the District Court for the due administration of justice. Therefore, I hold that the Appellant has failed to satisfy Court that it should exercise the revisionary jurisdiction. Therefore, I dismiss the appeal and affirm the judgment dated 30.08.1995 of the District Court. I direct the learned District Judge to enter the interlocutory decree according to that judgment.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR J.

I agree.

JUDGE OF THE COURT OF APPEAL