

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

In the matter of an application for revision and/or restitutio in intergrum under and in terms of Article 138 of the Constitution of Democratic Socialist Republic of Sri Lanka.

Mohamed Sarifdeen
(correctly Mohamed Saheed
Mohamed Sharifdeen) of No. 72/7
Goduwa, Balapitiya.

**17th Defendant-Respondent-
Petitioner**

Case No. : CA/RII/0013/2019

Vs

DC Balapitiya, Case No. 1050/P

Walimuni Amitha Lalani Mendis,
Galle Road, Goduwatta,
Balapitiya.

**7A Defendant-Appellant-
Respondent**

Abdul Cafer Mohamed Refars of No.
93, Galle Road, Balapitiya.

Plaintiff-Respondent-Respondent

01. Abdul Cafer Yesera
02. Abdul Cafer Munas,
03. Abdul Cafer Miplas

And others

**Defendant-Respondent-
Respondents**

Before: Hon. D.N. Samarakoon, J
Hon. Sasi Mahendran, J

Counsel : Sanjeeva Dassanayake with Rishi Kamoordeen for the Petitioner.
Sabry Nilamudeen with S. Rajendran for the 3rd Defendant-Respondent.
Chatura Weththasinghe for the 12A Defendant-Respondent.

Argued on: 14.12.2021

Written submissions tendered on: 22.05.2020 & 23.02.2022 by the
17th defendant Petitioner
09.02.2022 by 03rd defendant respondent

Decided on: 18.10.2022

D.N. Samarakoon, J.

Judgment

The name of the petitioner is Saheed Mohamed Sariffdeen. He is presently dead and Mohamed Sharifdeen Mohamed Shafraz Khan has been substituted as the 17A defendant petitioner. His position is that in action 1050/P of District Court, Balapitiya, he was a claimant before the Surveyor at the preliminary survey, but he received no notice from Court, until he received a notice in case No. SP/HCCA/GA/035/2003(F) of the Civil Appellate High Court instituted by 7A defendant, as the 17th defendant respondent. Thereafter, the petitioner has written to the Minister of Justice, on whose behalf he was informed to apply to the Court.

As per the Journal Entry No. 28 dated 08.01.1986, the Surveyor Mr. K. G. Fernando has submitted the Preliminary Plan No. 423. There is no mention of claimants in the said Journal Entry. The "Consideration" of the Preliminary Plan was fixed finally for 05.09.1986 and it appears that it was supplanted by an inquiry into an interim injunction. (Journal Entry No. 35)

The judgment has been pronounced, as per Journal Entry No. 87 dated 29.09.1994.

As per the said judgment shares as mentioned below has been granted,

The plaintiff	- 7082/14400
1 st defendant	- 480/14400
2 nd defendant	- 480/14400
3 rd defendant	- 480/14400
4 th defendant	- 240/14400
5 th defendant	- 240/14400
6 th defendant	- No Share
7 th defendant	- 3200/14400
8 th defendant	- 2198/14400
Total	- 14400/14400

Thereafter, the 07th defendant has preferred an appeal (Journal Entry No. 94 dated 12.10.1994)

08th defendant and 09th defendant too have preferred appeals separately.

By Journal Entry No. 103 dated 04.06.1997, the judgment in appeal has been pronounced. The Interlocutory Decree has been entered as per Journal Entry No. 104 dated 19.06.1997.

For the first time, there is a mention of a 17th defendant as per Journal Entry No. 156 dated 20.03.2014.

As per Journal Entry No. 157 dated 02.04.2014 the 17th defendant “Mohamed Sarudeen” [Sarifdeen] has been absent. Notices has been issued on those who were absent.

The aforementioned particulars as evidenced by the record of the District Court Case shows that “Mohamed Sariffdeen” (The Petitioner) has never been noticed or summoned prior to the trial and the judgment of the case.

Only the 3rd defendant and 12A defendant have appeared and opposed the application of the petitioner before this Court. The 3rd defendant in his Written Submissions dated 09.02.2022 has taken up the position that there was no necessity of issuing notice on the petitioner. It has not been stated in his affidavit that the petitioner had not claimed before the Surveyor.

Furthermore, the amended petition of the petitioner is dated 17.01.2020. Its 04th paragraph is as reproduced below,

“During the execution of the Preliminary Plan several parties have preferred their respective claims before the Surveyor. Accordingly, the report attached to the preliminary plan disclosed [a] few parties who had claimed before him, those parties are,

1. Saheed Mohamed Sarifdeen (The Petitioner)

.....”

The Statement of Objections of the 03rd defendant respondent dated 25.10.2021 in its paragraph 03 admits the averments in paragraph 04 of the said petition. Hence, even the 03rd defendant respondent has admitted that the petitioner was a claimant before the Surveyor.

The Journal Entries make it clear that at no time, prior to the trial and the judgment was the petitioner served with any notice or summons.

It can be 27 years or even more, but under section 25 of the Partition Law No. 21 of 1977 no proper investigation of title has been done.

The amended petition dated 17.01.2020 (which has been well drafted) has pleaded the title of the petitioner, especially from paragraphs 28 to 42, also referring to the collusion between the plaintiff and the 08th defendant.

The petitioner has cited S.C. Appeal No. 79/2017 dated 11.11.2021 in which, among other things, it has been said,

“The High Court sitting in appeal has not considered the relevant legal position and case law relating to such factors, but gone on a voyage of discovery, chartering through archaic history and going beyond the pleadings, to dismiss an application based on the failure to investigate acquisition of plaintiff’s predecessor’s title and has thus, in my view missed the wood for the trees”.

But in the present case, with respect, history had to be traced in the Journal kept by the District Court as far as from 1986 and it was done for the sole purpose of inquiring as to whether the petitioner has established his claim before this Court.

The 03rd respondent has cited **Dissanayake v. Elisinahamy, 1979** in which the Court of Appeal said,

“Relief by way of restitutio-in-integrum could also not be granted inasmuch as the petitioner had not been a party to the action. The petitioner’s remedy was under section 49 of the Partition Act. The fact that the claimants were minors would not alter the situation”.

But the present application is not only for restitutio in integrum, also for revision. This Court has exclusive revisionary jurisdiction under Article 138 of the Constitution.

As the petitioner has submitted, the extent to which the Courts are empowered to exercise revisionary jurisdiction is found in cases such as **Somawathie vs. Madawala 1983 (2) SLR 15 (Abdul Cadre J.)** and **Mariam Beebi vs. Seyed Mohamed 68 NLR 36 (Chief Justice Melanie Claude Sansoni)**.

It was said in the former case by Justice **Joseph Francis Anton Soza**,

“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 circumstances, this Court in exercising its revisionary jurisdiction, grants reliefs (b), (c), (d) and (e) of the prayer to the amended petition dated 17.01.2020.

The petitioner is entitled to the costs of this application.

D.N. Samarakoon

Judge of the Court of Appeal

I agree

Sasi Mahendran

Judge of the Court of Appeal