

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

In the matter of an application for revision and restitutio in intergrum in terms of Article 138(1) of the Democratic Socialist Republic of Sri Lanka.

Mestiyage Don Kaminda Thushara
Gunatilake, No. 15/5/1,
Kiregewatta, Waragoda, Kelaniya.

Petitioner-Petitioner

Case No. : CA/RII/0016/2016

Vs

DC Panadura, Case No. 18325/P

Wewitage Chandrika Priyanthi
Rodrigo, "Sewana", No. 62,
Kohumola Road, Mahawadduwa,
Wadduwa.

**Substituted-Plaintiff-Respondent-
Respondent**

1a. Thilaka Ethal Perera (nee De
Silva), No. 129, Thalpitiya South,
Daladawatte Road, Wadduwa.

And others.

**Defendant-Respondent-
Respondents**

Before: Hon. D.N. Samarakoon, J.
Hon. Pradeep Kirtisinghe, J.

Counsel : Ranjan Goonaratne with Himash Hattotuwa for the Petitioner.
J.M. Wijebandara with K. Pathirage for the Defendant-Respondent-Respondent.
Asthika Devendra with M. Saddhatissa for the substitute Plaintiff-Respondent-Respondent.

Argued on: 16.02.2021

Written submissions tendered on: 22.06.2019 of the Petitioner
20.09.2019 of the Plaintiff-Respondent.

Decided on: 08.11.2022

D.N. Samarakoon, J.

Judgment

It is stated in paragraph 45 of the Written Submissions of the substituted plaintiff respondent respondent dated 27.09.2019, that,

“45. The petitioner’s position was, since the Daladawatta Road was widened (This respondent denies this position) Malith M. de Silva Licensed Surveyor has shifted the Northern boundary of the Corpus and thus the extent of the Corpus of Preliminary Plan and Final Plan are identical”.

As per the Written Submissions of the petitioner petitioner (who is not a party in the partition action) the Preliminary Plan is No. 1468 dated 18.01.1984 and 31.01.1984. It is marked as X.2A. The judgment was entered on 13.12.2004. The Interlocutory Decree was entered on 25.02.2016. The Commission for Final Scheme was issued to Mr. Malith M. de Silva, L.S. His Final Plan is No. 2705 dated 07.04.2016 and 18.05.2016. It is marked as X.13. Hence, X.13 was made 32 years after the making of X.2A.

The petitioner's position is that the "Wal Ehela Tree", which was shown in X.2A as "out" (outside the Northern Boundary) has come into the land shown in X.13. **He says that Mr. Malith de Silva, L.S., has shifted the Northern boundary towards North encroaching upon a private road.**

The plaintiff denies that there was a widening of Daladawatte Road. His position is that Mr. Malith de Silva has not shown the "Wal Ehela" tree since it is not on the boundary. Denying that there was any widening of Daladawatte road, the plaintiff states that Mr. Malith de Silva has not included in his plan the land towards the North of the land shown in the Preliminary Plan.

Hence the basic question is, whether in X.13 the Northern boundary was shifted towards North.

The petitioner states that X.14 "a sketch" was prepared by Mr. W. R. M. Fernando, L.S. on 05.10.2016. As per the petitioner Mr. Fernando has surveyed the private road towards the North of the subject matter.

The said "Sketch" has been prepared at the request of Thushara Gunethilake, who is the petitioner. His "Sketch" shows the Northern boundary of X.2A in "blue". It shows Northern boundary of X.13 in "green". It shows the Southern boundary of Lot. 4 I and drain shown in plan No. 2 dated 16.06.1997 made by A.M.R. Jayasekera L.S., (X.10) in "red". It shows the resurvey of the existing boundaries of Lot. 4 I of the said plan in "black".

What is shown in X.10 is the land called Mahawatte alias Delgahawatte, which is the land towards the North of the subject matter in the partition action. The subject matter of the partition action is Ketakelagahawatte.

In deed No. 480 dated 25.09.1940 by which Mestiyage Don Theodoris Goonetilleke has sold Lot. 4 of Mahawatte alias Delgahawatte to Mestiyage Don Charles Goonetilleke (X.7) the Southern boundary is Ketakelagahawatte.

In X.14 three “Wal Ehela” trees togetherwith a coconut tree falls outside the “blue” line [outside the Northern boundary in X.2A] and fall inside the green line [within the Northern boundary of X.13].

Attached to the petition dated 30.12.2016, the petitioner has affirmed in an affidavit of the same date. He has produced X.14 by paragraph 13(b) of the said affidavit. The statement of objections of the plaintiff is dated 16.08.2017. In paragraph 9 (iii) the plaintiff states that X.14 is erroneous for the reasons, (a) the entire plan has not been used for the superimposition (b) the extent of the land has not been considered and (c) the plain itself is only a “Sketch”.

The statement of objections of 6B, 1A and 5A defendants are dated 26.06.2017. At paragraph 7 the averments in paragraph 13 of the petition are denied without elaborating reasons.

It is also stated at paragraph 10 that X.14 does not depict the “Corpus” [the subject matter]

The petitioner does not say that X.14 depicted the subject matter.

The petitioner has pleaded his title to the land called Mahawatte alias Delgahawatte in paragraphs 6 (a) and (b) 7 (a) (b) and (c) of the petition.

At the end of his Written Submissions the petitioner requests to allow his application.

His application, as per the prayer to the petition is to,

.....

(b) to revise the order of the District Court dated 11.11.2016 [abbreviated]

.....

(d) permit the petitioner to obtain a Commission to enable him to show the extent of the land that has been taken from the land [towards] North of the corpus (land sought to be partitioned) into the corpus in the final plan bearing No. 2705 and the drain, the Northern boundary...

(e)

The petitioner does not ask to exclude any part of the land from plan No. 2705 (X.13) from the subject matter of the partition action **by this application**. His application is to issue a Commission to show that he is correct.

As per paragraphs 14 and 15 of the petition, the petitioner has filed a petition dated 05.10.2016 in the District Court for the purpose of asking an exclusion and on 11.11.2016 after questioning Mr. Malith M. de Silva, L.S., the learned District Judge has dismissed the petitioner's application.

X.24 shows that on 11.11.2016 having recorded an oral application of the petitioner and having also recorded that the plaintiff says that there are no provisions in the Partition Law to grant the petitioner's application and having also recorded that 1A defendant accepts the position of the plaintiff, the learned District Judge has made a "bench order" running into 3 paragraphs and rejected the application of the petitioner.

He has commenced his order by saying that the partition action was instituted on 03.07.1983. Hence there has been, in his mind, a wish to conclude it as soon as possible. While no one can say that this is not good, an application has to be disposed not by hurrying alone but by reasoned deliberations.

The learned District Judge considers facts [the merits or demerits of the application of the petitioner] only in the 3rd paragraph of his order. It contains 9 sentences, out of which certain sentences are the narration. The reasoning is in 3 sentences.

They are, **“It is revealed that there was no road on the Northern boundary when the final plan was made. Furthermore, the plan No. 2 marked “D” relied upon by the petitioner is made in 1997. Hence it cannot be accepted the alleged position that a part of petitioner’s land has been included when the final plan was prepared”**.

That reasoning is not sufficient at any standards.

Although what was called plan “D”, presently marked as “X.10” was prepared by Mr. Jayasekera, L.S., in 1997, the perusal of it shows that it is based on plan No. 2529 dated 25.07.1938 of Mr. J. R. A. Rodrigo, L.S.

There are preliminary objections raised by the plaintiff. They are,

- (1) This application for revision and restitutio in integrum cannot be maintained as the petitioner is not a party to the partition action.

The correctness of the line of authorities that says that a person who is not a party cannot bring an application for restitutio in integrum, need not be examined since the petitioner’s application is also for revision and a nonparty can successfully maintain an application for revision.

- (2) The petitioner is guilty of suppression of material facts or misrepresentation and has not come with clean hand.

The reason for this application is that, the petitioner, said in the District Court that towards the North of the Northern boundary of the subject matter, there was a part of land belonging to the state which he does not say in this Court. Considering the question at issue, this is not a material question. The material

question is that however old a partition action can be, its subject matter cannot include any part of the lands outside the subject matter.

(3) The petitioner has not averred exceptional circumstances.

Whereas, there is a difference between the “old” section 753 and present section 753 of the Civil Procedure Code, which was appreciated in **Jax Fernando vs. The Ceylon Brewery Limited (1999)**., the Court of Appeal judgment of **Justice U. de Z. Gunewardane** [although a part of this case was overruled by the Supreme Court, in **THE CEYLON BREWERY LIMITED v. JAX FERNANDO, PROPRIETOR, MARADANA WINE STORES, (2001) 1 SLR 271**, the aforesaid part was preserved intact] questions whether there is a need for exceptional circumstances any longer, the want of proper consideration in X.24 itself, is an exceptional reason to invoke the powers of revision.

As the **Chief justice Melanie Claude Sansoni** said in **Mariam Beebee vs. Sayed Mohamed (1965) 68 NLR 36**,

“The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of the Court. Its object is the due administration 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 brings 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”.

As per section 26(2)(f) of Partition Law No. 21 of 1977, the Interlocutory Decree can exclude a part of the land from the subject matter. It says,

“(f) order that any specified portion of the land sought to be partitioned or surveyed be excluded from the scope of the action;...”

Hence it cannot be said that there are no provisions to grant the application of the petitioner.

The judgment of the Court of Appeal in CA/RII/4/2016 dated 26.11.2018 does not apply to this case, since in that case the Court found that the parents of the petitioners were parties although the petitioner said that he has not been made a party.

Hence invoking the revisionary jurisdiction of this Court, the order dated 11.11.2016 is set aside.

The learned district judge is directed to issue a Commission to enable the petitioner to show the extent of land [if any] that has been taken from the land [towards] North of the subject matter into the land shown in X.13.

If the petitioner can show that there is a part to be excluded, the Interlocutory Decree shall be amended accordingly.

The petitioner will bear the expenses of the Commission [As per the opinion of the Commissioner, it could be a Commission only to Superimpose the relevant plans, whereas he is at liberty to survey any land or lands if the need arises]

The petitioner is entitled to the costs of this application.

D.N. Samarakoon

Judge of the Court of Appeal

I agree

Pradeep Kirtisinghe

Judge of the Court of Appeal