

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

In the matter of an Application for restitutio-in-integrum under Article 138(1) of the Constitution in the exercise of its jurisdiction and the provisions of section 23 to 27 of the judicature Act No. 02 of 1978 and section 753 of the Civil Procedure Code in the exercise of the jurisdiction of the Court of Appeal.

Karunathilake Don Gunasekara

Narawila,

Mathugama.

1st Defendant-Petitioner

CA No. RII/16/2019

D. C. Mathugama Case No: 2404/P

Vs.

Dissanayake Mudiyansele Gotabhaya

Kumarasinghe

'Somasiri' Narawila,

Mathugama.

Plaintiff-Respondent

Gemunu Dissanayake, (Deceased)

Narawila, Mathugama.

2nd Defendant-Respondent

2a. Gunasinghe Arachchige

Nandawathie

- 2b. Kumari Dissanayake
 - 2c. Tharangika Dissanayake
 - 2d. Manory Dissanayake
 - 2e. Suranga Dissanayake
 - 2f. Harshani Dissanayake
- All are at.
Narawila, Mathugama.
3. Manel Don Justin Dissanayake,
Narawila, Mathugama.
 4. Edirisinghe Arachchige Manjula
Niroshana,
No. 698,
Hibutuwelgoda,
Kelaniya.

Respondent-Respondents

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Before : Hon. Justice. D.N. Samarakoon
Hon. Justice Sasi Mahendran

Counsel: Pinsith Perera instructed by M. Damunage for the Petitioner.
Chandrasiri Wanigapura for the 4th Respondent.

Argued on: 13.12.2021

Written Submissions on: 27.12.2021 by the Petitioner.

06.01.2022 by the 4th Respondent.

Decided on : 31.05.2022

D.N. Samarakoon,J

Interim Order

When this matter was taken for argument on 13.12.2021, the learned Counsel for the 01st defendant petitioner made an oral application to issue an interim order as per paragraph (f) of the prayer of the petition. He said there are excavations going on on the land. The opposing party, the 04th respondent being unable to give an undertaking the court invited parties to file written submissions on this matter.

This application is arising from a Partition action No. 2404/P. The petitioner in his written submissions dated 27.12.2021 has, among other things, said that there is a matter of costs and certain matters of alleged fraud and hence until the final determination of the action sand excavations may be stopped.

The 04th respondent on his written submissions dated January 2022 says that the petitioner has defaulted in his appearance in the partition action and it went ex parte against him. The plaintiff has given evidence and the learned district judge has allotted ½ share to the plaintiff while the balance ½ share was left unallotted. But it appears, as the 04th respondent states in his written submissions, the unallotted share was auctioned to recover the costs and the 04th respondent is the person who purchased the same.

The 04th respondent has also stated that when this matter was supported before Justice A.H.M.D. Nawaz in Court No. 301, the interim order was refused and the petitioner is again agitating for the same. However the perusal of the elaborate journal entry dated 23.09.2020 before Justice Nawaz shows that there is no mention of a refusal of a stay order. His Lordship even after the 04th

defendant raised legal questions, that restitutio in integrum will not lie since the 04th respondent is not a party and restitutio in integrum is not available after the lapse of 03 years from the orders to be revised, which objections the 04th respondent again raises in the present written submissions, has refixed the matter for further consideration, after which the benches were changed.

It appears that excavations for sand is continuing. The petitioner has produced photographs marked as A.38 to A.41 without objection which shows heavy machinery used for that. It is late in the day, so to say, but on the basis that “better be late than never”, the interim order prayed for in paragraph (f) of the prayer in the amended petition dated 20.07.2020, which is to grant an interim order restraining respondents in any mining on the land, alteration of the subject matter and exploiting the subject matter is issued until the conclusion of this application. There is no order on costs.

Judge of the Court of Appeal.

Hon. Justice Sasi Mahendran

I agree.

Judge of the Court of Appeal.