

**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 of the Constitution of the
Republic of Sri Lanka.

Kopiyawattage Nandawathie Perera,
Mahawadduwa, Wadduwa.

17B Defendant-Petitioner
(deceased)

Kaluachchige Douglas Perera,
72, Thotupola Road,
Mahawadduwa, Wadduwa.

**Substituted 17B Defendant-
Petitioner**

CA. Application No. : CA/RII/0009/2019

Vs

D.C. Panadura case No. 12128/P

Bhadra Padmawathie Rodrigo
3rd Lane, Molligoda, Wadduwa

Substituted Plaintiff Respondent

1. Suriyaarachchi Mudiyansele
Caroline Nona, Weragama Road,
Mahawadduwa, Wadduwa

and 23 others

Defendant Respondents

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

Counsel : Mr. K. Asoke Fernando instructed by A.R.R. Siriwardane for
Substituted 17B defendant petitioner petitioner.
Plaintiff Respondent and Defendant Respondents absent and
unrepresented.

Hearing on: 06.12.2022

Written submissions tendered on: 10.02.2023 by the Substituted 17B
defendant petitioner petitioner

Decided on: 10.03.2023

D. N. Samarakoon, J.

Judgment

Although notices have been sent to the respondents, on several occasions, through registered post and through the Fiscal of Nugegoda for those whose addresses were in that area, none of them have come to Court. This was the situation on earlier occasions too. In the judgment of the Court of Appeal dated 08.07.2005, in C. A. 1221/2002, a revision application made by the present petitioner, the 17B defendant, the Court said,

“Notices were issued on several occasions and only the 5th and the 6th defendant respondents were represented by counsel. Though a date was obtained to file objections the counsel for the 5th and 6th defendant respondents indicated to Court that they were not filing objections. In the circumstances no objections have been filed opposing this application”.

Hence, from 2002 at least, for twenty years and mostly from 1989, the date of the judgment, for 33 years, any contest for the unallotted shares the petitioner claimed was with the Court only.

Hence this Court fixed the application for hearing and making this judgment.

The plaintiff has instituted case No. 12128/P of District Court of Panadura on 30.06.1970, under Partition Act No. 16 of 1951. The 17th defendant, K. Richard Perera has tendered his statement of claims on 21.10.1971. The judgment has been pronounced on 26.10.1989, after 19 years, by the learned Additional District Judge of Panadura according to which the estate of Richard, who was dead by then, was allotted 14982/129600 shares. The judgment also kept unallotted a share of 47450/129600. Judgment marked as P.3.

The 17B defendant and her sister, Kopyawattage Deelin Perera have made an application seeking to allot from the said unallotted share. Since, the dates on which four applications for allocation [by other parties too] from unallotted shares were made is not stated, it is not clear as to what happened from 1989 to 2002. By order dated 04.03.2002, the learned district judge dismissed the applications of the petitioner and several others. Order marked as P.4.

The 17B defendant has preferred an appeal bearing No. C. A. 1221/2002 to the Court of Appeal, which allowed the appeal by judgment dated 08.07.2005 setting aside the part of P.4 relating to the 17B defendant and further directed the learned district judge to hold an inquiry with notice to the other parties expeditiously. (Andrew Somawansa J. and Wimalachandra J.) Judgment marked as P.5.

The learned District Judge, making an order dated 10.09.2007, held that although Richard's estate was allotted 14982/129600, the estate should have been allotted 14036/86400 share whereas Richard's sister Nanso (Nancy Perera) should be allotted 7018/86400. The said order further said, that, 14982/129600 share allotted to the estate of Richard should be correctly allotted as follows,

To K. Deelin Perera - 7491/259200

To 17B defendant K. Nandawathie Perera - 7491/259200 + 7491/259200
= 22473/259200,

making the inclusion of those shares in the judgment. Order marked as P.7.

The said order also held that since deed No. 6372 dated 11.02.1964 (2D.1) has not been produced the Court cannot come to a decision in respect of devolution of title on deed Pe.4 and hence no order is made in respect of Nancy Perera's rights.

The 17B defendant then sought to invoke the inherent powers of the district court under section 839 of the Civil Procedure Code. In respect of this application the subsequent learned District Judge made order dated 25.11.2013.

The said order determined, that, 17B defendant's claim is twofold, viz.,

(a) Nancy Perera's share - 7018/86400

(b) the additional share of Richard which was based on an error of calculation which is - 12144/259200 (14036/86400 - 14982/129600)

The said learned District Judge was of the view, that, the petitioner, without appealing the order P.7 is trying to question it by indirect means and dismissed the application under section 839 aforesaid. It is the decision of this Court, that, the application under section 839 was not such an application, but, an

application the petitioner could have made, in the circumstances, to bring it to the notice of the district court, that, she is entitled to a share from the unallotted share. The said order dated 25.11.2013 is marked as P.16.

The same learned District Judge who wrote P.16, has approved by journal entry dated 04.06.2014, the amended interlocutory decree.

Mr. Gamini D. Peiris, L. S., made plan No. 2907 dated 05.04.2015, which depicted only the unallotted shares. Subsequently plan No. 3035 dated 22.04.2016 was made.

Since, there were some discrepancies in the said plan the 17B defendant filed a motion dated 29.06.2016. A petition and affidavit were filed on 04.07.2016. The learned District Judge who has assumed duties after the learned district judge finally referred to made order dated 19.01.2017. The 17B defendant petitioner contends that this order is perverse and bad in law.

The learned District Judge in his order stated that after former learned District Judge Mr. K. S. Gunethilake, on 29.01.1992 allotted 2420/129600 share to the 6th defendant, the unallotted share should be 45030/129600 and thereafter no party has been allotted any share from the unallotted share. He further stated that as per the order dated 10.09.2007 (P.7), 17B defendant's share is 11236.5/129600 and 17C defendant's share is 3745.5/129600. The order marked as P.22.

Hence, the learned District Judge having revoked the amended interlocutory decree, further directed that (i) the 17B defendant shall bear the entire expense of the Final Plan (ii) the Final Plan and report to be set aside and (iii) the 17B defendant herself to tender the "correct" interlocutory decree as per which the land has to be partitioned. This Court sees that there was no reason to punish the 17B defendant, who was only trying to get a share allocated to her, which remained unallocated also, at least partly, due to the fault of the court itself.

Hence although P.22 is not in the spirit in it should have been made, because, the 17B defendant petitioner has by adducing documentary evidence on two days of inquiry held before the learned predecessor district judge who made order P.7, has shown, as to how she gets the share, although the said learned district judge who made P.7, thought, her hands are tied by the share allotted to the 17th defendant Richard by the judgment in 1989, despite ordering a certain “correction” referred to above be included in the judgment, on the whole the statement that nothing was allotted after Mr. K. S. Gunethilake’s order in 1992, in respect of the 6th defendant, is correct.

The 17B defendant appealed by leave to appeal application bearing No. WP/HCCA/ KAL/ 06 2017 LA, for which leave was granted on 4 questions and by its judgment, the said Civil Appellate High Court dismissed the appeal directing the learned District Judge to enter interlocutory decree as per the 1989 judgment (P.3) and also setting aside the aforesaid orders dated P.7 and P.16. Judgement is marked as P.27.

Among other things, the 17B defendant petitioner argues that, the said orders P.7 and P.16 “emanates from holding of inquiries subsequent to the direction of theCourt of Appeal in revision application bearing No. C. A. 1221/2002 (marked as P.5) and therefore by setting aside, the said orders P. 7 and P. 16, the Hon. Judges of the Provincial High Court exceeded the jurisdiction conferred upon them”.

The 17B defendant’s claim is basically from Richard, her father, son of William and who in turn was a son of K. Davith Perera, one of the original owners who had a share of undivided 11/12th and also from Nanso alias Nancy Perera, a sister of Richard and the aunt of 17B defendant.

It is pertinent to examine as to how shares were devolved upon, before considering whether the 17B defendant petitioner has established how much of a share should be allocated to him. This needs a pedigree to be drawn, a copy of which pedigree prepared by me is attached to this judgment.

It is not necessary, for the purpose of this judgment, to examine the entire pedigree as no shares come to Richard or Nanso from the other original owner, Michohamy, who owned an undivided $1/12^{\text{th}}$ share.

The petitioner claims through K. Davith Perera, who owned $11/12^{\text{th}}$ as aforesaid who had six children and Richard and Nanso were the children of one of the children of Davith called William.

The pedigree accepted at the trial has only a few variations from that was pleaded in the plaint dated 30.06.1970. Davith, one of the original owners dies and his $11/12^{\text{th}}$ share devolves upon his six children (1) Jamis (2) William (3) Salmon (4) Mailentina (5) Francina and (6) Bastian. Each of them get $11/72^{\text{th}}$ share. Jamis dies leaving a widow, but no children and $11/144$ goes to the widow Angage Caroline Perera. The balance $11/144$ devolves upon five of his siblings (1) William (2) Salmon (3) Milentina (4) Francina and (5) Bastian in $11/720$ shares. Bastian transfers his share by deed No. 9343 dated 12.01.1931 (1D.1) to Francina, who gets $11/72 + 11/72 + 11/720 + 11/720 = 242/720$. Francina dies unmarried, intestate and issueless and this share ($242/720$) in turn goes to (1) the widow of Jamis (2) William (3) Salmon (4) Mailentina and (5) Bastian in $242/3600$ shares each.

It is said in P.7, that $242/3600$ Jamis gets, goes to his widow $242/7200$ share and the balance $272/7200$ to his siblings (1) William (2) Salmon (3) Mailentina and (4) Bastian's estate in $242/28800$ share each. **But, this cannot happen, because, in calculating Francina's share as $242/720$, the share she gets from Jamis ($11/720$) has been added and Jamis cannot be resurrected to inherit from Francina again.** What goes from Francina in respect of Jamis is only for latter's widow as an heir in place of Jamis.

Hence William's share is calculated as follows, (a) paternal inheritance from Davith $11/72 +$ (b) inheritance from Jamis $11/720$ [the total of (a) and (b) = $121/720$] and not another $242/28800$ from Jamis again. Calculations were made in P.7 on this basis and it is stated that William gets a total share of $7018/28800$. The

last mentioned $242/28800$ will not come to William. Hence William's share is (a) and (b) above + (c) inheritance from Francina, which is, $242/3600$, that is, $121/720 + 242/3600 = 847/3600$ share. Since shares were calculated, at this stage, taking the common denominator as 28800, if this is given in that version, it is $6776/28800$ share.

William has children (1) 16th defendant Tuwinis (2) 17th defendant Richard (3) 19th defendant Nanso (4) Podisingho alias Francis and (5) Thiriyas. William has transferred $11/60^{\text{th}}$ of his title to Thiriyas on deed No 5683 dated 21.02.1940 (17D.1). P.7 says that this $11/60^{\text{th}}$ is equal to $5280/28800$. **But $6776/28800 \times 11/60$ is $74536/1728000$ share or $9317/216000$.** Therefore the share William has at his death is $847/3600$ which is $50820/216000$ [multiplied by 60] and when $9317/216000$ is deducted, the balance share is $41503/216000$.

This is the share that devolves on William's children (1) Thiriyas (2) Tuwinis (3) Richard (4) Nanso and (5) Francis. Each of them gets $41503/1080000$. Hence Richard and Nanso originally get $41503/1080000$ each.

Thiriyas's share on 17D.1 is $9317/216000$ share. On paternal inheritance he gets $41503/1080000$. The total is $46585 + 41503/1080000 = 88088/1080000 = 11011/135000$ share. Thiriyas dies unmarried, intestate and issueless leaving (1) Tuwinis (2) Richard (3) Nanso and (4) Francis. Hence they in addition gets $11011/540000$ share each.

Hence Richard's share is $41503/1080000 + 11011/540000 = 41503+22022/1080000 = 63525/1080000 = 12705/216000$ share.

There is one more addition. William's son Francis dies unmarried, intestate and issueless. His share which is $12705/216000$ devolves on (1) Tuwinis (2) Richard and (3) Nanso in $12705/648000$ share each.

Richard now gets $41503/1080000 + 11011/540000 = 12705/216000 + 12705/648000 = 38115 + 12705/648000 = 50820/648000 = 10164/129600$.

Tuwinis who has the same share which is 10164/129600 has transferred it on deed No. 7249 dated 01.08.1968 to Dharmadasa Sandanayake who transferred the same to Tuwinis Perera again on deed No. 7369/08.04.1969 who by deed No. 7405 dated 08.08.1969 transferred the same to Richard.

Hence Richard gets $10164/129600 + 10164/129600 = 20328/129600$.

This is the share that devolves on the petitioner and her sister.

Hence Richard's share is (a) paternal inheritance 41503/1080000 + (b) inheritance from Thiriyas 11011/540000 which is 12705/216000 + (c) inheritance from Francis 12705/648000 + (d) on deed No. 7405 dated 08.08.1969 from Tuwinis $10164/129600 = 20328/129600$.

It will be seen that even in 1989, after 19 years of the institution of the partition action also shares were given taking the common denominator as 129600. Now it is 52 years from the institution of this case. From 1989 to 2022, the period taken for this calculation is 33 years.

The judgment in 1989 allocated to Richard's estate a share of 14982/129600. The learned additional district judge has said that she is not calculating Francis's share. It was alleged that there was a miscalculation of the share even without Francis's share too. The entire share for Richard is 20328/129600. Since 14982/129600 share has been already allocated the newly allocated share is 5346/129600.

Nanso's share remain unallotted even in P.7. Nanso gets, (a) on paternal inheritance 41503/1080000 + (b) inheritance from Thiriyas 11011/540000 and (c) inheritance from Francis 12705/648000 the total of which is $41503 + 22022/1080000 + 12705/648000 = 12705/216000 + 12705/648000 = 50820/648000 = 10164/129600$.

Nanso has transferred 11/450 of her entitlement on deed No. 6372 (2D.1) to the 2nd defendant Leelawathie Perera. The said Leelawathie Perera has transferred that share on deed No. 21569 dated 07.02.2000 to the petitioner. The petitioner

with her application dated 17.05.2012 produced 2D.1 as X.2 and the latter deed as X.4. Nanso has also transferred her remaining title by deed No. 1189 dated 06.11.1978 to the petitioner which was produced as X.3. The petitioner submits that Nanso's share is 7018/86400. Her share 10164/129600 in terms of the said denominator will be 6776/86400, a little less, because, the error in Jamis's inheritance being calculated twice was corrected in this judgment¹. But substantially Richard as well as Nanso gets a larger share than given in 1989 judgment and whereas the new addition to Richard's share was stated afore, although deed No. 1189 (X.2) and deed No. 21569 (X.3) are subject to the Final Decree to be entered in the said partition action, it is directed that the entire share of Nanso [who is correctly Mrs. Nancy Perera, since "Nanso" undoubtedly is a kind of pet name] which is 10164/129600 be stated in the Amended Interlocutory Decree to be entered, as allotted to the petitioner and her sister, referring in the I/D 2D.1, X.2 and X.3 against the name of the petitioner and her sister, because, if those shares, which in any event goes to the petitioner and her sister were to be mentioned in the ordinary manner further mistakes, that will take several more years can be occurred. **It is well to remember, that allocation of shares, which includes allocation of them from the unallotted shares must be done always having the aid of a correct pedigree and the courts must take a realistic approach in doing so, not forgetting that, so many people in a pedigree to have died "unmarried and issueless" [in this case there were Francina, Thiriyas and Francis] is often a mere creation of proctors [presently registered attorneys-at-law] or their clerks. Especially, partition actions in the District Courts such as of Tangalla, Matara, Galle, Kalutara, Panadura and Horana have somewhat complex pedigrees. This case does not have a very complex pedigree. Had the Judges, who handled this case, took this duty upon themselves [of drawing the pedigree] at least the second lap of thirty three years could have been greatly reduced. Unallotted shares are kept unallotted for the purpose of allotting later on proof of title and applications for allocation of unallotted shares**

¹ This slightly reduces William's share [Nanso's father] and hence Nanso's share.

should not take the form of a contest between the court and such an applicant.

This Court decides the above, exercising its jurisdiction on restitutio in integrum and revision. The latter is not invoked by the petitioner, but the Court invokes revisionary powers *ex mero motu*. In respect of the former, restitutio in integrum, Ranasinghe J., (as he then was) in the minority of a Seven Judge Bench of the Supreme Court in **Mrs. Vivionne Gunawardena vs. Hector Perera, Officer in Charge, Police Station, Kollupitiya and others S.C. Application 20/1983** referred to the case of **Menchinahamy v. Muniweera, (1950) 52 NLR 409** decided by Dias S. P. J., to say that the Supreme Court of Ceylon [when that Court had the power of restitutio in integrum] has exercised it even to correct a mistake of the Supreme Court itself.

Ranasinghe J., referring to the judgment of **Menchinahamy vs. Muniweera (1950) 52 NLR 409**, while being on the minority will not diminish its value. It shows how the then Supreme Court, exercised the power of restitutio in integrum, **even** against a judgment of its own. Today, such a power is vested, hence, not only under Article 138 of the Constitution, but also **empirically**, so to say, in the arrangement of the powers of Courts, in the present Court of Appeal.

Menchinahamy vs. Muniweera was referred to by Fernando J., in the judgment of His Lordship in the Five Judge Bench of the Supreme Court [Justices Amerasinghe, Dheeraratne, Goonewardene and Wadugodapitiya concurring] in **Amerajeewa vs. University of Colombo (1993) 1993 (2) SLR 327**.

As for revision, **In the case of In Re the insolvency of Hayman Thornhill (1895) 2 NLR 105**, discussing the scope and object of the exercise of revisionary powers by the Supreme Court **Sir Winfield Bonser C.J.** stated as follows: "The Supreme Court has the power of revising the proceedings of all inferior courts. This power The object at which the Supreme Court aims in exercising its powers of revision is the due administration of justice; and whether any

particular person has complained against an order; proposed to be revised, or is prejudiced by it, is not to be taken into account in the exercise of such power."

Presently, the said power is vested in the Court of Appeal.

Exercising the above powers this Court sets aside orders P.22 and P.27. The orders P.7 and P.16 are restored, however, subject to this judgment. The learned district judge is directed to amend the I/D as follows,

- (i) Taking the share of Richard as 20328/129600,
- (ii) Since Richard was given in the judgment a share of 14982/129600, Richard's heirs [the petitioner and her sister] are to be given another 5346/129600 shares from the unallotted share of 47450/129600 or whatever remains from it presently,
- (iii) Since Nanso's share was not allotted by P.7 and as directed in this judgment in respect of 2D.1, X.2 and X.3, the said share vests in the petitioner and her sister, the said share 10164/129600, also to be given to them deducting from the unallotted share of 47450/129600 or whatever remains from it presently,
- (iv) The decisions in the judgment of the learned additional district judge dated 26.10.1989, pertaining to the shares of Richard and Nanso must be understood subject to this judgment

Having entered the amended I/D the learned district judge will direct the relevant surveyor to effect the required corrections, in the final plan already made, or if necessary, by making a fresh plan [expenses to be incurred pro rata] and take steps for final partition.

Richard died before seeing the judgment in 1989. Let his children's children at least see the conclusion of the partition case.

The Registrar of the Court of Appeal is directed to send a copy of this judgment to the learned District Judge of Panadura and also to the Hon. Director, Sri Lanka Judges Institute.

There is no order for costs.

Judge of the Court of Appeal

Hon. Sasi Mahendran

I agree

Judge of the Court of Appeal.