

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

*In the matter of an application revision and/or
restitution integrum in terms of Article 138
and 145 of the Constitution of the Democratic
Socialist Republic of Sri Lanka against the
judgment dated 08.08.2017 of the Learned
District Judge of Horana in case no.4032/P.*

1. Memmenda Arachige Priyantha
Senerath,
No. 194, Batuwita,
Gonapola Junction
(Deceased)

1A.Memmemda Arachige Nirosha
Lakmali Senerath,
16/M, Katuwawala,
Boralasgamuwa.

2. Wannu Arachige Chandrawathie,
No. 194, Batuwita,
Gonapola Junction.

Plaintiffs

Vs.

Court of Appeal Case No:
**C.A./RII/ Case No-
0005/2021**

D.C. Horana Case No.
4032/Partition.

1. Pathirage Seedin Perera
No.185, Batuwita,
Gonapola Junction.
2. Jayasuriya Arachchige Jayathissa,
“Jayanthi”,
Batuwita,
Gonapola Junction.
3. Jayasuriya Arachchige Senarathna,
No. 77/4,
Somananda Mawatha,
Horana.

4. Sandhyani Deepika Gamage,
No.194,
Batuwita,
Gonapola Junction.

5. Dewage Don Abeyratne,
No.194,
Batuwita,
Gonapola Junction.
(Deceased)

Defendants.

And Now Between

Sandhyani Deepika Gamage,
No.194, Batuwita,
Gonapola Junction

4th Defendant - Petitioner

Vs.

1A.Memmemda Arachige Nirosha
Lakmali Senerath,
16/M, Katuwawala,
Boralasgamuwa.

2.Wanni Arachchige Chandrawathie,
No. 194, Batuwita,
Gonapola Junction.

Plaintiffs - Respondents

1. Pathirage Seedin Perera,
No.185,
Batuwita,
Gonapola Junction.

2. Jayasuriya Arachchige Jayathissa,
“Jayanthi”,
Batuwita,
Gonapola Junction.
3. Jayasuriya Arachchige Senarathne,
No.77/4,
Somananda Mawatha,
Horana.

Defendants - Respondents.

BEFORE : D.N.Samarakoon J
Neil Iddawala J

COUNSEL : Thilan Liyanage instructed by Shehan De
Vas Gunawardena for the 4th Defendant –
Petitioner.

Argued on : 08.08.2023

Written Submissions on : 18.09.2023

Decided on : 26.09.2023

Iddawala – J

This is a petition of revision / *restitutio in integrum* submitted before this Court by the 4th defendant-petitioner (hereinafter referred to as the petitioner) pleading to revise and restore the rights of the parties prior to the delivery of the impugned order dated 08.08.2017, delivered by the learned District Court Judge of Horana.

The facts of the case are as follows. This is a partition action instituted on or about 01.12.2008 in order to partition the land named “Jayasuriyage Watta”. The plaintiffs in

their averred that the 4th and 5th defendants were entitled to 30/600 undivided shares from the corpus sought to be partitioned and furthermore that the 4th and 5th defendants are entitled to 1/20 shares of the corpus by virtue of Deed of Gift bearing no.6686 dated 16.07.1989.

Subsequently, the corpus sought to be partitioned was surveyed and the preliminary plan was prepared accordingly. Thereafter, the Statements of Claim were filed on behalf of the 4th and the 5th defendants, following which the trial commenced on 01.07.2014. On this day four issues were raised on behalf of the plaintiffs and a fifth issue was raised on behalf of the 4th and the 5th defendants.

Furthermore, when the above matter was further taken up for trial on 20.11.2014, the parties did not contest the issues and the issues raised on behalf of the plaintiffs and 4th and the 5th defendants, hence they were not required to be answered. The evidence of the 5th defendant was led on 01.10.2015 and it remained unchallenged. Therefore, the 5th defendant testified in Court with regards to the rights of Jayasuriya Arachchige Jayathissa (2nd Defendant) which had devolved on the 5th defendant by virtue of Deed of Transfer bearing no.14610 dated 20.08.1995 and that Jayasuriya Arachchige Somasiri who had become entitled to an undivided 1/5 share of the corpus had transferred a strip of land which was 3 feet in width to the 5th defendant by virtue of Deed of Transfer bearing no.12649 dated 12.08.1995 so that the said strip of land would be connected to the roadway which was situated within the land possessed by the 5th defendant, giving him access to the land.

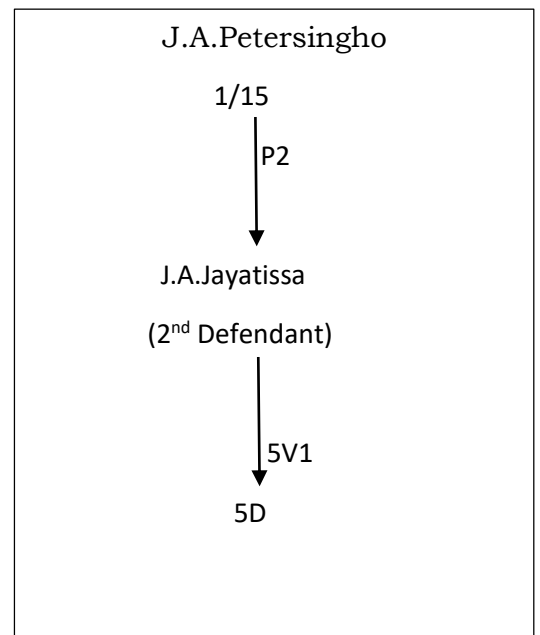
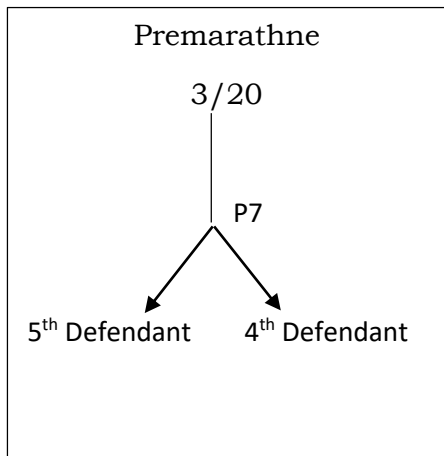
However, the trial was concluded on 10.03.2016 after evidence was led on behalf of the plaintiffs, 1st defendant and 4th & 5th defendants, and thereafter, the learned District Judge of Horana delivered the judgment on 08.08.2017 allotting only an undivided 1/20 shares (30/600) from the corpus to the 4th and the 5th defendants.

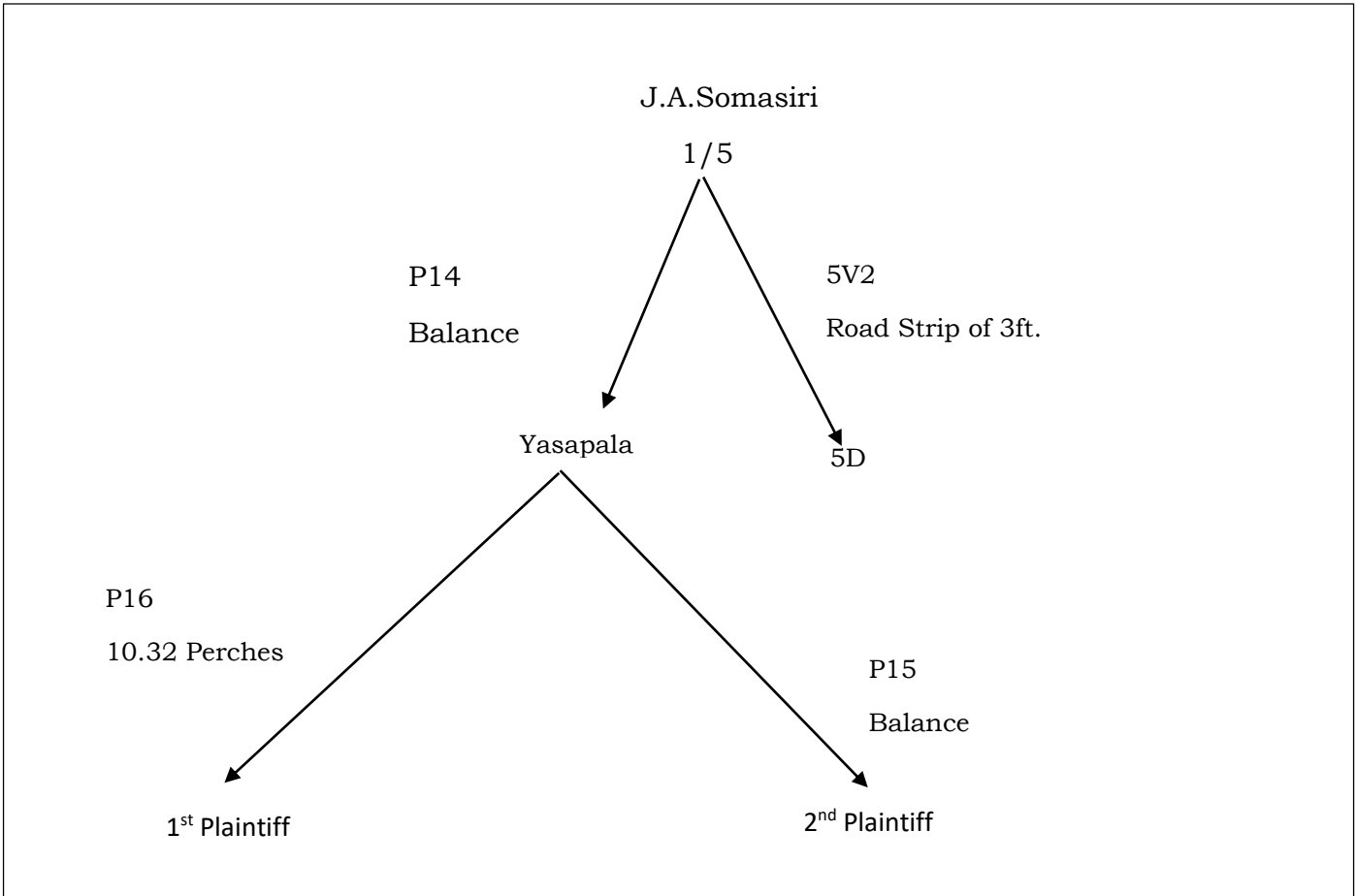
The 5th defendant who was dissatisfied with the above judgment delivered by the learned District Court Judge of Horana, filed a notice of appeal where it was averred that the learned District Judge has failed to take into consideration that the 5th defendant is further entitled to 1/15 share of the corpus by virtue of deed of transfer bearing no.14610 and that the 5th defendant is also further entitled to a strip of land which is 3 feet in width by virtue of deed of transfer bearing no.12649 dated 12.08.1995.

It is being dissatisfied and aggrieved by the above judgment that the 5th defendant has forwarded a notice of appeal to this Court dated 24.08.2017. However, the petitioner states that, the 5th defendant, her husband could not pursue the petition of appeal as he passed away on the 21.11.2019. It is in light of the above events that the petitioner has preferred this present application of revision and *restitution in integrum*, to this Court with regards to the impugned judgment of the learned District Judge.

The major contention underlying this application is that the learned District judge has failed to duly consider the evidence and documents submitted before the court, prior to delivering his judgment. This has resulted in a miscarriage of justice, for the defendants have been unjustly deprived of their shares of the land due to the learned District judge following the plaint rather than evaluating and perusing the evidence presented before the Court.

Therefore, this Court consider the evidence lead before the District Court judge and reiterate the following pedigree led before the District Court:





The above pedigree was led before the District Court and accordingly, the 4th and the 5th defendants are entitled to 3/20, 1/15, and a road strip of 3ft in width as evidenced through the documents submitted to the Court. Furthermore, this pedigree remained uncontested. The above-mentioned road strip of 3ft is the lots named N & R which can be identified, according to the survey plan marked, in the following manner:

Lot-N: 0.55

Lot-R: 0.91

Total: 1.46 Perches.

Therefore, as per the above-mentioned pedigree along with the entitlement of 1.46 perches to the 4th and the 5th Defendant, the final calculation of the shares should be as follows:

1st Plaintiff: 10.32* Perches

2nd Plaintiff: 204/600 (Minus *10.32 + **1.46 Perches)

1st Defendant: 10/600

2nd Defendant: - No share

3rd Defendant: 120/600

4th and 5th Defendant – 130/600

(4th Defendant- 45/600, 5th Defendant- 85/600 + **1.46 Perches)

Unallotted: 136 /600

It is evident from the above depiction of the allotment of the lots, the learned trial judge has erroneously deprived the entitlement of the 4th and the 5th defendants, where the learned trial judge has failed to consider the road strip of 1.46 perches to which the 5th defendant is entitled by virtue of a deed of transfer bearing no.12649 dated 12.08.1995 (5V2). The learned trial judge has followed the pedigree averred in the plaint rather than engaging in a perusal of the evidence and documents led before the court.

It is pertinent to highlight that it remains the duty of a trial judge to thoroughly evaluate the evidence and the documents presented before a court, in order to arrive at a determination, regardless of whether or not the matter before the court is contested or uncontested. Therefore, it is the observation of this Court that, blindly allotting shares to the parties is unacceptable as it lacks proper consideration of evidence and documents presented before the court, by the witnesses (defendants).

In the case of **Sopinona v Pitipanaarachchi and two Others** 2010 (1) SLR 07, it was held that *“In a partition action, it would be the prime duty of the Trial Judge to carefully examine and investigate the actual rights and title to the land, sought to be partitioned. In that process it would be essential for the Trial Judge to consider the evidence led on points of contest and answer all of them, stating as to why they are accepted or rejected.”*.

The above case further affirms the seminal duty of a trial judge to evaluate and examine the documents and evidence presented before a court, prior to arriving at a just determination. This is paramount because, in the absence of such thorough examination, unjust deprivation of property rights to individuals occurs. The unjust deprivation of property rights to an individual is unacceptable as every human being has a natural right to property, therefore, the law must ensure the protection of such rights rather than hindering the enjoyment of such rights. Furthermore, in a partition matter, if the court erroneously deprives an individual of a property, it would cause a flagrant violation of their rights, as it is possible, that the deprived property may be the individual's sole property.

In English courts it was held in many cases that a judge should not rely solely on the pleadings or statements in the plaintiff's complaint. Instead, the judge should consider the evidence and documents introduced during the trial to arrive at a fair and just decision. (**Ross v. Caunters** [1979] 3 WLR 131) and in **Donoghue v. Stevenson** [1932] AC 562: This landmark case established the importance of considering the evidence and facts presented during the trial. In this case, the House of Lords emphasized the need for reasoned judgments that explain the basis for a judge's decision. It highlighted that a judge should rely on the evidence and not be swayed solely by the plaintiff's allegations. Moreover, the lax consideration of evidence or negligence of a trial judge is taxing upon the parties due to the unnecessary consumption of time and waste of money. Therefore, the aggrieved litigants face the consequences of the errors made by the court. It is further noteworthy that, in such an instance, the aggrieved litigants are not compensated for the unnecessary consumption of time and money. Thus, it is imperative that a trial judge examines and evaluates the evidence and documents diligently, in order to ensure the due administration of justice.

In the case of **Mather v. Tamotharam Pillai** (1908) 6 NLR 246, the Full Bench of the Supreme Court headed by Chief Justice Layard decided more than 110 years ago that "*A partition suit is not a mere proceeding inter partes to be settled of consent, or by the opinion of the Court upon such points as they choose to submit to it in the shape of issues. It is a matter in which the Court must satisfy itself that the plaintiff has made out his title, and unless he makes out his title his suit for partition must be dismissed. In partition proceedings the paramount duty is cast by the Ordinance upon the District Judge himself*

to ascertain who are the actual owners of the land. As collusion between the parties is always possible, and as they get their title from the decree of the Court, which is made good and conclusive as against the world, no loopholes should be allowed for avoiding the performance of the duty so cast upon the Judge.”

The above determination of the Supreme Court cements the fact that a trial judge ought to evaluate the evidence before the Court in order to ascertain the entitlements of the parties involved. This, however, does not mean that a trial judge is expected to engage in a voyage of discovery but rather is expected to duly approach the matter and engage the judicial mind to arrive at a just determination after careful consideration of the evidence and documents marked during the trial.

Furthermore, as this instant matter is submitted to this Court as a revisionary matter, it is the duty of this Court to rectify the errors made by the learned trial judge in the interest of justice, despite the prevalence of any delays or laches. Therefore, this Court is not hesitant to exercise its revisionary jurisdiction in order to rectify the obvious visible erroneous judgment of the trial judge, which unfairly deprived the rights of the 4th and the 5th defendants. Moreover, Article 145 of the Constitution has bestowed upon the Court of Appeal, the revisionary powers to make any order in the interest of justice. The Court of Appeal may, *ex mero motu* or on any application made, call for, inspect, and examine any record of any Court of First Instance and in the exercise of its revisionary powers may make any order thereon as the interests of justice may require. Thus, it is pertinent to bring the instant matter within the ambit of Article 145 of the Constitution, in order for this Court to exercise its revisionary jurisdiction. As the facts of the instant matter are of such a nature that the 4th and 5th defendants have been unjustly deprived of their rightful entitlements, this Court deems it fit to exercise its revisionary jurisdiction as per Article 145 of the Constitution in the interest of justice.

In conclusion, this Court is of the view that this instant matter is a fit case for this Court to intervene and order the revision of the learned trial judge’s judgment dated 08.08.2017 and the interlocutory decree entered; and thereby, I order to enter an

amended interlocutory decree as per the final calculation of the shares in the manner depicted above in this judgment.

The Registrar of this Court is directed to dispatch a copy of this judgment to the District Court of Horana, forthwith.

Application allowed.

JUDGE OF THE COURT OF APPEAL

D.N. Samarakoon- J

I Agree

JUDGE OF THE COURT OF APPEAL