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

In the matter of a Revision and or Restitutio in Integrum under Section 48(3) of Partition Law No.21 of 1977 read together with Article 138 (1) of the Constitution of the Republic of Sri Lanka.

R.M.Kumarihami,
Aluthwela Gedara,
Kurukudegama,
Pattiyagedara.

Plaintiff

Vs.

Court of Appeal
Case No:
C.A./RII
Application
07/2023

HCCA/BDL/RA. :
10/2023

S.C/Revision No.
01/2015

D.C./Bandarawela:
P/497

01A. Dissanayake Mudiyanselage
Appuhami
Boralanda, Pitapola.
02. R.M.Dharmadasa (deceased)
02A. R.M.Siriyawathie
02B. R.M.Dhanapala
02C. R.M.Wijitha Bandara
02D. R.M. Sugath Perera
02E. R.M.Maithreepala
02F. R.M.Rajarathna
02G. R.M. Ranthilaka (added for R.M. Dharmadasa)
03. R.M. Leelawathi
04. R.M. Ranmanika
05. R.M. Punchibanda
06. R.M. Heenbanda
07. R.M. Appuhami
08. R.M. Muthubanda (Deceased)
09. R.M. Punchibanda,
All are at Dharmasiri, Mathatilla,
Mirahawatta.
10. R.M.Appuhami (Deceased)
11. R.M.Bandaramenika

12. R.M.Heenbanda
13. R.M.Gnawathie
14. R.M. Amarasekara
15. R.M. Suriyapala Rathnayake
16. R.M. Gunawardana
17. R.M. Gunarathna
18. R.M. Jayawardana
All are at Meeketiya Gedara,
Mathatilla, Mirahawatta.
19. Land Reform Commission,
C 82, Hector Kobbakaduwa Avenue,
Colombo.

Defendants

And Now Between

01. R.M.Amarasekara,
No.
Badulupitiya, Badulla.

14th Defendant/1st Petitioner

02. R.M. Suriyapala Rathnayake,

15th Defendant/2nd Petitioner

03. R.M.Gunawardana,

16th Defendant/3rd Petitioner

04. R.M.Gunarathna,

All are at Meeketiya Gedara,
Mathatilla, Mirahawatta.

17th Defendant/4th Petitioner

Vs.

01. R.M.Kumarihami,
Aluthwela Gedara, Kurukudegama,
Pattiyagedara.

Plaintiff/1st Respondent

02. Dissanayake Mudiyanselage
Appuhami, Boralanda, Pitapola.

1st A.Defendant/2nd Respondent

03. R.M.Siriyawathie,

2nd B.Defendant/ 3rd Respondent

04. R.M.Danapala,

2nd C.Defendant/4th Respondent

05. R.M. Sugath Perera,

2nd D.Defendant/5th Respondent

06. R.M. Maithreepala,

2nd E.Defendant/6th Respondent

07. R.M.Rajarathna,

2nd F.Defendant/ 7th Respondent

08. R.M.Ranthilake,

2nd G.Defendant/8th Respondent.

09. R.M.Leelawathie,

3rd Defendant/9th Respondent

10. R.M.Ranmenika,

4th Defendant/10th Respondent

11. R.M.Punchibanda,

5th Defendant/11th Respondent

12. R.M.Heenbanda,

6th Defendant/12th Respondent

13. R.M.Punchibanda,

9th Defendant/13th Respondent

All are at Dharmasiri, Mathatilla,
Mirahawatta.

14. R.M.Bandaramenika,

11th Defendant/14th Respondent

15. R.M.Heenbanda,

12th Defendant/15th Respondent

16. R.M. Gnanawathie,

13th Defendant/16th Respondent

17. R.M. Jayawardana,

18th Defendant/17th Respondent

All are at Meeketiya Gedara,
Mathatilla,
Mirahawatta.

18. Land Reform Commission,
No.475, Kaduwela Road,
Battaramulla.

19th Defendant/18th Respondent

BEFORE : D.N.Samarakoon J
Neil Iddawala J

COUNSEL : Dr. L.A. Kashyapa Perera for the Petitioner.

Vijaya Perera, P.C. with V.D.S. Perera for the 6th Respondent-Respondent.
M. Amarasinghe, SC with C. Ranathunga, SC for 18th Respondent.

Supported on : 26.06.2023

Written Submissions on : 22.09.2023

Decided on : 06.10.2023

Iddawala – J

This is a petition of revision and *restitutio in integrum* submitted before this Court by the 14th, 15th, 16th and the 17th defendant- petitioners (hereinafter referred to as the petitioners) pleading for an order to issue notices on the respondents and to set aside the judgment/interlocutory decree dated 17.07.2006 and order dated 30.11.2022.

The facts of the case are as follows. The case at the District Court of Bandarawela commenced in 1991 with the filing of a plaint where the land in question (Getahewapathana alias Belipolawatta) was originally owned by one R.M.Appuhami on a prescriptive title through the possession since 1940. Subsequent to the filing of the plaint and the Preliminary Survey, the statements of claims have been filed by the respective defendants. The preliminary plan and report were submitted on 05.07.1993 by the Licensed Surveyor P.W. Nandasena and it has been marked at the trial. Upon a lengthy trial the judgment dated 17.06.2006 has been delivered by the District Court of Bandarawela and the interlocutory decree entered accordingly. The said judgment was challenged by filing an appeal to the

Court of Appeal by the 5th, 10th, 11th, 13th – 18th defendant- respondents, few who are petitioners to the present application. Yet with the new amendment for the relevant legislation the appeal was transferred to the Uva Provincial Civil Appellate High Court.

The Appeal was dismissed by the learned Judges of the Uva Provincial Civil Appellate High Court on 14.11.2014 along with a rectification of the error in calculations made by the learned District Judge. Therefore, the learned judges at the Uva Provincial Civil Appellate High Court have determined in finality that the parties are entitled to the corpus in accordance with the preliminary survey plan prepared by the Licensed Surveyor P.W. Nandasena.

Consequent to the judgment delivered by the Uva Provincial Civil Appellate High Court the 5th, 11th, 13th – 18th defendant-appellant-petitioners, few of whom are petitioners to the instant application filed an application to the Supreme Court by way of a revision where the decision of the Uva Provincial Civil Appellate High Court was further affirmed and dismissed the revision application.

Therefore, the original case was returned to the District Court of Bandarawela on 24.08.2016. Thereafter the amended interlocutory decree and commission was issued to the surveyor to prepare the final partition scheme accordingly. On 03.10.2017 the final partition plan and report were prepared and submitted by Licensed Surveyor S.P. Ratnayake which was then objected by several parties including the petitioners.

A point of observation at this juncture is that as per Section 16 of the Partition Act No. 21 of 1977, read together with Section 27 (3) denotes that a commission issued under Subsection (2) of Section 27 must be issued to the same surveyor who conducted the preliminary survey unless the Court deems it necessary to appoint another commissioner of the court (surveyor), which is to ensure that the issuance of the commission for the final scheme is in accordance with law.

In the instant application the preliminary plan was prepared in the year 1993 by the Licensed Surveyor P.W. Nandasena. Upon his demise, through a commission by courts the final survey has been prepared by the Licensed Surveyor S.P. Rathnayake on 03.10.2017.

However, due to the identification of a State-owned land in the corpus of such final survey, learned Judge of the District Court of Bandarawela has directed to issue a commission again after an inquiry, to have the final report concluded by the court commissioner by the order dated 30.11.2022, following the directives given therein. Several parties including the petitioners did not accept the final partition Plan no 6146 and the report submitted by Licensed Surveyor S. P. Rathnayake. Thereby upon the request of the parties, a commission was issued to the Surveyor-General to obtain an alternative final partition plan and report prior to the inquiry. Thus, it is evident that in the matter at hand, the surveys have been conducted by different surveyors due to the unavailability and demise of the original surveyor who concluded the preliminary plan and the same is allowed by the law enshrined in Section 27(3) of the Act.

It was revealed that the alternative final survey plan submitted by the Surveyor-General *(P1K)* depicts an extent of 21 Acres, 1 Rood and 26.33 Perches inclusive of an extent of 2 Acres, 1 Rood and 4.34 Perches of State-owned land. When the extent of State-owned land was deducted the privately owned land amounts to 19 Acres, 0 Rood and 21.99 Perches. It is evident by such calculations that the extent specified in the preliminary plan *(P1C)* of the corpus prepared by P.W. Nandasena, which states 20 Acres, 2 Roods and 25 Perches has changed due to the importation of other plots of land as part of the corpus. This has led to the major point of contention of this instant matter which is that the extent of the corpus identified in the final survey Plan No 6146 made by S.P.Ratnayake is different from that of the Preliminary Plan No 353 made by P.W.Nandasena.

Nevertheless, in such circumstances, it is the duty of the trial judge to ascertain whether the land in concern encompasses a state-owned land. And if such concern arises the trial judge needs to take appropriate measures to resolve the matter at any stage of the proceedings.

Therefore, the petitioner claims there is no possibility to partition the corpus in accordance with the interlocutory decree *(Marked as P^1H)* which is based on the *(Marked as P^1F)* judgment of the Uva Provincial Civil Appellant High Court.

The additional lot identified as lot 13^{X} in $P^{1}M$ (F.V.P.-76) and $P^{1}N$ (Field Sheet 2 M 12/35) is a reservation and a public stream along the Alwathanne Kadura.

Therefore, it cannot be privately owned as per the Section 52 of the State Land Ordinance No. 8 of 1947. ***"****No person shall, by possession or user of any State reservation after the commencement of this Ordinance, acquire any prescriptive title to any such reservation against the State; and neither the Prescription Ordinance nor any other law relating to the acquisition of rights by virtue of possession or user shall apply to any such reservation after the commencement of this Ordinance".*

Similarly, as per Section 15 of the Prescription Ordinance it claims that no part can claim prescriptive title over State-owned land.

Section 15 of the Prescription Ordinance reads as below:

"Nothing herein contained shall in any way affect the rights of the State or shall be taken to apply to any proceedings in any action for divorce, or to any case in which special provision has been or may hereafter be made for regulating and determining the period within which actions may be commenced against any public officer or other person."

The identification of the corpus of a land is imperative in a partition action for only after such concrete affirmation of the corpus, that a title of the corpus could be determined. When several including the petitioners requested to issue a commission to obtain an alternative final partition plan the learned District Judge issued a commission on the Surveyor General as per Section 18 3(a) of the act. Thereby the survey plan of the Surveyor-General was submitted by 07.02.2019. Plaintiff 1st respondent along with several others did not accept the plan by the Surveyor-General. An inquiry was held and after calling evidence on the matter, the learned District Judge through the order dated 30.11.2022 stated: "*the order made by the District Judge of Bandarawela to issue a commission to the Superintendent of the Survey of Badulla District is not lawful and there is no ground to consider plan* $P^{1}K$ *and* $P^{1}L$ *and also has decided that the matters raised by the petitioners based on P1K and P1L in the identification of the corpus and the title of the*

first owner as it has framed in the point of contest No 1 of Rathnayake Mudiyanselage Appuhami being estopped…"

Being aggrieved by the order dated 30.11.2022, the petitioners filed this revision and *restitutio in integrum* on the grounds that the corpus of the plaint differs from that of the corpus marked in the preliminary plan and that the corpus of the plan is erroneously named.

According to Partition Law No. 21 of 1977 (herein after referred to as the Act) the Act sets clear guidelines and the procedure to follow from the commencement of preliminary survey to the final partition decree.

As per Section 16, upon the issuing of summons to all defendants' courts shall issue a commission to the surveyor directing him to survey the land and order him to return to his commission.

Upon the conclusion of trials of the partition action, the court shall pronounce judgment in open courts and soon after, the courts shall enter an interlocutory decree *(Section 26)* with the findings of the judgment which directs the commissioner to conduct the final survey of the land.

According to Section 27 (3) when the courts decide the land shall be partitioned, the courts will issue a commission to the surveyor who made the preliminary survey unless the court through its discretion decides to direct that the commission to be issued to another surveyor upon a reasonable basis.

In the instant application, a concern has been raised on the legality of the final partitioning and the commission report since it was conducted by another surveyor. However, it is evident that the court had ordered the commission to be issued to Licensed Surveyor S.P. Rathnayake after the scheme inquiry. Subsequently, it was found S.P. Rathnayake is feeble and therefore the court ordered to issue the commission to another licensed survey commissioner. Nevertheless, I do not see any impropriety or illegality in such an order.

When courts appoint a commissioner, he assumes the responsible position of an officer in court. In ***Appuhamy v Weeratunge*** **(1945) 46 N.L.R. 461** J Soertsz A.C. states *"His functions are quasi-judicial, and he is expected to act fairly and impartially…."*

In ***Hendrick v Gimarahamine*** **(1945) 47 N.L.R. 30** Soertsz A.C.J reiterated that it is undesirable and indeed irregular to substitute another surveyor for the commissioner appointed by court. It was also stated in the case where a scheme of partition submitted by a surveyor is found to be better than that submitted by a commissioner in the case. The proper course to adopt would be to remit the scheme to the commissioner appointed by the courts, with a direction to him to modify the scheme on the lines prepared by the surveyor.

Further, another concern was raised whether the Surveyor-General can be directed to conduct the final survey and prepare the scheme. Since the Act does not restrict the same, courts could direct the Surveyor-General to conduct the abovementioned if the judge sees fit. However, this option should not be exceedingly available as it could overburden the Surveyor-General's official tasks and open floodgates.

When the commission is issued under Section 27 it is the duty of the surveyor to prepare the final scheme of partition in accordance with the directions specified in the interlocutory decree. Further, he could include other appropriate directions that need to be adhered to as deemed fit. Nevertheless, the proposed scheme of partition needs to be justifiable and reasonable to all interested parties.

As per Section 35, upon the surveyor's return to the commission, the courts shall call the matter in open court and fix a date for the consideration of the proposed scheme of partition. The date fixed shall not be earlier than thirty days.

On the date fixed under Section 35 the parties could either admit the proposed scheme of partition, accept the proposed scheme with modifications or object to the proposed scheme of partition.

If any party objects to the proposed scheme of partition, the courts must conduct a summary inquiry under Section 36(1) and thereafter confirm with or without the modifications the proposed scheme of partition and enter final decree of partition accordingly.

The inquiry conducted must be a brief examination which does not trail longer than the trial already conducted. The inquiry does not require to examine the pedigree, title, and other preliminary concerns in detail. And

thus, should aim to ascertain the reasonableness, suitability and practicability of the proposed partition and compensation scheme to all parties of the matter. The inquiry must also determine whether the survey has been conducted in accordance with the interlocutory decree and other specified directions of the court.

Through the case ***Albert v Ratnayake*** (1988) 2 Sri L.R 246 in confirming the scheme, it was noted that the expression "modifications" should not be taken to mean only "slight alterations". In an appropriate case a scheme with substantial changes could be adopted. The trial judge may adapt the scheme of partition prepared by the commissioner with changes in any manner which he deems necessary.

With regard to the partition proposed by the commissioner, it has been repeatedly held that a partition will not be rejected on light grounds or for mere inequality of value of allotment, if in making it, the commissioner has honestly exercised his judgement.

Under Section 33, the surveyor is required to partition the land so that each party is entitled to compensation in respect of the improvements made to the land, as far as is practicable. Thus, the scheme should aim to accommodate any prior undisputed development or improvements in the land in the most reconciling manner. If the proposed scheme directs any compensation to be paid to a party, the value estimated must be in accordance with the present value and not the value at the time of the preliminary survey. Section 33 further states that '*The surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or of buildings erected thereon will, if that party is entitled to a share of the soil, be allotted, so far as is practicable, that portion of the land which has been so improved or built upon, as the case may be"*. Section 34 describes the way of paying compensation and owelty as thus *"(1) Where under any scheme of partition prepared by a surveyor, payment has to be made to or by any party to a partition action in respect of compensation for improvements to the land or of owelty, the amount of such payment shall, in the first instance, be assessed by the surveyor and shall be finally determined by the court.(2) The amount determined by the court, under subsection (1) of this section or under subsection (4) of section 26, as compensation for improvements or as owelty shall, from the date on which final decree is entered, be a charge on the portion*

of the land or the extent of land finally allotted to the party made liable for the payment of such compensation or owelty, as the case may be". It is clear that such payments should be finally determined by the court.

In ***Narayanan Chettiar v Kaliappa Chettiar*** (1945) 47 N.L.R. 77 Lord Thankerton, delivering the opinion of the Privy Council, stated that in an action for the partition of an estate carrying tea on it, a commissioner can, in fixing his valuation, take in to account the effect of the tea restrictions which were in operation. The principle acted upon by the judicial committee was that the allocation of lots in a partition action was similar to the distribution of assets among partners.

During the preparation of a final plan for a Partition case, strict adherence to the interlocutory decree and any explicit directives outlined in the surveyor's commission is obligatory. The Court commissioner is precluded from exercising independent discretion and is bound to comply with the interlocutory decree and the specific directives issued by the Court. The final plan must be founded upon a preliminary plan which has already been marked and accepted in the interlocutory decree. It is not permitted to introduce additional portions of land into the corpus during the final plan preparation process.

After the final partition scheme is prepared along with the modifications it would be most appropriate to allow the parties to re-consider the proposed final scheme prepared and thereafter the court could enter the final partition decree.

Nevertheless, as per Section 36A any party dissatisfied with any order made under Section 36 may prefer and appeal against such order.

A noteworthy prominence should also be given to the fact that the Land Reform Commission actively taking part as the 19th Defendant in the trial conducted and for raising issues. Nevertheless, though the Land Reform Commission made claims they were dismissed in the proceedings. And there is no evidence that the Commission has filed any appeal/revision application against the judgment/interlocutory decree entered.

Furthermore, this court notes an ambiguity in the caption with regard to naming the Land Reform Commission as party to this instant application.

Firstly, it is evident that the commission was named as the 19th Defendant in the District Court proceedings and in the current application the commission is identified as the 19th Defendant/ 18th Respondent.

The initial matter of concern dates to over thirty years, the plaint for the partition was filed at the District Court of Bandarawela in February 1991, the interlocutory decree was entered in June 2006, an appeal was made to the Uva Provincial Civil Appellate High Court and the same was dismissed in 2014 subject to few rectifications, later the parties sort a revision at the Supreme Court against the order of the Civil Appellate judgment yet the matter was dismissed. Thereby it is quite evident that the matter has been trailing for generations, well over thirty years and thus it is the view of this court that at least the present generation should be allowed to enjoy the fruits of the victory.

As observed by Soertsz A.C.J in ***Appuhamy v Weeratunge*** (Supra) *"There must be an end to a case, particularly to a partition case which is generally of a protracted nature and which prevents parties to it from dealing with the land as freely as they would wish to in the interval."*

Order dated 30.11.2022 had been attained after conducting a summary inquiry as per Section 36(1), thereby it can be ascertained that the order under the final partition scheme is correct.

The learned District Court Judge's findings with respect to the Surveyor General's proposed plan and report are not correct. Thereby, this Court further directs and emphasizes that when the final commission is conducted by the Licensed Surveyor (the Court Commissioner), should consider the observations made by the Surveyor-General in P1K and P1L along with the other directives specified by the learned District Judge after the scheme inquiry in the order dated 30.11.2022.

After the final partition scheme is prepared as stated above along with the modifications, an opportunity should be given to all parties to consider such a modified final scheme before the confirmation and entering of the final decree.

In light of this contention, any party to the application could resort to the remedy provided by the provisions of the Partition Act No.21 of 1977, where

under Section 36A any person dissatisfied with an order of the court, may prefer an appeal of such order to the Court of Appeal. Section 35 of the Partition Law promulgates the procedure for the court to consider the survey issued by the surveyor in open court. The courts after conducting the summary inquiry would either affirm or disaffirm the scheme of partition proposed by the surveyor. Subsequently, any party dissatisfied by such determination of the court, the law provides the remedy for the appeal of such order as reiterated above.

The interlocutory order dated 17.07.2006 was challenged through an appeal to the Uva Provincial Civil Appellate High Court. The civil appellate court affirmed the order of the learned District Court Judge subject to a few modifications. Later the same was challenged through a revision application at the Supreme Court where the order of the civil appellate court was reaffirmed.

In the case **CA/RI/15/2018** decided on 02/11/2018, Samayawardhena. J stated, *"I must state that there is no magic in the word restitution, as that relief, in my view, can also be sought in a revision application. Although, in law, revision and restitution in integrum are two different applications, in practice, they go hand in hand, and almost all the time, are sought in combination."*

Thereby, this court believes there is no standing to interfere with the said judgment /interlocutory entered, (subject to the modifications entered by Provincial Civil Appellate Courts) at this stage, as it has already been reaffirmed by the Supreme Court.

In light of the aforementioned changes, this Court affirms the order dated 30.11.2022, as the final and appropriate conclusion reached by the learned District Judge. The Court has thoroughly considered the matter and finds no valid reasons to issue formal notices to the respondents. Therefore, the Registrar of this Court is directed to send a copy of this order to the District Judge of Bandarawela to conclude the matter expeditiously, as directed, and enter the final decree.

Furthermore, it is important to note that over thirty years have passed since the institution of this case, and the Supreme Court has already upheld the judgment made by the learned Judges of the Provincial Civil Appellate Court

during the revision application process. At least, the succeeding generation of the original parties of the subject matter should now be allowed to fully enjoy the benefits of their victory.

Notice refused. Application dismissed without costs.

JUDGE OF THE COURT OF APPEAL

D.N. Samarakoon- J

I agree.

JUDGE OF THE COURT OF APPEAL