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

In the matter of an application for *restitution in integrum* and/or for revision against the judgment and/or interlocutory decree dated 28.09.2000 and/or revision against the order dated 03.03.2006 in the D.C. Matugama Case No.3880/P.

C.A. Case No.1105/2006 (Rev)

D.C. Matugama Case No.3880/P

Bamunusinghe Arachchige Dona Kamalani

of Iddagoda, Matugama.

PETITIONER-PETITIONER

-Vs-

Chandra Wijesinghe

of Iddagoda, Matugama.

1B PLAINTIFF-RESPONDENT-RESPONDENT

Bandula Jayasekara

of Iddagoda, Matugama.

16A DEFENDANT-RESPONDENT-RESPONDENT

Liyanarachchige Cyril Dayaratne

of Iddagoda, Matugama.

17th DEFENDANT-RESPONDENT-RESPONDENT

Liyanarachchige Jayanandanie

of Iddagoda, Matugama.

22nd DEFENDANT-RESPONDENT-RESPONDENT

Liyanarachchige Buddadasa Jayasekara

of Iddagoda, Matugama.

23rd DEFENDANT-RESPONDENT-RESPONDENT

Krishantha Jayasekara

of Iddagoda, Matugama.

26th DEFENDANT-RESPONDENT-RESPONDENT

Priyantha Jayasekra

of Iddagoda, Matugama.

27th DEFENDANT-RESPONDENT-RESPONDENT

Somawathie Jayasekara

of Iddagoda, Matugama.

28th DEFENDANT-RESPONDENT-RESPONDENT

And others

DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	L.B.J. Peiris for the Petitioner-Petitioner Rohana Deshapriya and Chanakya Liyanage for the 16A, 17th 22nd, 23rd, 26th, 27th & 28th Defendant-Respondent-Respondents
Decided on	:	17.05.2019

A.H.M.D. Nawaz, J.

The Petitioner-Petitioner (hereinafter sometimes referred to as "the Petitioner") who was not a party to the partition case made an application to the District Court, stating *inter alia* that the judgment and interlocutory Decree entered in the case and dated 26.09.2000, ought to be varied or set aside inasmuch as the land partitioned was not the land described in the Schedule to the Plaint and/or it included land which the Petitioner claimed by way of by prescriptive rights. The District Court by its order dated 03.03.2006 **(P6)** dismissed the Petitioner's Application. It is against this order that the Petitioner preferred this application for revision and/or *restitutio in integrum*. There is an operative stay order in this matter until the final determination of this application.

The Petitioner seeks to have the said judgment and/or interlocutory decree set aside, *inter alia*, on the following grounds:-

a) The land which has been dealt with by the judgment and/or Interlocutory Decree is 3 Acres 2 Roods and 21 Perches in extent and it is not the land which was described in the Schedule to the Plaint which in extent is only 2 Acres2 Roods and 35 Perches.

b) *Lis Pendens* had been registered in respect of the land described in the plaint which is in extent 2 Acres2 Roods and 35 Perches and not in respect of the land which has been dealt with by the judgment and/or Interlocutory Decree which is 3 Acres 2 Roods and 21 Perches in extent.

c) Although the Surveyor had been directed to survey a land called *Hikgahatenna* which was2 Acres 2 Roods and 35 Perches in extent, the Commissioner surveyed a larger land.

d) No Section 12 Declaration had been filed in respect of the larger land.

e) There has thus been a culpable failure on the part of the trial judge to have examined title.

f) All the deeds which were produced at the trial related to a land called *Hikgahatenna* bearing No. T.P. 115181 which was 2 Acres 2 Roods and 35 Perches in extent and not

to a land which is in extent 3 Acres 2 Roods and 21 Perches. However the learned District Judge erroneously allotted rights to the three acre land on the said deeds. *E.g.* Deeds **P2, P3, P4** and **P5** produced at the trial all deal with a land called *Hikgahatenna b*earing No. T.P. 115181 in an extent of 2 Acres 2 Roods and 35 Perches.

g) The learned District Judge has in his Judgment allotted rights/shares on Deed No.234 dated 30.08.1967, to the Plaintiff whereas the said Deed No.234 has not even been produced at the Trial, although referred to in the evidence.

Thus the learned Counsel for the Petitioner submitted that the proceedings teem with irregularities and the Petitioner's rights have been substantially affected. There are other irregularities that the learned Counsel brought forth in his argument.

> "Chandra Wijesinghe who gave evidence on 26.10.1999 had sought to describe herself as the Substituted Plaintiff, whereas the record bears out that the Substituted Plaintiff as at that date was one Freeda Wijesinghe. Chandra Wijesinghe had been substituted as the Substituted Plaintiff only on 10.01.2003, more than Three Years after the said trial Date."

Petitioner's Application to the District Court

On or about 27.02.2004, the Petitioner filed a Petition and Affidavit, pleading *inter-alia* that;

a) The Petitioner is the widow of the deceased 12th Defendant, who had died on 20.06.1996.

b) Upon the death of the said 12th Defendant, it was the Petitioner who ought to have been substituted in place of her deceased husband.

c) However, without any notice being issued to the Petitioner, on or about 21.11.1996, Freeda Wijesinghe, the 11th Defendant above named, has been wrongfully and/or unlawfully substituted as the 12A Defendant (*Vide* Journal Entry No.77 dated 21.11.1996).

d) Prior to the said substitution, on or about 14.07.1994, the said Freeda Wijesinghe had already been substituted as the Substituted Plaintiff. (*Vide* Journal Entry No.68 dated 14.07.1994)

e) Subsequently, according to Journal Entry No.86 on or about 09.10.1998, the Attorney-at-Law for the Plaintiff had tendered papers seeking to have the Petitioner substituted as the 12A Defendant.

f) Notice of the said application had not been served on the Petitioner on the ground that the Petitioner was not at the address.

g) Thereafter on 09.09.1999 (Journal Entry No.92) it has been notified to Court that steps for substitution for the 12th Defendant were unnecessary in view of the substitution made as per Journal Entry No.77.

h) In any event, on the trial date, *i.e*, 26.10.1999 the 12th Defendant/12A Defendant/Freeda Wijesinghe was not present and/or represented.

i) The witness who testified on 26.10.1999, *i.e*, Chandra Wijesinghe, was only the 13th Defendant as at the said date and had not been substituted as the Plaintiff by that date, although she had claimed to be the Substituted Plaintiff.

j) However, the Record bears out that the Substituted Plaintiff as at the said date, *i.e*, 26.10.1999, was Freeda Wijesinghe.

k) The Application to have the said Chandra Wijesinghe substituted as the Substituted Plaintiff has been made only on 01.07.2003 (*see* Journal Entry No.114 which is at Page 50 of **P2**), long after 26.10.1999, the aforesaid Trial date. (The said Freeda Wijesinghe had died on 26.08.2001)

l) The subject matter/corpus of the action was the land called *Hikgahatenna* bearing No. T.P. 115181 which is 2 Acres 2 Roods and 35 Perches in extent, whereas according to the Preliminary Plan No.124 filed of record by S. P. Illangakoon L. S. the land which was surveyed is 3 Acres 2 Roods and 21 Perches in extent.

m) The Lots which should form the corpus of this action were only Lots C and E of the said Plan No.124.

n) Lots A, B, D, F, G, H and I of the said Plan No.124 have all been wrongfully included into the corpus and that the said Lots ought to have been excluded from the corpus.

o) The Petitioner is in possession of Lots H and I of the land that by long and undisturbed possession of the said land for a period of well over ten years, by the Petitioner and her predecessors, they have acquired prescriptive title to the said Lots H and I.

p) The said Lots H and I are a portion of a different land, which is called *Pannati Okanda alias Dewatagaha Okanda.*

q) Having registered the *lis pendens* in respect of a land which in extent was 2 Acres 2 Roods and 35 Perches, the trial has proceeded in respect of a larger land by including Lots A, B, D, F, G, H and I, which is wrongful and/or unlawful.

r) The continuation of the action without substituting the lawful heirs of the 12th Defendant in his place, is wrongful and unlawful.

s) Proceedings in the case ought to be set aside and a fresh trial ought to be ordered.

The above matters were pleaded in the petition to the District Court but the application of the Petitioner was resisted by 16A, 21, 17, 22 Defendants and the 23rd, 26th, 27th, 28th Defendants and inquiry thereon was concluded by way of written submissions.

The learned District Judge by his order dated 3rd March 2006, dismissed the Petitioner's Application, *inter alia* on the basis that the Petitioner is not entitled to seek redress under and in terms of Section 48(4) of the Partition Law, as amended.

In this application the Petitioner also impugns the order dated 3rd March 2006 in addition to the main relief that she has sought namely the impugnation of the Judgment and/or Interlocutory Decree that have entered.

It is axiomatic that Section 48 of the Partition Law itself has preserved the powers of Revision and *restitutio in integrum* of the Court of Appeal-*see* Soza, J. in ***Somawathi v. Madawala*** (1985) 2 Sri L.R 15. The facts in the case repay attention. Madawala claimed that a portion of land that he was in possession of was outside the corpus to be partitioned. It had been incorporated without notice to Madawala. The latter's claim to intervene was rejected by the District Judge. In appeal the Court of Appeal ordered a trial *de novo*. On Appeal to the Supreme Court it was contended that the partition decree was final and conclusive. Soza, J. declared; *"While section 48 of the Partition Law enacts that the interlocutory decree entered shall be subject to the decision of any appeal which may be preferred therefrom, be final and conclusive for all purposes against all persons whomsoever, I am of the opinion that it does not affect the extra ordinary jurisdiction exercised by way of revision or restitution in integrum."*

The learned Counsel for the Petitioner also drew the attention of this Court to the case of ***Rev Induruwe Dhammananda v. Piyatissa and Another*** (2001) 3 Sri L.R 365. The Surveyor had reported that certain lots did not from part of the corpus. Notwithstanding that reality, some portions that fell out of the corpus had been included in to the corpus. Udalagama, J. held that; *"In all the attendant circumstances of this case, I am inclined to the view that in spite of the Surveyor's Report detailing the areas to be excluded no effort was made to issue notice on the necessary parties and at the trial when the contents of the report of the surveyor were considered, the same received scant attention. Besides the report of the Surveyor without doubt became very relevant to the investigation of title. This, I hold, is a glaring lapse which taints the entire proceedings* ***and transcend the bounds of procedural errors".***

The case of ***Jayaratne and Another v. Premadasa and Another*** reported in (2004) 1 Sri L.R 340 is to the same effect. In this case the original Plaintiff had filed action for partitioning of a land of 30 acres. The Surveyor who did the Preliminary Survey produced a Plan for 71 acres 1 rood and 20 perches. At the trial, judgment was delivered without a contest which was followed up with an interlocutory decree and further steps were taken to partition the larger land, on a Final Plan. Thereafter three persons who had not been parties to the action applied to set aside the judgment or alternatively to vary the corpus to

30 acres and for rights to that land. The District Judge allowed the application to vary the judgment and Interlocutory decree by restricting the corpus to 30 acres and the Court of Appeal affirmed the order of the District Judge.

The Supreme Court, having held that District Court and the Court of Appeal had erred in allowing the application made to amend the Interlocutory Decree inasmuch as the application was outside the scope of Section 48(4) of the Partition Law for several reasons, namely, *a)* it was not made by the parties to the action, *b)* it was intended to set aside the interlocutory decree or in the alternative to restrict the corpus to 30 acres, *c)* it did not set out the nature and extent of the rights of the parties *d)* it did not specify to what extent and manner in which the parties sought to have the interlocutory decree amended, nevertheless went on to hold that; "The revisionary powers of the Appellate Court are unaffected although Section 48 of the Partition Law invests interlocutory decrees entered under the Partition Law with finality. Thus the exercise of powers of revision and *restitution in integrum* to set aside partition decrees when it is found that the proceedings were tainted by what has been called fundamental vice is available to the Appellate Court. .....By surveying an extent of 71 acres which exceeded the extent he was commissioned to survey by 41 acres, the Commissioner had failed to comply with the terms of the commission. The Commissioner should have reported the fact that he was unable to locate a land of about 30 acres and asked for further instructions. It is unfortunate that the learned District Judge who heard the case had failed to give due consideration to the wide discrepancy in the extent.....On the above material I hold that the District Court had acted wrongly in proceeding to trial in respect of what appeared to be a larger land than that described in the plaint, the registration of a new *lis pendens* and the fresh declaration in terms of Section 12 have not been complied with. Therefore I set aside the proceedings in the District Court leading up to the trial and the judgment and the Interlocutory decree."

Adverting to the above case, the learned Counsel contended that the facts in the instant application are on all fours with the above case.

In fact some of the irregularities that are rife in the case transcend the bounds of procedural errors. If one turns to the issue of discrepancy in extent between the land that was sought to be partitioned and the land that was surveyed, it is manifest that rights of non-parties have been substantially affected.

The land described in the schedule to the Plaint is *Hikgahatenna* described in T.P. 115280, and the extent thereof was stated as 2 Acres 2 Roods and 35 Perches.

The Schedule to the Plaint states as follows:-

> "The land called *Hikgahatenna* situated at *Iddagoda* in *Idddagoda Pattu* of *Pasdun Korale* West in the District of *Kalutara* Western Province and bounded on the South West by land described in T.P. 115280 and on all other sides by the said land belonging to the Crown and containing in extent Two Acres Two Roods and Thirty Five Perches."

Lis Pendens had also been registered for a land in extent of 2 Acres 2 Roods and 35 Perches. However, the Commissioner surveyed and reported a land which is much larger than the land described in the plaint, in fact a land which in extent is Three Acres Three Roods and Twenty One Decimal Forty Four Perches.

Trial was held and Judgment and Interlocutory Decree were entered in respect of the larger land.

Although the Judgment and Interlocutory Decree are in relation to a land which is Three Acres Three Roods and Twenty One Decimal Forty Four Perches in extent, the deeds produced at the trial relate to a land which is much smaller, *i.e*, the extent of land described in the Schedule to the Plaint (2 Acres 2 Roods and 35 Perches).

Upon a perusal of the judgment which barely runs into 3 ½ pages, it is quite manifest that there is a culpable failure on the part of the learned District Judge of *Matugama* to investigate title.

A glaring instance of failure to investigate title that was pinpointed is the fact that Chandra Wijesinghe the party who gave evidence on the trial date claiming to be the

Substituted Plaintiff, had in her evidence spoken of a Deed No.234 dated 30.08.1967, upon which she claimed the Plaintiff had derived title. This Deed had not been marked or produced at the trial. However, the learned District Judge had allotted shares on the said Deed No.234 to the Plaintiff.

The imperative duty cast on the District Judge to investigate title to the corpus is too well known in Partition Law-*see* ***Gnanapandithen v. Balanayagam*** (1998) 1 Sri L.R 391; ***Kularatna v. Ariyasena Report Bar Association Law Reports*** 2001 (vol. IX) Part 1 Page 6; ***Richard v. Siebel Nona*** (2001) 2 Sri L.R 1; ***Karunaratne Banda v. Dasanayake*** (2006) 2 Sri L.R 87.

In the course of the argument the learned Counsel for the Respondents contended that the Petitioner and her children had by a Deed bearing No.885 dated 05.09.1991 attested by W. K. C. Dharmawardana N. P. transferred the rights that devolved on her from her deceased husband, the 12th Defendant, to Chandra Malini Wijesinghe the 13th Defendant-14th Respondent-14th Respondent, who is also the 1B Plaintiff-1st Respondent-1st Respondent.

But it is apparent that the rights that have been dealt with by the said Deed No.885, are rights which the 12th Defendant would be entitled to in terms of the Final Decree to be entered in the Partition Action No.3880/P in respect of the land called *Hikgahawatta* which in extent is 2 Acres 2 Roods and 35 Perches. This is how the Schedule of the said Deed No.885 **(P5)** describes the land dealt with as "*All rights to the Lot/Lots allotted to the Grantors by Final Decree in D. C. Matugama Case No.8380/P in respect of the land Hikgahawatta in extent of Two Acres Two Roods and Thirty Five Perches.*"

It is clear upon a perusal of the deed that what has been dealt with by the said Deed No.885 are the rights inherited from the deceased 12th Defendant. The Petitioner's present claim is not what she inherited from her deceased husband but rights to a land which she claimed independently.

Another contention was that according to the Report of the Surveyor to Plan No.124, the 12th Defendant had claimed Lot H (which is one lot she is claiming in these proceedings by way of prescriptive rights) in common with the Plaintiff and 6th to 15th Defendants and

therefore, it was sought to be argued that the Petitioner's claim to Lot H on independent rights cannot be sustained.

When one peruses the report of the surveyor vis-à-vis the preliminary plan, the only parties who had been present are the 1st, 15th and 16th Defendants and the mothers of the Plaintiff, 2nd and 3rd Defendants.

Therefore these objections would be unsustainable. All these irregularities inherent in the proceedings that led to the judgment would render the judgment perverse and they would constitute circumstances that shock the conscience of Court warranting the exercise of revisionary jurisdiction of this Court. In the circumstances, I take the view that this is an appropriate case wherein this Court feels impelled to exercise the Revisionary Jurisdiction and/or to act in *restitutio in integrum* and set aside the Judgment and/or Interlocutory Decree entered in the action.

The issue whether the Court should exclude Lots A, B, D, F, G, H and I shown and depicted in the said Plan No.124, from the corpus and restrict the corpus to Lots C and E of the said Plan No.124 was an issue that should have engaged the attention of the learned District Judge and this failure along with all steps since the failure to have the Section 12 declaration on record become invalid and nullified and I would quote Justice Soza in ***Somawathi v. Madawala*** *(supra)*;

> *"The purpose of this declaration is to satisfy the conscience of the Court that all persons who are seen upon an inspection of the entries in the Land Registry to be persons entitled to a right, share or interest in the land sought to be partitioned are before it. In fact it is only after the declaration is filed that the Court issues summons. It is the declaration that gives the green light for the case to proceed."*
>
> *"This glaring blemish taints the entire proceedings. It amounts to what has been called 'fundamental vice'. It transcends the bounds of procedural error."*

This principle was again articulated by Wimalachandra, J. in ***Maduluwawe Sobitha Thero v. Joslin*** (2005) 3 Sri L.R 25 at 31:-

"It is imperative to make a declaration under Section 12 (1) of the Partition Law after the partition action is registered as a lis pendens. Section 12(1) stipulates that after the registration of the lis pendens, the plaintiff must file or cause to be partitioned in the register maintained under the Registration of Documents Ordinance, stating the names of all persons found, upon the inspection of those entries, to be added as necessary parties to the action under section 5 of the Partition Law, No. 21 of 1977."

"The failure to make a correct declaration under section 12(1) of the Partition Law, amounts to a procedural irregularity which results in a miscarriage of justice, in that the petitioner who has a title deed duly registered to the entire property, which is the subject matter of the said partition action, was kept out without being made a party. This amounts to what is called a fundamental vice."

The two judgments I have cited above ***Somawathie v. Madawela*** *(supra)* and ***Maduluwawe Sobitha Thero v. Joslin*** *(supra)* both speak in terms of the peremptory nature of Section 12 of the Partition Law No.21 of 1977 and whilst Soza, J. states in ***Somawathie v. Madawela*** that Section 12 declaration gives green light for the case to proceed and a failure to comply with it is a blemish that taints the entire proceedings, Wimalachandra, J. in ***Maduluwawe Sobitha Thero v. Joslin*** declares that such a procedural irregularity leads to a miscarriage of justice. The import of all these pronouncements is that whatever step that is taken subsequent to the non-compliance with Section 12 becomes invalid and the entire proceedings thereafter become null and void.

I am fortified in this reasoning by the language of Section 48(1) and its 2nd paragraph thereto which have the object of making partition decrees inviolate and immune from internal and collateral attack. The legislature sought to secure finality for the decrees entered under the partition law by specifically providing that the interlocutory decree and final decree shall be final and conclusive *"notwithstanding any omission or defect of procedure"* and by expressly protecting these decrees from attack on the ground of fraud and collusion.

So even an *omission or defect of procedure* will not result in partition decrees being attacked and having taken note of the fact that the Courts had intervened on several occasions to impugn partition decrees on the ground of what was called a fundamental vice, the legislature sought to insulate partition decrees from these fundamental vices. They were categorized as *omissions or defects of procedure* and formulated as such in the 2nd paragraph of Section 48(1) of Partition law No.21 of 1977. The expression "*omission or defect of procedure*" was defined to include an omission or failure:-

a) to serve summons on any party; *or*

b) to substitute the heirs or legal representatives of a party who dies pending the action or to appoint a person to represent the estate of the deceased party for the purposes of the action; *or*

c) to appoint a guardian *ad litem* of a party who is a minor or a person of unsound mind.

The upshot of these legislative amendments was that despite these enumerated omissions or defects of procedure in the 2nd paragraph to Section 48(1) of Partition Law, finality of partition decrees was kept inviolate. I hasten to point out that the failure to file a Section 12 declaration is not specified as an enumerated item in the expression "*omission or defect of procedure*". If those omissions or defects of procedure as are enumerated in (a), (b) and (c) of the 2nd paragraph to Section 48(1) will not invalidate partition decrees, the failure to file a Section 12 declaration is not one of those grounds falling within the above enumeration and therefore the failure to file such a declaration is bound to have the effect of eroding the finality.

In my view the omission to specify, within the classification of *omission or defect of procedure*, "failure to file a Section 12 declaration and take all the steps that have to be taken under Section 12" is deliberate on the part of the legislature and therefore it follows that when there is non-compliance with Section 12 of Partition law, such non-compliance would not come within such omissions or defects of procedure" that are excusable. It is only the *omissions or defects of procedure* categorized under the 2nd paragraph to Section 48(1) that are excusable.

Failure to comply with Section 12 is more than an omission or defect of procedure. It is more fundamental than a mere omission or defect of procedure. That is probably the reason why Justice Soza stated in ***Somawathie v. Madawela*** *(supra)* that the failure to follow Section 12 of the Partition Law transcends the bounds of procedural error.

A failure to follow Section 12 leads to the ouster of a true claimant with a legitimate interest from participating at the partition suit and such a deprivation of a due process cannot be a mere omission or a defect of procedure.

It is indeed a fundamental vice to precipitate the non-participation of a legitimate claimant at the trial and such a fundamental vice cannot save the partition decrees from attack. In my view the legislature deliberately omitted to keep out of the list given in the 2nd paragraph to Section 48(1) "the failure to comply with Section 12" and such a deliberate exclusion fortifies my reasoning that Section 12 non-compliance renders the decrees under Partition Law susceptible to attack and impugnation. The failure to make a correct declaration under Section 12 would amount to a fundamental vice which is more than a mere omission or defect of procedure and such an irregularity results in proceedings that are null and void. In other words the failure to follow Section 12 is jurisdictional and not merely procedural.

A non-conformity with Section 12 gives rise to a jurisdictional defect which can be impugned both directly and collaterally. If I may sum up the effect of the 2nd paragraph of Section 48(1) in another way, a failure to effect due service of summons on any party may not vitiate partition decrees but a failure to file a Section 12 declaration correctly and accurately is more fundamental than a mere omission or defect of procedure.

Therefore, in order to ensure that the rights of all those who have been prejudiced are adjudicated upon, the judgment and interlocutory decree and all orders entered in the case are hereby invalidated.

Since the surveyor has not identified the corpus properly, the learned District Judge is directed to reject the preliminary plan and report that have already been filed and a commission must be reissued to effect a preliminary survey of the land depicted in the

plaint with the correct metes and bounds of the extent. The surveyor must be directed to notice all the parties having interests in the land and do the survey in the presence of all the necessary parties. The new parties can be permitted to file their statements of claim after the return of the plan and report. All other mandatory steps have to be taken according to law.

As such I would proceed to set aside the judgment and/or interlocutory decree dated 28.09.2000 and remit this case back to the District Court of *Matugama* for a trial *de novo*.

JUDGE OF THE COURT OF APPEAL