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.

C.A. Case No.626/2004 (Rev)

D.C. Kuliyapitiya Case No.7086/P

1. **Kadupitige Jayasekara Perera** (Deceased)
   of Kadahapola, Horombawa.

1A. **Kadupitige Gunarathne**
   of Kadahapola, Horombawa.
   Substituted-PLAINTIFF

-Vs-

1. **Jayaweerage Marshall Perera** (Deceased)
   of Kadahapola, Horombawa.

1A. **Gajasinghege Millie Silva**
   of Kadahapola, Horombawa.

2. **Abullage Somawathie Menike**
   of Kadahapola, Horombawa.

3. **Ranasinghe Mudiyanselage Dilson Perera** (Deceased)
   of Kadahapola, Horombawa.

3A. **D.A. Somawathie Podi Menike**
   No.128, Kadahapola,
   Horombawa.

4. **Akmeemana Palliya Gurunnanselage Sunil Premathilaka**
   of Kadahapola, Horombawa.

5. Land Reforms Commission,
   Kurunegala.
6. Reginold Melvin Dayananda
   of Kadahapola, Horombawa.
   DEFENDANTS

AND

1. Marasinghage Chandra Somasiri Marasinghe
   of "Chandila", Kadahapola, Horombawa.
2. Kohthagamage Anthony Ernest Michel Grero
   of Kadahapola, Horombawa.
3. Madurawala Gamage Don Chandradasa
   of "Asiri", Kadahapola, Horombawa.
4. Hettiarachchige Jayaratne
   of Kadahapola, Horombawa.
5. Witharanalage Nuwan Priyanjith
   of Kadahapola, Horombawa.
   PETITIONERS

-Vs-

1. Kadupitige Gunarathne
   of Kadahapola, Horombawa.
   Substituted-PLAINTIFF-RESPONDENT
2. Gajasinghege Millie Silva
   of Kadahapola, Horombawa.
   Substituted 1st DEFENDANT-RESPONDENT

3. Abullage Somawathie Menike
   of Kadahapola, Horombawa.
   2nd DEFENDANT-RESPONDENT

4. D.A. Somawathie Podi Menike
   No.128, Kadahapola,
   Horombawa.
   Substituted 3rd DEFENDANT-RESPONDENT

5. Akmeemana Palliya Gurunnanselage Sunil Premathilaka
   of Kadahapola, Horombawa.
6. Land Reforms Commission,
   Kurunegala.
7. Reginold Melvin Dayananda
   of Kadahapola, Horombawa.
   4th to 6th DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. Marasinghage Chandra Somasiri Marasinghe
   of "Chandila", Kadahapola, Horombawa.
2. Kohthagamage Anthony Ernest Michel Grero
   of Kadahapola, Horombawa.
3. Madurawala Gamage Don Chandradasa
   of "Asiri", Kadahapola, Horombawa.
4. Witharanalage Nuwan Priyanjith
   of Kadahapola, Horombawa.
   1st to 3rd and 5th PETITIONER-PETITIONERS

-Vs-

1. Kadupitige Gunarathne
   of Kadahapola, Horombawa.
   Substituted-PLAINTIFF-RESPONDENT

2. Gajasinghege Millie Silva
   of Kadahapola, Horombawa.
   Substituted 1st DEFENDANT-RESPONDENT

3. Abullage Somawathie Menike
   of Kadahapola, Horombawa.
   2nd DEFENDANT-RESPONDENT

4. D.A. Somawathie Podi Menike
   No.128, Kadahapola,
   Horombawa.
   Substituted 3rd DEFENDANT-RESPONDENT

5. Akmeemana Palliya Gurunnanselage Sunil Premathilaka
   of Kadahapola, Horombawa.
6. Land Reforms Commission,
   Kurunegala.
7. Reginold Melvin Dayananda
   of Kadahapola, Horombawa.
   4th to 6th DEFENDANT-RESPONDENTS

1. Pallegamaralalage Kalyani Mangalika
2. Disnaka Supun Hettiarachchi
3. Upeksha Harshamali Hettiarachchi
4. Chalithya Nimna Gayangana Hettiarchchie
   RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Saliya Peiris, PC for the Petitioners Manohara de Silva, PC for the 6th Defendant-Respondent Jacob Joseph for the 4th Defendant-Respondent Canishka Witharana for the 5th Defendant-Respondent S. Karunadhara for the Substituted-Plaintiff-Respondent
Decided on	:	12.07.2019

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

The Petitioners in both C.A. 63/2004 and C.A. 626/2004 have filed these two applications before this Court for *restitutio in integrum* and revision.

The Petitioners aver that they purchased their separate lots from one Melvin Dayananda (the 6th Defendant-Respondent in the partition action D.C. *Kuliyapitiya* Case No.7086/P) out of the blocked portions that the said Dayananda had made after his own purchase of a larger land that had belonged to the Land Reforms Commission. The Petitioners in both applications have attached to their petitions their respective deeds of transfer along with the Deed bearing No.1168 that had transferred the larger land called *Marylandwatta alias Kammalwatta* from the Land Reforms Commission to Dayananda (6th Defendant-Respondent). It is after this purchase from the Land Reforms Commission that the 6th Defendant-Respondent blocked out the land into 12 lots and sold them to the Petitioners.

The Petitioners exercised due diligence in obtaining title reports that indicated that their vendor 6th Defendant-Respondent had valid and effectual title to the said land-*caveat*

emptor; qui ignorare non debuit quod jus alienum emit-"No one ought in ignorance to but that which is the right of another".

Some of the Petitioners purchased their blocks under loan schemes and thereafter they constructed houses on the lands and their families live peaceably in their houses in the comfortable belief and warranty that the title to their dwellings are free from any defects.

Both applications plead that their respective folios in the land registry never indicated that any partition action had been instituted in respect of their lands.

Both petitions for revision and *restitutio in integrum* state that-'somewhere in January 2004, the Petitioners came to know that the District Court of *Kuliyapitiya* had entered a final partition decree in respect of a land called *Delgahawatta* and that this decree incorporates the lands of the Petitioners' as well. One of the beneficiaries of the partition decree is the 4th Defendant-Respondent and even the date for execution had been fixed. Upon inquiries made from the District Court, the Petitioners came to know that there had been a partition action bearing No.7086/P and the judgment in the case had been delivered on 15.05.1997. They also found that their lands had been engulfed in the corpus of the said partition action.

It appeared that the visit of the fiscal to eject the Petitioners in consequence of the final partition decree entered in D.C. *Kuliyapitiya* 7086/P was imminent and that imminence impelled the Petitioners to move this Court for revision and *restitutio in integrum* and further steps in the District Court have since been stayed.

The plans produced in the partition action throw some light on the fact that the lands of the Petitioners have been included as part of the corpus that was sought to be partitioned. The preliminary plan bearing No.916 of 17.02.1986 and its report show that the Plaintiff-Respondents were seeking to partition lots 1, 2, 3, 4, and 5 depicted in the said plan. The report of the surveyor R.B. Navaratne dated 17.02.1986 clearly shows that Narada Dayananda (the vendor of the Petitioners who became the 6th Defendant in the partition suit) had been present before the surveyor and even the parties to the case admitted before the surveyor that he had been in possession of lots which had once

belonged to the Land Reforms Commission. In other words the fact that Lots No.1 and 2 in the preliminary plan bearing No.916 should be excluded from the corpus sought to be partitioned is quite clear from the surveyor's report. Lots 1 and 2 in Plan No.916 are lands that LRC had sold to Narada Dayananda (6th Defendant-Respondent) who in turn blocked and sold them to the Petitioners. I must state that this aspect of the matter had gone begging and the learned District Judge of *Kuliyapitiya* failed to bring his mind to bear upon this aspect of the report in his imperative duty to investigate title.

Let me turn to the background in which the partition action had proceeded in the District Court

The survey plans bearing 1711 of *Marylandwatte* and Plans 916 and 1398 in the partition Action

a. The Plaintiff-Respondent instituted this partition action on 04.08.1983 against the 1st to 6th Defendant-Respondents in respect of *Delgahawatte* also known as *Thiriwannagalagodahena* which is the adjoining land to the *Marylandwatta.* As evidence from the folios discloses no *lis pendens* had been registered in respect of *Marylandwatta.*

b. The preliminary survey had been done by R.B. Navarathna, Licensed Surveyor. The preliminary survey plan was numbered 916 and is dated 17.02.1986. Thereafter a superimposition was done by superimposing Plan No.1711 of Surveyor Y.M.A. Yapa (being the survey plan of that part of *Marylandwatte)* upon Plan No.916. The plan containing the superimposition was marked as **X1** in the District Court. The report thereon has been appended as **X.**

c. In the report the surveyor has clearly indicated that Lot 1B and 2B of the plan bearing No.1398 and dated 03.12.1987 is part of the land depicted in Plan No.1711 prepared by Y.M.A. Yapa licensed surveyor (called *Marylandwatte*).

d. The total extent of Lot 1B and 2B in Plan 1398 is 1 acre 0 roods and 17 perches the exact extent of that part of *Marylandwatte* originally purchased by Dayananda from the Land Reform Commission.

e. As such Court ought to have excluded Lots 1B and 2B from the partition action, but it failed to do so.

The Plaintiff-Respondent cannot plead ignorance of the fact that the corpus contained a land named *Marylandwatte* for which no *lis pendens* had been registered at the *Kurunegala.*

The trial and judgment in the District Court

On the 10.06.1996 when the above matter came up for trial the Counsel for the 4th Defendant-Respondent informed the court that he had sold his share and was not staking claim in respect of the land. However on 12.09.1996 the Counsel for the 4thDefendant-Respondent informed court that he had not sold his share whereupon the learned District Judge vacated the earlier evidence and commenced trial afresh.

When the trial commenced on 12.09.1996 the Plaintiff testified to the effect that the surveyor Navaratne prepared Plan 1398 (the Plan marked as **X1** and the Report marked as **Y1**) in order to secure the exclusion of the land belonging to the Land Reform Commission. He had in evidence inadvertently stated that only Lot 1A needed to be excluded. However if the learned District Judge had examined the surveyor's report it would have become evident that not only Lot 1A but also Lot 1B and 2B should have been excluded as the land belonging to the Land Reform Commission.

When the 4th Defendant gave evidence he clearly stated that he was entitled to 1/5th of corpus,

In the judgment dated 15.05.1997 the learned District Judge while holding that Plan 1398 was prepared in order to exclude the land of the Land Reform Commission merely acted on the Plaintiff's evidence and excluded only Lot 1A without examining the report of surveyor Navaratne which clearly indicated that Lots 1B and 2B were also lands contained in Plan 17811 (*i.e.*, LRC land), which had to be excluded.

The learned District Judge also held that the 4th Defendant was entitled to 22495 of 58896 shares of the land, when both in the statement of claim and his evidence the 4th Defendant has staked a claim only in respect of a 1/5th share of the land.

According to the said final decree the 4th Defendant-Respondent had been allotted Lot No.1 of preliminary plan bearing No.916 made by R.B. Navaratne Licensed Surveyor. It has been brought home to the notice of this Court in this application that the said Lot No.1 contains the land named *Marylandwatte* which belongs to the Respondents.

On 05.01.2004 a writ of execution came to be issued in favour of the 4th Defendant-Respondent.

There is no doubt that the plan that arose out of the superimposition namely 1398 clearly shows that Lot 1B and Lot 2B must have been excluded from the corpus sought to be partitioned. The corpus included the land belonging to LRC which is known as *Marylandwatte*. In addition to Lot 1A, Lot 1B and 2B must have been excluded.

It is quite clear that the corpus was a larger land and there was no *lis pendens* that was registered for the *Marylandwatte*. The purpose in registering *lis pendens* is twofold: firstly, that all parties who have registered documents may have notice of the action; and, secondly, that intending purchasers of undivided shares may be made aware of the partition action that is pending. There is every possibility that without such *lis pendens*, the Petitioners were ignorant of the partition suit and purchased their lands and built their houses thereon. The extracts of the folios have been appended to the applications and they clearly indicate that no *lis pendens* had been registered in relation to *Marylandwatte*. In other words the Petitioners had not been put on notice of the fact that the parcels of land that they had purchased were incorporated into the corpus of the partition action.

The genuineness of the claims of the Petitioners is brought out by the final plan. The report of the surveyor who prepared the final plan bearing No.3616 disclose that there are newly built houses in Lot 1 of the survey plan.

The statements of objections filed by the chairman of the Land Reform Commission, the Plaintiff-Respondent and 6th Defendant-Respondent confirm that the Petitioners secured their title from the Land Reform Commission and accordingly the lands belonging to the Petitioners must have been excluded.

From the foregoing it is clear that whilst the report of the surveyor clearly showed that Lots 1B and 2B were parts of the plan bearing No.1711, the learned District Judge merely looked at the evidence of the Plaintiff and excluded only Lot A.

In my view the learned District Judge had acted mechanically and routinely. He had been oblivious to the obvious facts and in view of the material that has emerged in this application, it becomes incumbent upon the learned District Judge to ask the question as to how people (not disclosed in the plaint) could reside on the land if they did not have interest in the soil or the land.

The learned District Judge had excluded from consideration facts evidenced by the preliminary plan bearing No.966 and the plan that arose out of the superimposition. The reports of the surveyor speak volumes of the interests of others in the land that had been incorporated into the corpus. If the learned District Judge had given the utmost consideration to the plans and reports, he would have seen Lots 1B and 2B would not belong to the Plaintiff or the 4th Defendant-Respondent.

It is trite law that if the title of the parties had not been investigated, the Court of Appeal or the Supreme Court in the exercise of its revisionary jurisdiction would set aside the judgment of the District Court even on the application of a person who has not even been a party to the action and had even been absent from the Court on the trial date-*see* ***Kannangara v. Silva*** 35 N.L.R 01. In this case the Supreme Court directed the District Court to hold the trial *de novo* and investigate title.

So I would set aside the judgment and decree entered in this case and direct the learned District Judge to conduct a trial *de novo* and the Petitioners should be added and permitted to file their statements of claim. All proceedings had so far in this case are all invalidated.

This judgment would also be applicable in full force to the connected application C.A. Application No.63/2004. The same orders I have made in this application are made in C.A. Application No.63/2004.

Thus I allow both these two applications namely C.A. Application No.63/2004 and Application No.626/2004

JUDGE OF THE COURT OF APPEAL