

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

In the matter of an Application for Revision and/or Restitutio in Integrum under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka against an order of learned Judge of High Court of Civil Appeal of Western Province Holden in Kalutara case bearing No. WP/HCCA/KALU/90/2016(F) dated 30.11.2023, and the Judgement of the District Court of Kalutara dated 27.01.2009.

**CA Case No: RII/04/2024
WP/HCCA/KALU/F Appeal
No. 90/2016(F)
DC Kalutara Case No. 7915/P**

1. Mohomed Hanifa Mohamed Azahim of No. 362, Matugama Road, Darga Town.
2. Mohomed Hanifa Mohamed Afan of No.35/1, Sachia Road, Darga Town.

Plaintiffs

Vs.

1. Mohomed Hanifa Siththi Fathima of No. 361, Matugama Road, Darga Town.
2. Mohomed Hanifa Mohamed Nazeb of No. 143, Matugama Road, Darga Town.
3. Mohomed Hanifa Mohamed Noufer of No. 360, Matugama Road, Darga Town.
4. Mohomed Hanifa Mohamed Siddik of No. 40, Church Road, Gorakana, Keselwatta.
5. Mohomed Hanifa Siththi Suveima of No. 362, Matugama Road, Darga Town.
6. Mohomed Hanifa Fathima Nasrura of No. 362, Matugama Road, Darga Town.

Defendants

AND BETWEEN

1. Mohomed Hanifa Mohamed Azahim of No. 362, Matugama Road, Darga Town.
2. Mohomed Hanifa Mohamed Afan of No. 35/1, Sachia Road, Darga Town.

Plaintiffs- Appellants

Vs.

1. Mohomed Hanifa Siththi Fathima of No. 361, Matugama Road, Darga Town.
2. Mohomed Hanifa Mohamed Nazeb of No. 143, Matugama Road, Darga Town.
3. Mohomed Hanifa Mohamed Noufer of No. 360, Matugama Road, Darga Town.
4. Mohomed Hanifa Mohamed Siddik of No. 40, Church Road, Gorakana, Keselwatta.
5. Mohomed Hanifa Siththi Suveima of No. 362, Matugama Road, Darga Town.
6. Mohomed Hanifa Fathima Nasrura of No. 362, Matugama Road, Darga Town.

Defendants- Respondents

AND NOW BETWEEN

1. Mohomed Hanifa Mohamed Azahim of No. 362, Matugama Road, Darga Town.

1st Plaintiff- Appellant-Petitioner

Vs.

1. Mohomed Hanifa Siththi Fathima of No. 361, Matugama Road, Darga Town.

2. Mohomed Hanifa Mohamed Nazeb of No. 143, Matugama Road, Darga Town.
3. Mohomed Hanifa Mohamed Noufer of No. 360, Matugama Road, Darga Town.
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5. Mohomed Hanifa Siththi Suveima of No. 362, Matugama Road, Darga Town.
6. Mohomed Hanifa Fathima Nasrura of No. 362, Matugama Road, Darga Town.

Defendants-Respondents- Respondents

Before:

R. Gurusinghe J.

&

M.C.B.S. Morais J.

Counsel:

J.M. Wijebandara with Dimitri Pandiwita instructed by Mr. Milindu Sarathchandra for the Petitioner.

M. Nizam Kariapper, PC with Chathurika Perera instructed by Mr. M.I.M. Iynullah for the 4th Defendant-Respondent- Respondent.

Written Submissions:

By the Plaintiff-Appellant- Petitioner – on 28.02.2025

By the 4th Defendant-Respondent- Respondent – 05.02.2025

Argued on:

16.12.2024

Decided On:

15.05.2025

ORDER

M.C.B.S. Morais J.

This is an application for revision and / or *restitutio integrum* under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka. The 1st Plaintiff-Appellant-Petitioner (herein after sometimes will be referred to as the Appellant) is challenging the order dated 30th of November 2023 made by the learned Judge of High Court of Civil Appeal of Western Province Holden in Kalutara and the judgement dated 08th of March 2016 delivered by the learned District Court of Kalutara.

Although the caption mentions the learned District Court Judge has delivered the judgment on 27th January 2009, the judgment of the learned District Court Judge of Kalutara was in fact delivered on 8th March 2016. Accordingly, the Appellant has prayed for the following.

- I. *"Issue notice to the Defendants-Respondents-Respondent at the first instance,*
- II. *Revise and set aside the judgment of High Court of Civil Appeal of Kalutara dated 30.11.2023 (X12), and the judgment of the District Court of Kaluthara dated 08/03/2016(X7)*
- III. *To restore the rights of the parties prior to purported documents marked as "er 6"/81 which on the face of it appears as a deed of gift bearing number 6943 dated 05-06-1993 attested by A.C.M.A. Mashood Notary Public,*
- IV. *Enters the judgment as prayed for in the plaint of the District Court of Kalutara dated 25.10.2010,*

OR

- V. *In the alternative to the above (d) direct a trial-de-novo allowing parties to raise actual point of contest arising out of the dispute,*
- VI. *Call for the record of the District Court case bearing No.DC/Kalutara/7915/P.*
- VII. *Issue an interim order staying the further proceedings of the District Court of Kalutara case bearing No.7915/P until the final determination of this application,*

VIII. Call for the record of the High Court of Civil appeals case No: WP/HCCA/Kalu/90/2016(F),

IX. Grant costs,

X. Any other and further relief that Your Lordships' Court may seem meet."

The Appellants have instituted a Partition action against the above six Defendants who are the sisters and brothers of the same family. It is the Appellants' position that the original owners of the corpus were Rahuman Lebbe Mohomad Hanifa and Ummul Jemila who were husband and wife. All 8 parties to the action are children born out of the wedlock. Therefore, the Appellants have prayed for division of the corpus according to the shares described in Paragraph 5 of the Plaintiff.

However, all six Respondents have made a joint statement of claim and disputed the schedule of shares set out in the plaint. Further, all six Respondents have taken up the position that the 4th Respondent should be declared as the sole owner of the said property.

Although there were two Appellants, the 2nd Appellant was not in the country in most instances, hence the 1st Appellant has come forward representing both the Appellant's interest.

During the trial it was revealed that, out of the two original owners, the rights of the aforementioned Rahuman Lebbe Mahamadu Hanifa (the father of all 8 children) has transferred half of his share to one Yasawathi Padma Punchihewa by deed bearing No.11311. Further, the said Yasawathi Padma Punchihewa has transferred the said share in the name of the 4th Respondent.

The other original owner, namely Thambi Marikkar Ummul Jemila has died intestate, and her husband namely Rahuman Lebbe Mahamadu Hanifa and the two plaintiffs and the six Respondents have inherited that half of her shares. The Appellants states that they have inherited the shares together with the other Respondents. However, it is the Respondents claim that all intestate heirs got together and gifted their rights exclusively to the 4th Respondent by Deed of gift bearing No.6943 dated 5th of June 1993, attested by A.C.M.A. Mashood Notary Public. However, it is the contention of the Appellants that the aforesaid deed of gift No.6943 is fraudulent and was not accepted by the 4th Respondent and therefore invalid in law.

Further, it is the Appellants stance that during the trial the official witness from the land registry has given evidence enunciating informal interpolation, discrepancies and the absence of the attesting witnesses signature in the deed marked as ‘V1’. However, having considered the materials submitted, the learned District Court Judge has made the judgement dated 08th of March 2016 in favor of the Respondent and has dismissed the plaint.

Being aggrieved by the said order of the learned District Court Judge of Kalutara, the Appellants have appealed to the High Court of Civil appeal holden in Kalutara on the ground that the said judgement is contrary to law and the learned District Court Judge erred in law.

Accordingly, on 30th of November 2023 the learned Judge of the High Court of the Civil Appeal holden in Kalutara dismissed the appeal of the Appellants and affirmed the judgment of the learned District Court Judge of Kalutara. Being aggrieved by the said order, the Appellants have made an application under Article 138 of the Constitution considering the exceptional circumstances of the case.

Accordingly, the 4th Defendant-Respondent-Respondent (hereinafter sometimes will be referred to as the Respondent) has raised the following preliminary Objections.

- A. “ *Ex-facie the Petitioner has failed to establish the existence of exceptional circumstances;*
- B. *The purported Application of the Petitioner is ex-facie misconceived and/or bad in law; The Petitioner has failed to act with utmost promptitude and the Petitioner is guilty of blatant lack of due diligence, and of laches in instituting the above styled Application;*
- C. *The Petitioner is guilty of willful suppression and misrepresentation of material facts and documents;*”

It is the contention of the Respondent that the Appellants have failed to establish any exceptional circumstances to make an application under *restitutio in integrum* or revision and therefore is contrary to law. Even though the Appellants contend the validity of the deed bearing No.6943, the burden is on the Appellant to prove what he asserts.

Furthermore, it is apparent that in the case filed in the District Court of Kalutara the Appellants have refrained from disclosing that they have signed the impugned deed. This amounts to non-disclosure of material facts, as their signature on the deed of gift bearing No. 6943 is undisputed.

The basis of the Appellants' contention is fraud. Therefore, in order to succeed in a *restitutio in integrum* or revision application, the Appellants must establish that the Respondents have committed fraud. The alleged fraud concerns the absence of the signature and the interpolation of the name of the second witness in some copies of the impugned deed of gift.

The Respondent claims that the absence of one witness in the deed bearing No. 6943 does not invalidate the deed according to Section 33 of the Notaries' Ordinance.

"33. Instruments not to be invalid for non-compliance in any matter of form.

No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form:

Provided that nothing hereinbefore contained shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions of any other written law."

It is apparent that non-compliance of formal requirement does not invalidate the deed. Further, the Respondent claims that the acceptance of the said deed was done by a cousin, who has been authorized to accept such by the 4th Respondent on his behalf (as stated so in the said impugned deed itself). Considering that the impugned deed was executed in 1993 and the partition action was filed in 2010, the continuous and uninterrupted possession of the said corpus leads to an inference that the deed of donation was accepted.

This has been established by Hutchinson CJ. in the case of ***Senanayake v. Dissanayake (1908) 12 NLR 1,***

"it is not essential that the acceptance of a deed of gift should appear on the face of it. but that such acceptance may be inferred from circumstances and that possession by the

donee of the property donated leads to the inevitable inference that the deed of donation was accepted.”

In any event the situation might have been different if the Appellants had gone to the District Court on the basis of a declaration of nullity. However, they have elected to file a partition action on the basis that the impugned deed is fraudulent, which is yet to be proven.

When considering the preliminary objections raised by the Respondent, it is apparent that the Appellants could have appealed against the impugned judgment of the High Court of Civil Appeal holden in Kalutara. For reasons best known to the Appellants, they have failed to do so, and no reason for this failure has been provided. Had the Appellants filed an appeal, the merits of the judgment made by both the learned District Court Judge and the learned Judge of the Civil Appellate High Court would have been considered. However, since this is an application for *restitutio in integrum* or revision, it is mandatory for the Appellants to establish exceptional circumstances such as fraud or other valid grounds to invoke the extraordinary jurisdiction, which the Appellant has failed to do.

In light of such, and when considering together with the entirety of the materials before us, it is my view that the extraordinary jurisdiction vested in this Court by Article 138 need not be invoked, as there are no exceptional circumstances or reasonable grounds warranting such an invocation.

Accordingly, the said preliminary objection is upheld, and the application of the Appellants is dismissed with costs fixed at Rs. 50,000.00 payable to the 4th Respondent by the Appellants.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree

Judge of the Court of Appeal