

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

In the matter for an application for *Revision*
and/or Restitutio in Integrum under and in terms
of Article 138 of the Constitution and the
Rules of the Supreme Court.

C.A. RI 877/2010

D.C. Kegalle Case
No. 24852/P

2. Ratna Banjanayalage Piyadasa
Kolongalla,
Hiriwadduna

3. Divullewegedara Sobanie
Kolongalla,
Hiriwadduna

2nd and 3rd DEFENDANT-PETITIONERS

-Vs-

Divullewegedara Siripala
Kolongalla,
Hiriwadduna

PLAINTIFF-RESPONDENT

1. Divullewegedara Somawathie
Kolongalla,
Hiriwadduna

4. Viskuruppu Yaddessalage Chaminda Lal
Wickramasinghe
Kolongalla,
Hiriwadduna

1st and 4th DEFENDANT-
RESPONDENTS

BEFORE

:

A.H.M.D. Nawaz, J. (P/CA)
Sobhitha Rajakaruna, J.

COUNSEL. : M. Premachandra for the 2nd and 3rd
Substituted-Defendant-Petitioners
V. Gunaratne for the Plaintiff-Respondent
R.J. Upali de Almeida for the 1st Defendant-
Respondent

Argued on : 14.09.2020
Decided on : 30.11.2020

A.H.M.D. Nawaz, J. (P/CA)

This is an application for revision/ or *restitutio in integrum* seeking to set aside inter alia

- 1) the judgment dated 12.2.1999 of the District Court of Kegalle
- 2) the interlocutory and final decrees that have been entered in the case, including the proceedings that took place on 12.02.1999;

or to have a trial *de novo* ordered with the participation of the 2nd and 3rd defendants. It is these 2nd and 3rd Defendants to the Partition case (one Piyadasa and Sobanie a son and mother combination) that have preferred this application for revision or *restitutio in integrum*.

As the arguments of all counsel unfolded and upon a perusal of the pleadings in this partition case bearing No 24852/P, it is clear that Siripala (the Plaintiff-Respondent to this application) sought partition of the subject matter in the action among himself, one Somawathie (1st Defendant to the Partition case) and Piyadasa (2nd Defendant to the partition case). Siripala had cited only Somawathie and Piyadasa as the 1st and 2nd Defendants in his plaint but not Sobanie-his sister. Sobanie added herself as the 3rd defendant and filed her statement of claim praying for a dismissal

of the partition action filed by her brother Siripala. It is this Sobanie (3rd Defendant-Petitioner) who is before this Court along with her son Piyadasa (2nd Defendant-Petitioner) seeking the invalidation of all the proceedings in the Partition action. Though Siripala claimed an exclusive half a share of the corpus to the partition action, the sister Sobanie (the 3rd defendant) repudiated his claim and asserted that he had no entitlement whatsoever to the half share. Siripala relied on a deed bearing No 4446 of 31/12/1984 which was purported to have been executed by his father Unga-vide P3 and the pedigree filed by Siripala -page 73 of the case record marked as A. Sobanie claimed in her statement of claim that this deed was a forgery as the deed was not the act and deed of her father Unga. It is on this account that she asserted that she had sought a nullification of the deed in the same Court in Case No 4291/L. Her statement of claim dated 11.06.1991 sought a dismissal of Siripala's partition action on the basis that he derived no title to the half share as the forged deed 4446 of 31.12.1984 would convey no title or interest to him. In the alternative she claimed that since the half share of her father Unga devolved equally on her and Siripala, the half share must be partitioned in equal lots between her and Siripala. Her assertion was that any partition of the half share depended on the outcome of the other case 4291/L that she had filed in the same court to invalidate the impugned deed bearing No 4446.

So much for the half share of the corpus which was thus disputed. This aspect of the matter has received scant or no consideration by the learned Additional District Judge of *Kegalle* and I will presently revert to it.

As regards the other half share of the corpus, the Plaintiff Siripala claimed that it had devolved on Somawathie (the 1st Defendant to the Partition case) but since Somawathie later sold an extent of 2 lahas of paddy sowing to Piyadasa (the 2nd

Defendant), that half share must be partitioned between Somawathie (half share-2 lahas of paddy sowing extent) and Piyadasa (2 lahas of paddy sowing extent). It is significant to note that in a joint statement of claim filed, both Somawathie (the 1st Defendant) and Piyadasa (the 2nd defendant) acknowledged this factual position and conceded that the relevant half share must be partitioned in the way Siripala asserted in his plaint namely Somawathie (half share-2 lahas of paddy sowing) and Piyadasa (2 lahas). Thus there was an admission in the pleadings by Somawathie that she did not have full title to the half share but only half a share minus 2 lahas of paddy sowing extent. So much for the other half share, which too had received sloppy treatment by the learned Additional District Judge.

Thus it is crystal clear that Siripala's claim to absolute ownership of the half share of the corpus hinged around one deed bearing No 4446 of 31.12.1984, which was being challenged as a forgery by his sister Sobanie in the other case bearing No 4291/L.

In such a backdrop the investigation of title in the partition case (24852/P) has to await the outcome of the case for nullification of the deed (4291/L) and upon a perusal of the journal entries, it does appear that the partition case filed by Siripala had been called along with the case for nullity of the deed till 12.09.1997.

The case for nullity ended in Sobanie's favour when the learned District Judge of *Kegalle* pronounced judgment in the case on 19.09.1997 declaring the deed No 4446 of 31.12.1984 null and void. This declaration of nullity by the District Court on 19.09.1997 would mean that Siripala did not derive any title to the half share in the corpus. Thus it would appear that Sobanie's claim that it should be partitioned equally between her and Siripala, as asserted by her in her statement of claim, was

more probable than his claim and as could be expected, Siripala preferred an appeal to the Court of Appeal and all counsel notified this Court that after Siripala failed in the Court of Appeal in CA 883/97 (F) D.C. Kegalle 4291/L, his application for special leave to the Supreme Court (SC spl LA 259/2018) became abortive when the Supreme Court refused leave on 13.03.2020.

Thus the judgment of the District Court of *Kegalle* in case no 4291/L that declared Siripala's pivotal deed bearing No 4446 null and void was affirmed by the Supreme Court resulting in his claim of absolute ownership to half share failing in the end. If at all, I would observe that the partition case 24852/P should have begun its course after the conclusion of proceedings in the Supreme Court on 13.03.2020.

But it was not to be as there was undue haste in concluding this partition action whilst appellate proceedings were pending in the Court of Appeal. Notwithstanding the fact that the validity of his deed was in appeal in the Court of Appeal, Siripala took the stand in the partition case on 12.02.1992 before the learned Additional District Judge of *Kegalle* and testified to his absolute entitlement to the half share-see proceedings dated 12.02.1999-page 137 of the brief. To cap it all, none of the defendants were present in Court and the Court even proceeded to admit a certified copy of the duplicate of the impugned deed bearing No 4446. This is explicable as the original deed would have found its way to the Court of Appeal as he had preferred an appeal.

As I said before, the learned Additional District Judge of *Kegalle* paid no attention to the pleadings in the case. A cursory glance at Sobanie's statement of claim (the 3rd Defendant-Petitioner) and the journal entries would have alerted him that the validity of the deed relied upon by Siripala was crucial to the investigation of his

title. A diligent reference to the case for nullity of the deed 4291/L would have revealed that it was not safe to embark upon *ex parte* proceedings in the way the learned Additional District Judge set about.

He could not have allotted the half share to Siripala on the mere production of a certified copy of a duplicate of the deed bearing No 4441, whose very validity was in question in the Court of Appeal. Here was a witness Siripala whose deed had been declared null and void by the District Court of Kegalle on 19.09.1997. His appellate proceedings had not run its course but he was audacious enough to take the witness stand on 12.02.1999 in the absence of all other defendants to stake his claim to the half share, when the validity of his deed had not even been established.

Therefore the allotment of the half share to Siripala in such circumstances shocks the conscience of this Court-see Jameel's J judgment in the Court of Appeal *Wijesinghe v Tharmaratnam* IV Sriskantha's Law Reports 47 at 49.

It needs recapitulation that the duty of a District Judge under Section 25 of Partition Law is quite independent of what parties may or may not say. I need hardly reiterate the golden rule that a partition decree operates against the whole world and no trier of fact should leave any stone unturned in ascertaining the real entitlement of the parties-see the dicta of L.W. de Silva, A.J (with Basnayake C.J., agreeing) in *Juliana Hamine v Don Thomas* (1957) 59 N.L.R 546 at 549:

"We are of the opinion that a partition decree cannot be the subject of a private arrangement between parties on matters of title which the court is bound by law to examine. While it is indeed essential for parties to a partition action to state to the court the points of contest inter se and to obtain a determination on them, the obligations of the court are not

discharged unless the provisions of Section 25 of the Act are complied with quite independently of what parties may or may not do."

The judgment of the learned Additional District Judge of Kegalle suffers from a want of investigation that goes to taint his allotment of half a share of the corpus absolutely to the Plaintiff Siripala. In view of the fact that both the Court of Appeal and Supreme Court have both found the deed that allegedly gave him half a share null and void, it would be preposterous to uphold the judgment of the Additional District Judge dated 12.02.1999.

There is another cardinal error that vitiates the judgment in yet another respect. As if the error in allotting the half share to Siripala is not glaring enough, the learned Additional District Judge fell into a grave error once again when he allotted the other half share of the corpus only to Somawathie (the 1st Defendant). A careful glance at the joint statement of claim of Somawathie (1st Defendant) and Piyadasa (2nd Defendant) revealed that Somawathie had less than half since she had parted with 2 lahas of paddy sowing extent to Piyadasa. Even in the so called *ex parte* proceedings on 12.2.1999, Siripala did admit that Piyadasa had purchased an extent of land in 2 lahas out of the half share of Somawathie. I must say that the learned Additional District Judge turned a blind eye to this item of evidence. Based on the admission of Somawathie and evidence, the other half share must have been partitioned between Somawathie and Piyadasa but the learned Additional District Judge chose to give the entire half to Somawathie. Quite contrary to the joint statement of claim and evidence, I hasten to say that he deprived Piyadasa of the extent of 2 lahas paddy sowing to which he was lawfully entitled.

Thus the judgment in this case dated 12.02.1999 is patently erroneous and unsustainable for its non-compliance with partition law. In the circumstances the interlocutory and final decrees entered in this case become vitiated and they have to be set aside.

The learned counsel for the 1st Defendant-Respondent Somawathie complained of delay on the part of the Petitioners Sobanie and her son Piyadasa, whose interests in the land have both been greatly prejudiced by the defective proceedings in the case. Piyadasa's interest to the other half share (2 lahas of paddy sowing) has been extinguished wholly, whilst the interest of his mother Sobanie (one fourth of the half share which Siripala claimed) has not been considered at all.

Such a manifest illegality in the proceedings cannot remain as such merely because there has been delay in preferring this revision/ or *restitutio in integrum* application to this Court. Whatever delay there was cannot trump the illegality in the judgment which dealt with the proprietary rights of Sobanie and Piyadasa and wiped them out completely to their prejudice. It is not as if Sobanie has lain dormant. I find that all her applications to Court- first to the District Court and thence to the Civil Appellate Court- have all but failed owing to misappreciation of the law pertaining to what relief should be sought and such misappreciation commonly encountered in our courts cannot be visited upon the Petitioners who have been deprived of their entitlement to the corpus-see the availability of revision even after a long lapse of time when there is manifest illegality- *Kankanamage Chandana Geetha Priya v Don Martin Amarasinghe and Others* CA R,I 382/2014 (CA minutes of 07.05.2019).

At this stage I have to advert to another argument advanced by the learned Counsel for the 1st Defendant-Respondent Somawathie. It is common ground that Somawathie who, on her own admission, had only half a share minus 2 lahas subsequently found herself allotted with the half share quite paradoxically by the defective judgment in this case. We may recall that she had admitted in a joint statement of claim with her vendee Piyadasa that she had ownership only to less than half a share of the corpus.

But when the learned additional District judge wiped out the 2 lahas of Piyadasa and gave Somawathie back the full half share, she subsequently executed a deed for the full half share in favor of one Susantha Rohana. Though Susantha Rohana was not a party before this Court, the learned Counsel for the 1st Defendant-Respondent called him a successor of Somawathie and contended that Susantha Rohana's rights in the land cannot be prejudiced in the event this Court proceeds to set aside the judgment and all decrees in the case. It has to be noted that Somawathie was well aware that she was not entitled to the full half share of the land when she had already sold 2 lahas of paddy sowing extent to Piyadasa. Merely because a defective judgment deprives her vendee Piyadasa of his interest and gives her back the share that she had already parted with, she could not have conveyed the full half share to Susantha Rohana. She had no title to the half share and she could have transferred only half a share of the corpus minus 2 lahas to Susantha Rohana.

In my view Susantha Rohana could have acquired only what Somawathie owned namely an allotment of the half a share minus the 2 lahas.

If Susantha Rohana has constructed any buildings on the whole half share, I hold the view that Somawathie who obtained consideration for the 2 lahas must pay compensation to Piyadasa at the current value of the extent which would fetch for an extent in 2 lahas. Alternatively if an extent of 2 lahas can be carved out of the half share which Susantha Rohana has purchased, that extent has to be allotted to Piyadasa-the 2nd Defendant in the case.

I am acutely aware of the inordinate delay that would result if I were to remand this case back to the District Court of *Kegalle* and though I am inclined to set aside all proceedings and decrees and make the allotment in this Court itself on the reasoning I have adopted above, I do feel that since the facts are quite plain as a pikestaff, the learned District Judge sitting in *Kegalle* cannot take long to conclude this matter even if this case is remanded back to the District Court.

In a nutshell I have concluded that one half of the corpus must be divided in equal parcels between Siripala and Sobanie. The other half has to be partitioned between Somawathie (half a share minus 2 lahas) and Piyadasa (2 lahas). If Susantha Rohana has bought from Somawathie as contended by Counsel, his claim has to be established and in the process of the investigation an ascertainment must be made as to whether he has built on the whole half share or an extent of 2 lahas can still be carved out of the half share. In that event it should be allotted to Piyadasa or else he has to be compensated by Somawathie who has benefitted out of the sale to Susantha Rohana.

Such a course of action needs investigation and so I proceed to set aside the judgment dated 12.02.1999 and all decrees entered in this case. The learned District Judge of *Kegalle* is directed to fully investigate title and ascertain the rights of parties. All parties including Susantha Rohana have to be noticed by Court and the learned District Judge shall give priority to this case and conclude the matter expeditiously. Thus a trial *de novo* is ordered and the case is remitted back to the District Court.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna J.

I agree.

JUDGE OF THE COURT OF APPEAL