

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

In the matter of a *Revision / Restitutio in Integrum* application against the judgment and interlocutory decree and subsequent steps taken in case No. P/943/08 of the District Court, Gampola under section 48 of the Partition Act.

C.A. RI 04/2018

D.C. Gampola Case  
No: P/943/08

1. Ratnayake Mudiyanselage Heen Banda
2. Ratnayake Mudiyanselage Bissomenika
3. Ratnayake Mudiyanselage Tikiri Banda
4. Ratnayake Mudiyanselage Mallika
5. Ratnayake Mudiyanselage Thamara Kumari

All of,

Megoda Kalugamuwa,  
Peradeniya.

**PLAINTIFFS**

-Vs-

1. Ratnayake Mudiyanselage Ratnayake
2. Ratnayake Mudiyanselage Podimenike
3. Ratnayake Mudiyanselage Ananda Ratnayake
4. Ratnayake Mudiyanselage Nandani Podimenike

All of,

Megoda Kalugamuwa,  
Peradeniya.

5. Ratnayake Mudiyanselage Tikiri Banda

All of,  
No. 179/l, Narandeniya,  
Godawatte,  
Megoda Kalugamuwa,  
Peradeniya.  
(Deceased)  
DEFENDANTS

AND NOW

1. Pathirage Dona Perli Jayawardena
2. Induni Madhushanka Bandara
3. Ratnayake Mudiyanselage Nuwan Asela Bandara Wijeratne
4. Ratnayake Mudiyanselage Sachini Amanda Wijeratne

All of,  
No. 179/l, Narandeniya,  
Godawatte,  
Megoda Kalugamuwa,  
Peradeniya.

PETITIONERS

- Vs-
1. Ratnayake Mudiyanselage Heen Banda
  2. Ratnayake Mudiyanselage Bissomenika
  3. Ratnayake Mudiyanselage Tikiri Banda
  4. Ratnayake Mudiyanselage Mallika
  5. Ratnayake Mudiyanselage Thamara Kumari

All of,  
Megoda Kalugamuwa,  
Peradeniya.

1-5 PLAINTIFF- RESPONDENTS

6. Ratnayake Mudiyanselage Ratnayake
7. Ratnayake Mudiyanselage Podimenike
8. Ratnayake Mudiyanselage Ananda Ratnayake
9. Ratnayake Mudiyanselage Nandani Podimenike

All of,  
Megoda Kalugamuwa,  
Peradeniya.

1-4 DEFENDANT- RESPONDENTS

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

COUNSEL : Sunil Abeyratne with Buddhika Alagiyawanna  
for the Petitioners.  
  
Ikram Mohamed, PC., Jagath  
Wickramanayake, PC., Chamila  
Wickramanayake with Gimhani Jayaweera  
instructed by C. Suriyaarachchi for the 1<sup>st</sup> to 5<sup>th</sup>  
Plaintiff-Respondents and 1<sup>st</sup> to 4<sup>th</sup> Defendant-  
Respondents.

Argued on : 10.07.2020  
Decided on : 25.11.2020

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

The Petitioners who were not parties to the partition action seek the relief of *revision/restitutio in integrum* in their attempt to set aside the judgment and interlocutory decree that have been entered in the said partition action bearing No P/943/08 in the District Court of *Gamploa*. The 1<sup>st</sup> to 5<sup>th</sup> Plaintiffs-Respondents to this application (hereinafter sometimes referred to as the Plaintiffs) had instituted this action on 20<sup>th</sup> November, 2008, against the 1<sup>st</sup> to 4<sup>th</sup> Defendants-Respondents (hereinafter sometimes referred to as the Defendants) to partition the land called *Narandeniya Godawatte* into 9 Lots, each of them to be entitled to 1/9<sup>th</sup> share of the said land equally, and leaving an extent of 16 perches out of the subject matter. Between the Plaintiffs and the Defendants there was no contest with regard to the identity of the corpus, shares and the title of their predecessors. The five Plaintiffs and the four Defendants are relatives. The land was surveyed, on a commission issued by the Court, by one D.M.P.B. Rambukwella, Licensed Surveyor on 17<sup>th</sup> May, 2010, whose preliminary plan bearing No. 3269 and Report dated 16.12.2010 have been filed of record marked "X" and "Y" respectively.

In the original plaint, the 5<sup>th</sup> defendant was not mentioned as a party. He had appeared at the time of the preliminary survey before the surveyor and claimed a right to the land surveyed. The surveyor informed court of this by way of his Report, stating that one R.M. *Tikiri Banda* had built a house and lives in Lot 5 depicted in his Plan, and has given this claimant's address. The said R.M. *Tikiri Banda* was duly noticed by Court and added as the 5<sup>th</sup> defendant.

The 5<sup>th</sup> defendant had appeared in Court upon notice and on 12.03.2013 his proxy was filed by Lalith Weerasena, attorney-at-law. Despite having filed the proxy, he had not taken any step to participate in the case nor did he file a statement of claim or a memorandum under section 81 of the Partition Law, as amended. In fact the record reveals that the said Tikkiri Banda had obtained a date to file his statement of claim. On 17.11.2014, it is recorded in the proceedings that "Mr. Lalith Weerasena, Attorney-at-law

on behalf of the 5<sup>th</sup> defendant states that he has no instructions". Subsequently, the 5<sup>th</sup> defendant is reported to have died on 04.10.2015. After his death no substitution had been effected on his behalf.

When the case was taken up for trial on 17.11.2014 and thereafter, the 2<sup>nd</sup> Plaintiff, and the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants gave evidence in respect of their respective shares. The 2<sup>nd</sup> Plaintiff stated in her evidence that she had no objection to allotting the unclaimed 16 perches to the 5<sup>th</sup> Defendant. However, the learned District Judge without allotting the said 16 perches or any share of the corpus to the 5<sup>th</sup> Defendant, delivered his judgment on 26.04.2016, leaving the 16 perches unallotted.

This application for *restitutio in integrum* and or revision dated 26<sup>th</sup> day of February, 2018 has been filed by the Petitioners, seeking relief, *inter alia*, (i) to set aside the judgment, and interlocutory decree entered and all the subsequent steps taken in case No. P/943/08 of the District Court of *Gampola*, (ii) to restore the rights of the Petitioners allowing them to intervene in the said case and to tender their statements of claims explaining their title and rights to the land surveyed and described in the said Plan No.3269, and (iii) to order the exclusion of Lot 79 of Cadastral Map No. 320124 of the Surveyor General from the subject matter of the partition case.

Before proceeding to consider these reliefs, this Court has to ascertain whether the application of the Petitioner can be allowed to stand in the eyes of the law, in view of the fact that the Petitioners were not parties to the original case before the District Court. The following matters need consideration, namely,

- (i) failure to nominate legal representatives by the 5<sup>th</sup> defendant;
- (ii) failure to intervene in the case when it was pending in the District Court; and
- (iii) inordinate delay in making this application before this Court.

It must be noted here that the preliminary survey of the corpus was done by the Surveyor D.M.P.B. Rambukwella on 17<sup>th</sup> May, 2010, and his Plan and report dated 16.12.2010 have been filed of record. In this report, the 5<sup>th</sup> Defendant's address is given by the surveyor

as No. 179/1, Narandeniya, Godawatte, Megoda Kalugamuwa, Peradeniya. This address must have been furnished by the 5<sup>th</sup> defendant to the surveyor. This is the same address that appears in the caption of the proceedings dated 17.11.2014. Surprisingly, this address is also given by all the four Petitioners in the present application for *restitutio in integrum* and or revision dated 26<sup>th</sup> day of February, 2018, as their residential address. From this it can be presumed, without any doubt, that the deceased 5<sup>th</sup> Defendant must have lived with the Petitioners at the same residence or address prior to his death on 04.10.2015 and therefore the Petitioners cannot disown any knowledge of the partition action bearing No. P/943/08. I am driven to this conclusion because the Petitioners state in their Petition that the 5<sup>th</sup> Defendant did not file his memorandum as required by Section 81 of the Partition Law owing to his serious illness and hospitalization. It is manifest from paragraph 12 (h) of the Petition that the said 5<sup>th</sup> Defendant Tikkiri Banda had been living at the same address as the Petitioners.

The Petitioners, however, state in their written submission that they came to know about the case only after the Surveyor's notice dated 17.12.2017 arrived. This appears to be the notice for final survey. This notice had been sent by the Surveyor to the deceased 5<sup>th</sup> defendant at the address given by him stating that he intended surveying the land on 03.01.2018. The Petitioners' statement in their written submission that they came to know of the pendency of the case only after this notice confirms the position that the 5<sup>th</sup> defendant had lived with the Petitioners at the same address. Therefore, the Petitioners cannot take up the position that they were not aware of the case at an earlier stage.

It is beyond imagination that the Petitioners who had lived at the same address as the 5<sup>th</sup> Defendant were not aware of the Partition Case No. P/943/09 which was pending in the District Court of Gampola. It is also surprising that the 5<sup>th</sup> Defendant, who had appeared before the surveyor, claiming a share in the corpus, did not utter anything about it to any of the inmates in the house including the four Petitioners. Neither the 5<sup>th</sup> defendant nor any one on his behalf had marked his appearance in the case for well over five years. The statement of the Petitioners that they became aware of the case only

after the surveyor's notice is unworthy of credit and unacceptable in light of the tests of probability and means of knowledge. On the question of credibility and evaluation of evidence two very important tests that are applied are the means of knowledge of parties and the test of probability. Did the Petitioners at the relevant time have means of gaining correct information? The test of probability is that one thing may be regarded as more likely to have happened than another with the result that the Judge will reject the evidence in favor of the less likely. These tests were devised because one of the most difficult tasks of a judge, whether it be in the original court or appellate court, is to assess and evaluate the evidence of a witness and decide whether to believe or disbelieve him- see *State of Bihar v Rada Krishna Singh* A.I.R. 1983 S.C.684; Also see an incisive article by a former Master of the Rolls, Chief Justice and a Law Lord of England all rolled into one Sir Thomas Bingham, titled "*The Judge as Juror: The Judicial Determination of Factual Issues,*" -(1985) Curr. Legal Problems, 1-27.

The Indian Supreme Court in *State of Bihar v Rada Krishna Singh* (supra at paragraph 193) enunciated the following matters as material considerations-

- (a) The relationship or the connection however close it may be, which the witness bears to the persons whose pedigree is sought to be deposed to by him;
- (b) The nature and character of the special means of knowledge through which the witness has come to know about the pedigree;
- (c) The interested nature of the witness concerned;
- (d) The precaution which must be taken to rule out any false statement made by the witness *post lite motam* or one which is derived not by means of special knowledge but purely from his imagination; and
- (e) The evidence must be substantially corroborative as far as time and memory admit-see Section 32 (5) of the Evidence Ordinance.

In fact applying these tests I find it difficult to be persuaded that the Petitioners acquired knowledge of the partition action only when the notice for final survey arrived.

It is unthinkable and improbable that the Petitioners, who are claiming to be the owners of the land through the 5<sup>th</sup> defendant and residing in the same house as the 5<sup>th</sup> Defendant had lived, had no knowledge of this Partition action that was pending in the District Court of *Gampola*

It must be noted that the party invoking the extraordinary powers of this Court such as revision must display honesty and frankness in seeking this remedy. Where a party by its own conduct has approved or acquiesced in the proceedings in the lower Court, the Court of Appeal will not exercise its discretion to set aside the proceedings sought to be impugned. For it is not the function of Court in the exercise of its jurisdiction in restitution to relieve the party of the consequences of its own folly, negligence or laches.

*See- Don Lewis vs. Dissanayake* (1967) 70 N.L.R. 8.

It is a general practice that if a person who has a case in a Court of law falls sick or unable to attend court on a particular day due to sickness or any other reasons, he sends some relative or someone to acquaint his lawyer with his inability and obtain a date. The 5<sup>th</sup> Defendant, who had filed his proxy in this case from the same address as the Petitioners did not take any such step. This omission cannot inure to the benefit of the Petitioners.

Furthermore, it is the responsibility of each and every party to a Partition action to file a memorandum, nominating at least one person and not more than three persons, in order of preference as his legal representative in the event of his death-(Section 81 of the Partition Law introduced by Partition (Amendment) Act No. 17 of 1997).

**Memorandum nominating legal representative.**

81. (1)

*Every party to a partition action or any other person required to file a memorandum under this Law, (hereinafter referred to as “the nominator”) shall file, or cause to be filed in court, a memorandum, substantially in the form set out in the Second Schedule to this Law, nominating at least one person, and not more than three persons, in order of preference, to be his legal*

*representative for the purposes of the action in the event of his death pending the final determination of the action.*

As has been averred in the Petition before this Court, if the 5<sup>th</sup> defendant was seriously ill, but was yet interested in the corpus, he should have taken this step and nominated at least one of the Petitioners as his legal representative. But he failed to do so. It cannot be contended that the obligation to file a memorandum is only directory. The failure to file such a document as mandated by law may cast doubts on the credit worthiness of a revision application like this when this Court has to make inferential conclusions on the conduct of parties and even non-parties such as the Petitioners having regard to the fact that there were opportunities to participate at the trial but they were missed due to utter negligence or laches.

When a party to a Partition action dies, whose duty is it to take steps for substitution? Section 81 of the Partition Law, as amended by Act No. 17 of 1997, provides a special procedure for substitution, according to which the responsibility is cast upon every party, whether plaintiffs or defendants, to submit a memorandum to Court nominating at least one or a maximum of three nominees as his legal representatives. So, it was the 5<sup>th</sup> defendant's responsibility to have nominated three persons as his legal representative before his death. There is no Section 81 paper that could be seen in this case.

It has to be noted that Section 21 of the Amending Act No.17 of 1997 repealed section 48(4)(a)(iii) which enabled before 1997 a legal representative, in the event of death of a party, to make an application to intervene. Section 81 post the 1997 amendment required every party to file a memorandum nominating a legal representative thus obviating the unnecessary delay in substitution in the event of the party's death pending the action. The reason for the repeal of Section 48 (4) (a) (iii) of the Partition Law in 1997, is because the new provision Section 81 compensated for it adequately by insisting on legal representatives to be named in a memorandum. In the event a party dies during the pendency of the action, the legal representative steps into the shoes of the deceased party.

It has to be noted that failure to file a memorandum does not erode the finality of partition decrees. Section 81 (9) of the Partition Law binds the heirs to the partition decrees despite the fact that a deceased party had not filed a memorandum.

### **Section 81 (9)**

*Notwithstanding that a party or person has failed to file a memorandum under the provisions of this Section, and that there has been no appointment of a legal representative to represent the estate of such deceased party or person, any judgment or decree entered in the action or any order made, partition or sale effected or thing done in the action shall be deemed to be valid and effective and in conformity with the provisions of this Law and shall bind the legal heirs and representatives of such deceased party or person. Such failure to file a memorandum shall also not be a ground for invalidating the proceedings in such action.*

To the same tenor is Section 48 (1) of Partition Law which insulates a partition decree from attack on the basis that a deceased party was not substituted with a heir or legal representative.

### **Section 48. (1)**

*Save as provided in subsection (5) of this Section, the interlocutory decree entered under Section 26 and the final decree of partition entered under Section 36 shall, subject to the decision on any appeal which may be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this Section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all Partition Law 451 persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.*

*In this subsection “omission or defect of procedure” shall 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.* In this subsection and in the next subsection “encumbrance” means any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month

One can see how ring fenced the insularity is. The partition judgment and decrees have been put beyond the pale of judicial scrutiny notwithstanding the fact that a party crossed the great divide during the action and no representative stepped into his shoes, nominated or otherwise. The saving grace is revision or restitutio in integrum as provided for in Section 48 (3) of Partition Law.

### **Section 48 (3)**

*The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this Section notwithstanding the provisions of Section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.*

*The powers of the Court of Appeal by way of revision and restitution in integrum shall not be affected by the provisions of this subsection.*

These principles were affirmed by the unanimous decision of a Divisional Bench of five judges of the Supreme Court (SC Minutes of 29.06.1983) and constitute the law as it stands at present-see Soza., J in *Somawathie v. Madawela* (1983) 2 Sri.LR 15.

So it would appear that the fact that Tikkiri Banda -the 5<sup>th</sup> Defendant in the case was not substituted with his heirs or legal representations would entail the consequence that his heirs or legal representatives are bound by the judgment and the partition decree.

It was not argued before me whether the Petitioners were in fact the heirs of Tikkiri Banda. There was no argument put forward by both counsel on this question. The Petition filed before this Court indicates the intimate knowledge of the Petitioners about Tikkiri Banda possibly because they all resided in the same abode as Tikkiri Banda.

It is for this reason I observed before that the assertion of the Petitioners that they became *au fait* about the case only after the notice for final survey arrived does not inspire confidence in this Court. But the learned Counsel for the Petitioners was heard to argue that the Petitioners claimed through one Wijeratna Banda who stood as a purchaser in the chain through Tikkiri Banda-the 5<sup>th</sup> Defendant. This argument would only show that the Petitioners were neither heirs nor legal representatives of Tikkiri Banda.

So if they claim to anything but heirs, it follows as the crow flies that if at all only revision will be their remedy.

#### No Restitution when alternative remedy is available.

Under the Roman-Dutch Law, this remedy was not granted if there was any other remedy available to the applicant or unless it is shown that restitution was the more effectual remedy. (Voet 4, 1, 13, 14). In the words of Voet, "*restitutio in integrum* is extra ordinarium remedium, not to be given in the following circumstances:

- (a) Where there is some other remedy available to the person seeking restitution
- (b) It is not to be given for the mere asking;
- (c) It is not to be given unless it is sought within a certain period.

An application for *restitutio in integrum* is an action governed by the Prescription Ordinance and is barred in three years-see *Silindu et al vs. Duraya*, 1 A.C.R. 150, and *Silindu vs. Akura*, (1907) 10 N.L.R. 193. If there is an application on the ground of

discovery of fresh evidence after decree, it must be made with the utmost promptitude. See- *Babun Appu vs. Simon Appu et al*, (1907) 11 N.L.R. 44.

It must, therefore, be borne in mind that restitution is granted by Court only if no other remedy or no alternate remedy is available to the party aggrieved. If there are alternate remedies available, this remedy cannot be sought, and there should not be delay in making the application.

In a very earlier case of *Dodwell Carlill & Co. vs. Rawter*, (1899) 1 Tam. 18, it was held that, when any other remedy is open to a party, the extraordinary one of *restitutio in integrum* cannot be granted-also see *Menchina Hami vs. Muna weera* 52 N.L.R. 409.

In the Interlocutory decree entered in this case, an extent of 16 perches has not been allotted to any party in the case. This portion of the land may be claimed by the Petitioners if they could establish their right to it.

Further, Section 49 of the Partition Law provides that 'any person, not being a party to a partition action, whose rights to the land to which the action relates, have been extinguished or who is otherwise prejudiced by the interlocutory decree entered in the action, may, by a separate action instituted not later than five years from the date of the final decree in the partition action, recover damages from any party.....'. If the Petitioners claim any right to the land it is open to them to seek the relief under section 49 of the Partition Law.

### **Restitution is available only to parties to a case.**

It is the position taken by the Supreme Court that restitution can only be asked for by the parties to an action. The reason behind this is that restitution of the case will only have the effect of putting the parties to the position they were in before judgment was given. If the applicant is not a party to the case, he cannot avail himself of this remedy.

As regards the persons who can claim restitution, Pereira, J. in the case of *Perera vs. Wijewickreme et al*, (1912) 15 N.L.R.411, took the view that, "this remedy can only be

availed of by one who is actually a party to a contract or legal proceeding in respect of which restitution is desired. This remedy is not granted in Ceylon if the applicant has any other remedy equally effectual open to him". The learned judge cited a passage from Voet's Commentaries (4, 1, 9) and in that passage "Voet lays down that "all who have been injured or prejudiced and have a just cause of restitution can claim it", *non constat* that they may be strangers to the contract or legal proceeding in respect of which restitution is claimed. Voet says earlier (4, 1, 3) it appears to me that when restitution is sought in respect of a legal proceeding, the applicant should be somebody who already has had direct connection with that proceeding"-Also vide this principle enshrined in *Perera v Simon Appuhamy* 2 Times Reports 119.

### Inordinate delay.

Restitution reinstates a party to his original legal condition which has been deprived of by the operation of law. It is an extraordinary remedy and will be granted under exceptional circumstances. The remedy can be availed of by one who is actually a party to the legal proceeding. He cannot claim damages but he should have suffered damages. A party seeking restitution must act with the utmost promptitude. The court will not relieve parties of the consequences of their own folly, negligence or laches.

The 5<sup>th</sup> defendant had died on 04.10.2015 and this application was filed only on 26<sup>th</sup> day of February, 2018. There is an inordinate delay in presenting this application regarding which no explanation is available. In an application for *restitutio in integrum*, the applicant must act without inordinate delay and without laches. In *Gunesekera vs. Abdul Latheef* (1995) 1 Sri L.R. 225, it has been held, *inter alia*, that the court will grant relief if the delay can be reasonably explained.

In this case the Petitioners are subject to undue delay for which no valid reasons are given. They have also failed to give exceptional grounds, which entitle them for the relief asked for. The material before court does not disclose any exceptional circumstances, which warrant the intervention of this court in revision. In *Menchina Hami vs.*

*Muniweera* 52 N.L.R. 409, it was held that the remedy by way of *restitutio in integrum* is an extraordinary remedy and is given only under very exceptional circumstances and this remedy must be sought with utmost promptitude.

In the circumstances, I am of the opinion that upon the material placed in this application, the reliefs claimed by the Petitioners cannot be granted. I hold that the application for *restitutio in integrum* and/or revision of the applicant is liable to be dismissed with costs

Accordingly I proceed to dismiss this application for revision/*restitutio in integrum*.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna J.

I agree

JUDGE OF THE COURT OF APPEAL