

In the Court of Appeal of the Democratic
Socialist Republic of Sri Lanka

*In the matter of an application for
revision and restitutio in integrum
under Article 138 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka*

CA 215//2002

DC Kandy 125781/P

Ranhoti pedi Gedara Charles,
Ambagastenna,
Kadugannawa.
Deceased-Plaintiff

VS

Ranhoti Gedara Keerthiratna,
Maathgamuwa and another.
Defendants

And Now between

D.A.S.K. Dissanayaka,
56, Ambagastenna,
Kadugannawa.
Petitioner

Vs

M.R.Prema Lal de Charles,
Ambagastenna,
Kadugannawa
Substituted- Plaintiff-Respondent
Ranhoti Gedara Keerthiratna,
Maathgamuwa and another.
Defendant-Respondents

Before: A.W.A.Salâm,J.

Dr F.A.Sunil Cooray for the petitioner and Nihal Jayamanne PC with Ajith Munasingha for the substituted plaintiff-respondent.

Written Submissions tendered on : 12.03.2009.

Decided on: 17.03.2009

A.W.Abdus Salâm, J.

The petitioner has filed the present application in revision to have the trial proceedings in partition action No 12578/P in the district Court of Kandy and the judgment and interlocutory decree entered in the case set aside and to obtain an order of court to have the petitioner added as a party defendant in the action. He also seeks an order from this court for a reasonable opportunity to file a statement of claim and to take other steps to contest the partition action.

When the matter was taken up for argument on 30 January 2009, the learned president's counsel of the substituted plaintiff-respondent raised a preliminary objection with regard to the purported rights of the petitioner to have and maintain the present application for revision and/or *restitutio in integrum*, inasmuch as the petitioner had no locus standi

to maintain the application as he had no rights in the corpus at the time or prior to the entering of the judgment and interlocutory decree.

The plaintiff-respondent instituted the partition action to have the corpus partitioned between him and the 1st defendant-respondent in the proportion of 2/3 and 1/3. The 2nd defendant-respondent has been made a party to the partition action as she was attempting to enter the corpus without any manner of title. The 1st and the 2nd defendants filed a joint statement of claim and prayed inter alia that they be given an equitable portion of the subject matter together with the buildings and Plantations standing thereon.

At the commencement of the trial the parties informed the learned district Judge that there was no contest with regard to the identity of the corpus and that they were agreed to have the land depicted in the unnumbered plan dated 8th September 1911 shown by way of superimposition on the preliminary plan No 590 dated 21st April 1992 marked as X be treated as the subject matter of the partition action. Pursuant to the said agreement, the plaintiff testified as to the devolution of title as averred in the plaint.

At the conclusion of the trial, the learned district Judge delivered his judgment accepting the land shown by the superimposition in red lines as the subject matter of the partition action and directed that the corpus be partitioned between the plaintiff-respondent and the 1st defendant-respondent in the proportion of shares, referred to by the plaintiff-respondent in his evidence. The petitioner in his petition has attempted to make out that the plaintiff had not disclosed deed No 9747 as being a material deed with regard to the devolution of title, even though by deed No 593 dated 3 September 1991 (pending partition deed) the plaintiff has purchased from the 1st defendant and his brother somadasa the right title and interest they will be declared entitled to by the final decree to be entered in the partition action in question. The petitioner states that in deed No 593, the vendors have recited title from deed No 9747 dated 12 October 1916 and therefore cannot be unaware of the said deed recited as being the source through which the vendors in deed No 593 have acquired title.

The position of the substituted plaintiff-respondent is that deed No 593 deals with two lands and on a reading of the

schedule to the deed it is quite clear that the 2nd land described in the schedule to the said deed is the subject matter of the partition action and the first land has no relevance whatsoever to the corpus. In other words the substituted plaintiff-respondent maintains that he has acquired title to 2nd land dealt in deed No 593, by purchasing the right title and interest that would be allotted to the 2nd named vendor Samarasingha.

The substituted plaintiff respondent has submitted that the deeds marked as C1, C2 and C3 referred to in paragraphs 17 and 18 of the petition were not pleaded in the joint amended statement of claim of the 1st and 2nd defendants and therefore the relevance of the said deed was not a matter that was required to be considered in the lower court and the petitioner is now attempting to set out a false claim to the land and delay the conclusion of the partition action.

As a matter of fact the 1st and the 2nd defendants in their amended statement of claim dated 4.9.1995 filed in the district court took up the position that Abraham Appu was entitled to lot B described in the schedule to the said amended statement of claim by virtue of the final decree entered in partition case No 25071 D.C Kandy and decree

entered in the court of request of Gampola in action No. 116. In terms of the said amended statement of claim the rights of Abraham has finally devolved on Bambarende Don Kalyanawathie Wanigaratne (2nd defendant-respondent), -do- Gunawathie, -do- Francis, -do- Arthur and -do- Badra. By way of relief the 1st and the 2nd defendant-respondents have sought that they be given an equitable portion of the land.

By paragraph 21 of the petition the petitioner has accepted the devolution of title of Abraham up to Podihamine whom the petitioner says became the sole owner of the property on deed No.2639 dated 9th August 1949 mentioned in their amended statement of claim filed before the learned district judge. Even though in the amended statement of claim the 1st and the 2nd defendants had stated that the rights of Podihamine devolved on the collaterals namely, Ema Nona Gunawardena and Ariyadasa Gunawardena, the petitioner is now trying to state by paragraph 24 of the petition that the said Podihamine died on 1.10.1984 leaving an administrable estate and in fact was administered in D.C.Kandy case No.3236/T and one Helanhamy was granted with the letters of administration and she (Helanhamy) thereafter by deed No.252 dated 3.5.1994 has transferred the corpus to

D.A.Kusumalatha Malani who is a sister of the petitioner. In the same breath the petitioner has attempted to say that the said Kusumalatha Malani by deed No.13805 dated 24.9.1998 attested by G.Premaratne N.P. has transferred the rights in the corpus to the petitioner and accordingly the petitioner is the sole owner of the corpus.

A salient defect in the petitioner's case appears to be paragraph 21 of the petition where he has accepted the devolution of title of Abraham as set out in the joint statement of claim of the 1st and 2nd defendants up to the point they say Podihamy became the sole owner of the subject matter on deed No 2639. By the averment in paragraph 21 of the petition, the petitioner is now trying to further espouse the cause of the 1st and 2nd defendants despite the fact that they were parties in the partition action and they failed to challenge the judgment entered in the partition action.

The judgment in the partition action has been entered on 12 March 1997. According to the petitioner the rights of Podihamy had devolved on Helanahamine and the latter had transferred it to the sister of the petitioner on deed No 252 in the year 1994. More significantly the petitioner is alleged to have acquired title from his sister on deed No 13805 on 24 September 1998. According to

the Journal entries produced in this application the partition action has been instituted on 23 August 1990. Thus, it is crystal clear that the petitioner has based its title on a deed executed in 1998, namely almost 8 years after the institution of the partition action and 1 year and 6 months after the entering of the judgment. Admittedly the petitioner was not a party to the partition action at the time when the interlocutory decree was entered. Therefore it reveals that the petitioner had no rights to the property at the time the interlocutory decree was entered. As the petitioner was not a party to the partition action at the date of the interlocutory decree, it has been submitted by the president's counsel that the petitioner cannot be considered as a party aggrieved by the interlocutory decree, since no decision has been made against him in the partition action. Undoubtedly it disentitles him to contest the interlocutory decree.

In this respect the judgment of this court in case No CA 329/02 (Don Saranadasa Ranasingha Vs Samanthi Sulochana Gunasekera) applies to this case, being a decision made almost on identical facts to this application. In the said judgment citing Perera, J in Perera Vs Wijewikrama 15 NLR 411, Wimalachandra J, reiterated the following passage.

"I am of the opinion that the remedy of restitutio in integrum can only be availed of by one who is actually a party to the contract or legal proceeding in respect of which restitution is desired" (page 413).

The Learned President's Counsel has submitted that special leave sought to challenge the decision in Don Saranadasa Ranasingha Vs Samanthi Sulochana Gunasekera has been refused by the Supreme Court in application No SC (Spl) LA 161/06 by SC minutes dated 23 May 2007.

For the foregoing reasons, I am of the view that the preliminary objection raised against the maintainability of the revision application should succeed. Hence, the application made in revision by the petitioner stands dismissed subject to costs.

Judge of the Court of Appeal

Kwk/-