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

In the matter of an application in Revision and Restitutio in Integrum in terms of Article 138 of Constitution.

SuduDewage John Jayasiri of

340/4, Robert Gunawardena Mawatha,

Malabe.

3A Defendant – Appellant

Petitioner.

C.A Revision Application

No: 304/2012

D.C. Homagama Case No:

903/Partition.

Vs.

1. S.S. Fernando (Deceased)

1A. S. David,

No: 33, Malabe.

2. G.M. Fernando,

No: 336, Malabe.

3. H. Saina

No: 340, RobrtGunawardena Mawatha, Malabe.

4. W.H. Jain

5. G. Sirisena

6. G. Abeydasa.

7. G. Jalin.

8. G. Karunawathie.

9. G. Sirimawathi.

All of No: 346, Robert Gunawardena Mawatha, Malabe.

10. M.D. Kusumawathi,

No: 33A, Malabe.

11. W.H. Premadasa,

Robert GunawardenaMawatha,

Malabe.

Plaintiff – Respondents

1. S. Saneris (Deceased)

1A. S.D. Podinona,

No: 1/94, Thalahena, Malabe.

2. S. Udenis (Deceased)
No: 342, Robert Gunawardena Mawatha, Malabe.

2A. S. Roslin

No: 342, Robert Gunawardena Mawatha, Malabe.

3. S. Jalis (Deceased)
No: 340,Robert Gunawardena
Mawatha, Malabe.

4. S. Maisa,
Batugampola, Hadapangoda.

5. P. Martin (Deceased)
Batugampola, Hadapangoda.

5A. S. Rani,

Batugampola, Hadapangoda.

6. S. Melis,
Thambapana, Urugala, Ingiriya.

7. S. Jain
8. G. Michel
9. G. Alis
All are of Batugampola,
Hadapangoda.

BEFORE : **P.W.D.C. JAYATHILAKE, J**

COUNSEL : Dr. Jayatissa de Costta P.C. with

Daya Guruge for the Petitioner.

Edward Ahangama for the

Respondent.

ARGUED ON : 09.07.2014

DECIDED ON : 20.11.2014

P.W.D.C. Jayathilake, J

The partition case bearing no.903 had been filed on 06.09.1974 in the District Court of Homagama seeking to terminate the co-ownership of the land called Batadombagahalannda alias Batadombagahawatte A.4R.1P.02.00 in extent. There were 11 Plaintiffs and 9 Defendants according to the plaint filed under the provisions of Administration of Justice Law. According to the pedigree averred in the plaint the original owner of the subject matter was Hendha Fenando who had acquired ownership by two deeds, no.5283 of 06.08.1893 and no.8130 of 29.12.1894 respectively and by the prescriptive title. According to the devolution of title shown in the pedigree as co-owners are 11 Plaintiffs and the 9 Defendants. But the 3rd Defendant who had been given undivided

share Of 1/24 of the land according to the pedigree of the plaint of the had claimed that he had become the owner of the entire land by prescription.

The case had been taken up for trial on 11.06.1980. The 2nd Plaintiff and the 3rd Defendant had been present and represented by their registered attorneys and counsel. No points of contest had been raised and the 2nd Plaintiff had given evidence without any contest. He had marked both deeds mentioned above as P1 and P2 and had given evidence describing the pedigree and producing the other deeds namely P3 to P8. But in the evidence of the 2nd Plaintiff he had stated instead of the undivided share of the 3rd Defendant shown in the pedigree, he and all the other parties of the case were willing to give one acre and one road out of the entire land to the 3rd Defendant. The learned District Judge had accepted the evidence of the 2nd Plaintiff and had given the judgment allotting undivided shares according to the evidence of the 2nd Plaintiff and ordered to enter interlocutory decree and proceed to partition.

An appeal had been lodged by the 3A Defendant in this court and it had been dismissed and the case record had been sent back to the District Court for further steps. Thereafter, the commissioner appointed to execute the final partition had submitted the final plan. There had been another appeal filed by

the 3A Defendant before the Civil Appeal High Court of Awissawella contesting an order made by the District Judge in respect of adaption of the final scheme

of partition. The said appeal too had been dismissed by the Civil Appeal High Court. Then the 3A Defendant had appealed to the Supreme Court against the said dismissel of appeal by the Civil Appellate High Court. The Supreme Court had dismissed that appeal on the application made by the appellant for withdrawal. This case is a fresh application made by the 3A Defendant Petitioner seeking the relief of restitutio-in-integrum. It has to be noted that when the original case record was submitted to this court on the order made in that respect, the final degree of the partition had been entered and submitted for registration to the Land Registry.

The argument of the Learned President's Counsel for the Petitioner that the Petitioner had made several appeals on wrong advice received by him. His contention is that the learned District Judge had made the order to partition the land accepting the evidence of the 2nd Plaintiff on the basis that there had been a consensus between the parties. But there was no settlement or compromise as the provisions of Sec.91 and Sec. 408 of the Civil Procedure Code have not been followed by the parties according to the learned President's Counsel.

It is a settled law that the remedy by way of restitutio-in-integrum is an extra ordinary remedy, and is given only under exceptional circumstances. And also it

should be sought with the utmost promptitude. This remedy is generally not available for a person guilty of carelessness or negligence as a principle.

In the instant case, the 3rd Defendant has not contested the case presented by the 3rd Plaintiff obviously as a result of the understanding that he is getting one acre and one road in extent for his claim for the entire land on prescription. Even though, it appears that the learned District Judge had given the judgment without investigating into the title of the co-owners, when there is no contest in that regard, the judge has no reason to go for a voyage of discovery to investigate title unless it appears that parties are acting in collusion to defeat a 3rd party. But, here clearly the contest was between the 3rd Defendant and all other parties. The trial was concluded without a contest obviously on the agreement entered into, by the 3rd Defendant and all other parties.

On the other hand as mentioned before, this application has been made after the final decree being entered. Therefore, if this court restores the proceedings to the trial stage, the final decree which has already been entered may still stand as a decree in rem. Grenier A J in *Silindu V. Akura* (10NLR 193) has commented the argument of the learned counsel for the appellant in regard to the non application of time bar to the remedy of restitutio-in-integrum.

"There was undoubtedly much force in the argument that as the remedy was one not provided for by the jus civile, and was not governed by its rigid and

strict principles, but was by an act of grace of the Sovereign given to a subject on equitable grounds, time did not run against it."

But it has been held in that case

"An application for restitutio-in-integrum is an action within the meaning of section 11 of ordinance No: 22 of 1871, and is barred in three years."

There is no doubt that remedy of restitutio-in-integrum is an extraordinary one which should be granted on equitable grounds. Yet, the final decree of a partition action is also an extraordinary decree where finality has been guaranteed by Statutory Law.

Therefore, this court is of the opinion that the remedy of restitutio-in-integrum is no longer valid after the final decree being entered in a partition case. As such the application of the petitioner is dismissed with cost.

Application dismissed.

JUDGE OF THE COURT OF APPEAL