IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1A. Sarath Godagampala
14. Indra Srimathie Godagampala
15. Nandanie Sriyalatha Godagampala
16. G.D. Wijethunga
17. G. D. Chandraratne Wijethunga
All of
Thalgasmote
Veyangoda

Defendant-Petitioner-Appellants

SC.Appeal No.98/2007
SC (Spl) L.A.202/2007
C.A.Application No.188/98
D.C.Gampaha Case No.29416/P

Vs.

W.K.Peter Fernando
No.171, Thalgasmote,
Veyangoda

Plaintiff-Respondent-Respondent

2. G. D. Rosalin
3. G. D. Asilin
4. W.K.Jinadasa
5. W.K.Sunil
6. W.K.Kusumawathie
7. W.K.Vipulasena
8. W.K.Josephin
9. M.H.P.Jinel Nona
10. S.D.Nonis
11. S.D.Guneris
12. S.D.Lionel
13. S. Chandrasiri Udayaratne
All of
Thalagasmote
Veyangoda

Defendant-Respondent-Respondents

BEFORE : WANASUNDERA, PC, J.
GOONERATNE, J.
K.T.CHITRASIRI, J.

COUNSEL : S.C.B,Walgampaya, P.C.with Upendra Walgampaya for the 1A, 14th, 15th, 16th and 17th Defendant-Petitioner-Appellants

Dr. Jayatissa de Costa, P.C. with Wijeratne Hewage and Lahiru N. Silva for the Substituted-Plaintiff-Respondent -Respondent

J.C.Boange for the 9th, 11th, 12th and 13th Defendant-Respondent-Respondents

ARGUED ON : 16.03.2016

WRITTEN SUBMISSIONS ON : 30.03.2016 by the 1A, 14th, 15th, 16 and 17th Defendant-Petitioner- Appellants
25.04.2016 by the 10th, 11th, 12th and 13th Defendant Respondent-Respondents

DECIDED ON : 10.06.2016

CHITRASIRI, J.

1A and 14th to 17th defendant-petitioner-appellants (hereinafter referred to as the appellants) filed this petition of appeal dated 27th July 2007 seeking to set aside the judgment dated 18th June 2007 of the Court of Appeal. The appellants have also sought to have the judgment and the Interlocutory Decree entered on 10th December 1992 in the District Court of Galle, set aside. Having considered the material placed before this Court, it made order granting special leave to proceed with this appeal, on the

questions of law referred to in paragraph 24 of the petition dated 27th July 2007. Those questions of law read thus:

(a) Did the Honourable Court of Appeal err in not setting aside the interlocutory decree, whereby 11/12 shares have been allotted, exercising the powers of revision and/or restitutio in integrum, when on the face of the evidence led in the case is only 7/12 shares have devolved on the parties?

(b) Should the Court of Appeal have exercised the powers in revision and/or restitutio in integrum when admittedly a grave miscarriage of justice has occurred?

At the outset, it is to be noted that the consideration by the Court of Appeal of the application filed in that Court was basically of two fold.

- First being the mistakes and/or inaction of the registered attorney who marked his appearance in the District Court for the 1st, 14th to 17th defendants.
- Second being the issue of jurisdiction of the Court of Appeal to entertain the said application since it was an application for revision and/or restitutio in integrum in which that the appellants alleged to have failed to establish the existence of exceptional circumstances.

Hence, it is seen that the Court of Appeal has not addressed its mind to the alleged incorrect allocation of shares determined by the learned District Judge which is the issue raised in the revision application filed in that Court. It is on that issue, even the special leave was granted by this Court.

Therefore, I will first look at the correctness of the allocation of shares determined by the learned District Judge. Allocation of shares in a partition action depends on the title claimed by the parties to the action. It is trite law that the examination of such title of the parties is the duty of the trial judge though we follow the adversarial system in this jurisdiction. The aforesaid duty of the trial judge to examine the title of the parties' emanates from Section 25 (1) of the Partition Law No.21 of 1977 (as amended). It reads as follows:

> "*on the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the Court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right share or interest of each party to, of, or in the land to which action relates, and shall consider and decide which of the orders mentioned in section 26 should be made."*

Long line of authorities is found in support of this position of the law referred to in the Statute. A few of those decisions are cited below.

- **Peiris Vs. Perera (1) NLR 362**

  "The Court should not regard a partition suit as one of to be decided merely on issues raised by and between the parties and it ought not to make a decree unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned."

- **Silva Vs. Paulu 4 NLR 177**

  "In partition suits the Court ought not to proceed on admissions but must require evidence in support of the title of all the parties and allot to no one a share except on good proof."

- **Golagoda Vs. Mohideen 40 NLR 92**

  "The Court should not enter a decree in a partition action unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property."

- **Juliana Hamine Vs. Don Thomas 55 NLR at 546**

  "We are of the opinion that a partition decree cannot be subject of a private arrangement between parties of matters of title which the courts 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 and to obtain a determination on them, the obligation 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 interlocutory decree which the Court has to enter in accordance with its findings in terms of section 26 of the Act is final in character since no interventions are possible or permitted after such a decree. There is therefore, the greater need for the exercise of judicial caution before a decree entered. The Court of trial should be mindful of the special provisions relating to decrees as laid down in section 48 of the Act. According to its terms, the interlocutory and final decrees shall be good and sufficient evidence of the title of any person so as to the interests awarded therein and shall be final and conclusive for all purposes against all persons whom so ever, notwithstanding any omission or defect of procedure or in the proof of title adduced before the Court, and notwithstanding the provisions of section 44 of the Evidence Ordinance, and subject only to the two exceptions specified in sub-section 3 of section 48 of the Act."

- **Cooray Vs. Wijesuriya 62 NLR 158**

  "Section 25 of the Partition Act imposes on the Court the obligation to examine the title of each party to the action and section 26(f) gives legal action to a practice that existed in actions tried under the old Partition Ordinance of leaving a share unallotted. It is unnecessary to add that the Court before entering a decree should hold a careful investigation and act only on clear proof of the title of all the parties. It will not do for a plaintiff merely to prove his title by the product of a few deeds relying on the shares which the deeds purport to convey. It is a common occurrence for a deed to purport to convey either much more or much less than what a person is entitled to. Before

Court can accept as correct a share which is stated in a deed to belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share. How then is the proof to be established in a Court of Law? It only too frequently happens, especially in uncontested cases, that the Court is far from strict in ensuring that the provisions of the Evidence Ordinance are observed; and when this happens where there is a contest in regard to the pedigree as in the present case, the inference is that the Court has failed totally to discharge the functions imposed upon it by section 25 of the Act. It cannot be impressed too strongly that the obligation to examine carefully the title of the parties becomes all the more imperative in view of the far reaching effects of section 48 of the new Act which seems to have been specially enacted to overcome the effect of the decisions of our Courts which tended to alleviate and mitigate the rigorous of the conclusive effect of section 9 of the repealed Partition Ordinance of No.10 of 1863."

- **Cynthia De Alwis Vs. Marjorie D'Alwis and Two others 1997 (3) SLR 113**

"A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. In the exercise of this sacred duty to investigate title a trial Judge cannot be found fault with for being too careful in his investigation. He has every right even to call for evidence after the parties have closed their cases."

- **Piyaseeli Vs. Mendis and Others 2003 (3) SLR 273**

"(i) Main-function of the trial Judge in a partition action is to investigate title, it is a necessary pre-requisite to every partition action.

(ii) Partition decrees cannot be the subject of a private agreement between parties on matters of title which the Court is bound by law to examine. There is a greater need for the exercise of judicial caution before a decree is entered."

- **Faleel Vs. Argeen and others 2004 (1) SLR 48**

"It is possible for the parties to a partition action to compromise their disputes provided that the Court has investigated the title of each party and satisfied itself as to their respective rights."

- **Somasiri Vs. Faleela and others 2005 (2) SLR 121**

"(i) The error had arisen owing to the failure of the trial Judge to investigate title.

(ii) The trial Judge must satisfy himself by personal Inquiry that the plaintiff made out a title to the land sought to be partitioned and that the parties before Court are solely entitled to the land.

(iii) While it is indeed essential for parties to a partition action to state to court the points of contest inter-se and to obtain a determination on them the obligation of the courts are not discharged unless the provisions of Section 25 of the Partition Law are complied with quite independently of what parties may or may not do."

- **Karunarathna Banda Vs. Dassanayake 2006 (2) SLR 87**

1. .....

2. A partition suit is not a mere proceeding inter-parties to be settled of consent or by the opinion of the Court upon such points as they choose to submit to it in the shape of issues.

3. The Court has to safeguard the interests of others who are not parties to the suit who will be bound by the decree.

4. The Court should safeguard that the plaintiff has made out his title to the share claimed by him.

- **Sopinona Vs. Cornelis and others *2010 BLR 109***

(a) It is necessary to conduct a thorough investigation in a partition action as it is instituted to determine the questions of title and investigation devolves on the Court.

(b) In a partition suit which is considered to be proceeding taken for prevention or redress of a wrong it would be the prime duty of the judge to carefully examine and investigate the actual rights and to the land sought to be partitioned.

The above authorities clearly indicate that it is the duty of the trial judge in a partition action to investigate title of the parties before determining the share allocation. Hence, I will now consider whether the learned District Judge has discharged the said duty upon analyzing the evidence led before him when he decided to allocate the shares among the parties.

At the commencement of the trial, it was recorded that the parties have resolved their disputes that they had in respect of the devolution of title as well as the corpus. Thereafter, they had decided to accept the evidence of the plaintiff without him being cross examined. The judgment of the learned District Judge show exactly what had taken place at the commencement of the trial. Relevant paragraph of the judgment dated 10.12.1992 is as follows:

> **"ඉන් පසු පැමිණිල්ලේ විසඳිය යුතු ප්‍රශ්ණ දෙකක්ද, 10, 11, 12 විත්තිකරුවන් වෙනුවෙන් විසඳිය යුතු ප්‍රශ්ණ දෙකක්ද, ඉදිරිපත් කරන ලදී. ඉන් පසුව නඩුව 1992.09.02 වෙනි දින විභාගයට ගත් අවස්ථාවේදී අංක 1234 පිඹුරේ පෙන්වා ඇති ඉඩම පිළිබඳව සහ එහි අයිතිවාසිකම් ලැබෙන අන්දම පිළිබඳව පාර්ශවකරුවන් අතර සමතයකට පත් වී ඇති බව සඳහන් කරමින් විසඳිය යුතු ප්‍රශ්ණ ඉල්ලා අස්කර ගන්නා ලදී. ඉන්පසුව පැමිණිලිකරු සාක්ෂි දීම සඳහා කැඳවන ලදී. ඔහු අධිකරණයට පැවසුයේ බෙදීමට ඉල්ලා ඇති කහටගහවත්ත නැමැති ඉඩම අංක 1234 දරණ පිඹුරේ නිසි ලෙස පෙන්වා ඇති බවත්, එය 'X' වශයෙන්ද, ඊට අදාල වාර්තාව 'X 1' වශයෙන්ද, ලකුණු කරන බවයි."** (vide at page 54 in the original District Court record)

As mentioned before, the evidence of the plaintiff was not subjected to cross-examination even though the 10th, 11th and 12th defendants and 14th to 17th defendants were represented by Counsel in the District Court. Attorney Prajapala Gunwardane had appeared for the 14th to 17th defendant-appellants. Subsequently, it was revealed that the 1st defendant had died by then though the Attorney Prajapala Gunawardena has marked his appearance on his behalf. 1A defendant who was subsequently substituted in the room of the deceased 1st defendant and the 16th defendant in the District Court action is one and the same person. Moreover, 14th to 17th defendant-appellants have claimed rights emanated from the 1st defendant. In the circumstances, the learned District judge is bound to accept the evidence of the plaintiff and to act accordingly.

The plaintiff, namely W.N.Peter in his evidence has stated that he cannot explain as to the devolution of title for 5/12 shares of the land subjected to in this case. Following evidence of the plaintiff recorded on 1.9.1992 show that it is so.

" මෙම ඉඩමේ 1/12 පංගුවක් හිමිව සිටිය වතුපිටි කන්දලාගේ රොමා පැ.1 විසින් 1940 දී අංක 25736 දරණ පැ. 1 ලෙස ලකුණු කරන ඔප්පුවෙන්, එම 1/12 පංගුව පැමිණිලිකාර මට පවරා තිබෙනවා. 1/12 කොටසක් පැ.2 ගඩිරියෙල්ට හිමිව තිබුනා. ඔහු විසින් 1947 දී අංක 33032 දරණ පැ. 2 දරණ ඔප්පුවෙන් එම 1/12 ක කොටස පැමිණිලිකාර මට පවරා තිබෙනවා. අනෙක් හිමිකරුවන් තමයි 1/12 ක කොටස බැගින් හිමිව සිටි රොයිදා, වලා, බ්‍රම්පි යන අයවළුන් සහ 1/6 කොටසක් හිමිව සිටි එම්.සි. සිංවියා. මේ ඉඩමේ 5/12 කොටසක අයිතිවාසිකම් පැවරෙන ආකාරය මා දන්නේ නැහැ." (vide at page 149 in the original District Court record)

Despite the evidence referred to above, learned District Judge made order having kept only 36/342 (1/12) shares un-allotted from the corpus. He has not given any reason either, to show why he kept only 1/12 shares un-allotted despite the fact that there were un-contradictory evidence of the plaintiff to state that he cannot explain as to the devolution of title for a share amounting to 5/12 fraction. Therefore, it is clear that the learned District Judge has not properly addressed his mind to the evidence when he made order to keep only 1/12 share un-allotted.

The decision referred to above of the learned District Judge clearly show that he has not performed his duty cast upon him under Section 25(1) of the partition law. I do not see any reason as to why the Court of Appeal, in the revision application did not consider such an error, which clearly amounts to a violation of a statutory provision of the law.

Court of Appeal was of the view that there were no exceptional circumstances for it to interfere with the judgment of the learned District Judge. I do not think it is a correct approach to the issue. Disregarding a statutory provision alone would amount to have established exceptional circumstances that are necessary to invoke revisionary jurisdiction. Revisionary jurisdiction is a discretionary remedy in which the Court is empowered to exercise its discretion to meet the ends of justice. The Courts are empowered to exercise its discretionary powers to correct errors even though the party who is affected by those errors has failed to exercise the right of appeal given to him/her by the Statute.

Error committed by the learned District Judge in this instance creates a fit and proper opportunity for the appellate Court to exercise its discretionary power to remedy such an error. As stated before, the error committed by the trial judge, it being a violation of a statutory provision of the law should be considered as exceptional circumstances and therefore the Court of Appeal could have corrected such a violation invoking its revisionary jurisdiction. Accordingly, I am unable to agree that there were no exceptional circumstances to invoke the jurisdiction as decided by the Court of Appeal. Hence, the judgment of the Court of Appeal is set aside.

Extent to which the courts are empowered to exercise revisionary power is found in many judicial pronouncements that include **Somawathie Vs. Madawala 1983 (2) SLR 15** and **Mariam Beeee vs. Seyed Mohamed 68 NLR 36.** In Mariam Beebee Vs. Seyed Mohamed, Sansoni C J held thus:

> *"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by the Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not, I conceive, made any changes in this respect, and the power can still be exercised in respect of any order or decree of a lower Court."*

Having considered the law referred to above and the facts of this case, I am of the opinion that the decision as to the allocation of shares in this instance is contrary to the evidence and therefore it becomes an incorrect

decision. In the circumstances, learned District Judge is directed to carefully consider the evidence already led in this case and to allot shares according to the evidence, giving reasons thereto.

The Registrar of this Court is directed to return the original record to the District Court of Gampaha forthwith. The judgment dated 10.12.1992 of the District Court of Gampaha is set aside. Learned District Judge is directed to write a judgment afresh considering the evidence already recorded since the parties had agreed to accept the evidence of the plaintiff having resolved their disputes as to the corpus as well as the pedigrees of the respective parties. Accordingly, the questions of law raised in this Court are answered in favour of the Appellants.

Appeal allowed. No costs.

JUDGE OF THE SUPREME COURT

WANASUNDERA, P.C, J .

I agree

JUDGE OF THE SUPREME COURT

GOONERATNE J.

I agree

JUDGE OF THE SUPREME COURT