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

SC Appeal 210/2015
SC/HCCA/LA/141/2014
WP/HCCA/Avi/222/2011(Rev)
D.C. Pugoda Case No. 327/L

Udawela Pathiranehelage
Dharmasena of
Bandaranayake Mawatha,
Millathe, Kirindiwela.

Plaintiff

-Vs-

1. I.L. Malani, 19 1/3,
   Bauddhaloka Mawatha,
   Gampaha

2. Sooriya Arachchige Sandasiri Perera
   No. 247, Weerangula,
   Yakkala.

3. Polwattege Abeysinghe
   No. 65/1, School Road,
   Meddegama, Kiridiwela.

4. D.M. Leelawathi Dissanayake,
   Anuragoda,
   Pepiliyawela.

Defendants

AND

Udawela Pathiranehelage
Dharmasena of
Bandaranayake Mawatha,
Millathe, Kirindiwela.

Plaintiff- Petitioner

Vs

1. I.L. Malani, 19 1/3,
   Bauddhaloka Mawatha,
   Gampaha

2. Sooriya Arachchige Sandasiri Perera
   No. 247, Weerangula,
   Yakkala.

3. Polwattege Abeysinghe
   No. 65/1, School Road,
   Meddegama, Kiridiwela.

4. D.M. Leelawathi Dissanayake,
   Anuragoda, Pepiliyawela.

Defendants – Respondents

AND NOW BETWEEN

3. Polwattege Abeysinghe
   No. 65/1, School Road,
   Meddegama, Kiridiwela.

4. D.M. Leelawathi Dissanayake,
   Anuragoda, Pepiliyawela

DEFENDANTS-RESPONDENTS-PETITIONERS/APPELLANTS

VS.

1a. Lewwanda Pathirannehelage
    Leelawathie,

1b. Manel Ajantha Chandrakanthie,

1c. Anoma Nalini Swarnakanthie,

1d. Himali Pradeepika Malkanthie,

1e. Priyani Priyadharshini,

All of,
No. 75/16, Amuhena,
Welliwaththa Road, Papiliyawala.

SUBSTITUTED
PLAINTIFF- PETITIONER RESPONDENTS

1. I.L. Malani, 19 1/3,
   Bauddhaloka Mawatha,
   Gampaha.

   Now at

   Rathnaloka Enterprise,
   37/4, New Trade Complex,
   Gampaha.

2. Sooriya Arachchige Sandasiri Perera
   No. 247, Weerangula,
   Yakkala.

DEFENDANTS-RESPONDENTS-RESPONDENTS

Before: B.P.Aluwihare P.C. J,
Vijith K. Malalgoda P.C. J, and
Murdu N.B.Fernando, P.C. J.

Counsel: Niranjan de Silva with Kalhara Gunawardena for the 3rd and 4th Defendants-Respondents – Appellants.
Rohan Sahabandu PC with Hasitha Amarasinghe for the Substituted Plaintiff – Petitioner- Respondents.

Argued on: 30-11-2018

Decided on: 18-12-2020

Murdu N.B. Fernando, PC J.

The appeal before us pertains to an Order made by the District Court of Pugoda dated 18-08-2011 in respect of a writ of execution of a decree which was set aside by the Provincial High Court of Civil Appeal of the Western Province holden in Avissawella ("the High Court") on 05-02-2014.

The 3rd and 4th Defendants–Respondents-Petitioners ("the 3rd and 4th defendants/ appellants") being aggrieved by the aforesaid High Court Order came before this Court and were granted Leave to Appeal on 15-12-2015, on two questions of law which are as follows: -

i) **Have the learned High Court Judges erred in law in not considering that the remedy of revision should not have been exercised to the benefit of the Plaintiff- Petitioner- Respondent in the instant case?**

ii) **Have the learned High Court Judges erred in law in not considering that case No. 317/P and No. 327/L in the District Court of Pugoda are two distinct and different actions with two mutually exclusive Judgements dated 22.06.2001 and 25.04.2002 delivered by the same Additional District Judge of the District Court of Pugoda?**

Thus, the matter before us for determination is whether the High Court was correct in setting aside the Order made in the District Court case bearing No 327/L in which the learned District Judge made Order for the Plaintiff-Petitioner-Respondent ("the plaintiff/ respondent") to accept the consideration preferred by the 3rd and 4th defendants in the instant case and execute the transfer deeds and give effect to the Judgement of the District Court dated 25-04-2002 and in the event, the plaintiff fails to execute the said deeds, for the Registrar of the Court, to execute such deeds in favour of the 3rd and 4th defendants.

The learned Judges of the High Court in its Order, refer to a partition action bearing No 317/P of the District Court of Pugoda ("the partition action") and the contention of the plaintiff that the final decree in the said partition action cannot be assailed in the instant 327/L case and held, that with the entering of the interlocutory decree in the partition action, the rights of the parties were finally decided and that the District Judge was misconceived in directing the plaintiff to execute deeds in favour of the 3rd and 4th defendants and thus set aside the Order dated 18-08-2011 of the District Court of Pugoda in case bearing No 327/L.

It is observed that in the said Order, neither the contention of the 3rd and 4th defendants nor the preliminary objections raised nor the reasons to invoke the revisionary powers of the court have been considered by the Learned Judges of the High Court. Furthermore, the learned Judges have failed to refer to any judicial authority pertaining to revision, partition or execution of decrees in its Order.

Prior to adverting to the legal issues raised before this Court, I wish to refer to the facts of the two cases referred to in the aforesaid High Court Order.

Firstly, the **case bearing No 327/L, ("the land case")** the genesis of the instant appeal.

01. The plaintiff sued four defendants, the 1st and 2nd defendants, proprietor directors of a company to whom the plaintiff by agreement dated 21-07-1992 had given the land more fully referred to in the 2nd schedule to the plaint for development and sale and 3rd and 4th defendants who were in possession of the land more fully referred to in the 3rd and 4th schedules to the plaint; and prayed that the plaintiff be declared the owner of the lands described in the 2nd, 3rd and 4th schedules to the plaint.

- The plaintiff's case was that the 1st and 2nd defendants (who surveyed the land and divided it into nine lots) violated the above referred agreement by non-payment of

the consideration within the agreed time frame and claimed damages from the said two defendants.

- The plaintiff also pleaded that upon the breach of the agreement, seven lots of the land were re-possessed by the plaintiff except the lots referred to in the 3rd and 4th schedules which were occupied by the 3rd and 4th defendants and moved for an order of court to eject the said two defendants from the said lands.

- The case of the 3rd and 4th defendants was that they went into occupation of the said lots, upon part payment of the consideration to the 1st and 2nd defendants the property developer and moved that they be issued with the conveyances for the said lots upon payment of the balance sums of money.

02. The said land case 327/L, filed on 24-06-1997 was taken up for trial and by Judgement dated 25-04-2002, the learned District Judge dismissed the plaint wherein the plaintiff prayed for a declaration of ownership to the lands referred to in the 2nd,3rd and 4th schedules. Further, the learned District Judge made Order in favour of the 3rd and 4th defendants as prayed for in the answer that lots 1 and 6, the lots the said two defendants were in possession (and referred to in the 3rd and 4th schedules) be conveyed to the said two defendants upon payment of a sum of Rs 40,000/= and Rs. 47,000/= respectively.

03. The plaintiff filed a notice of appeal against the said Judgement but did not file a petition of appeal and refrained from canvasing the Judgement in 327/L dated 25-04-2002 before any forum.

04. The 3rd and 4th defendants deposited the sum mentioned in the Judgement in Court but did not take any action to execute the decree until 28-07-2010. Instead the 3rd and 4th defendants took steps referred to hereinafter in case bearing No 317/P, the partition action.

05. The said **partition action 317/P,** was also filed by the plaintiff, to partition a larger extent of land stated therein which is also referred to in 327/L, the land case discussed earlier, as the 1st schedule.

06. The partition action was filed against four defendants but the plaint referred to shares held by only the plaintiff and the 1st defendant. The 3rd and 4th defendants (who are also the 3rd and 4th defendants in the land case) were not to be beneficiaries but were named since they were in possession of a part of the corpus.

- This action was filed prior to the case discussed earlier and Judgement was entered on 24-11-2001 five months prior to the Judgement in case no 327/L the land case, the genesis of this appeal.

07. In the said partition action, the learned District Judge made Order to partition the land and further that the possession of the 3rd and 4th defendants should not be disturbed until the Judgement in 327/L case was delivered.

- In the partition action it is observed that issues bearing numbers 7 to 14, raised by the 3rd and 4th defendants were not answered by the learned District Judge upon the premise that in 327/L the land case, which was an ongoing trial, the same grounds had to be traversed and answered by the very same Judge.

08. Upon delivery of the Judgement in 327/L the land case, the 3rd and 4th defendants deposited the requisite sums of money in court and moved (unsuccessfully though) to incorporate the Judgement of 327/L the land case, in the partition action, consequent to the issuance of interlocutory decree and even moved for an alternative plan when the final plan was subjected for consideration of the parties of the partition action.

- Failing same, the 3rd and 4th defendants in June and September 2004 after final decree was entered, moved to incorporate the Judgement of 327/L the land case, in the partition action. The said applications made before successive Judges were rejected upon the ground that the land case 327/L, had no bearing upon the partition action since the 3rd and 4th defendants were not allotted any shares in the partition action.

09. Thereafter, in the year 2004, the 3rd and 4th defendants filed a revision application before the Court of Appeal against the Judgement of the partition action. The said application was dismissed by the Court of Appeal on 09.09.2009 upon the basis of delay and the 3rd and 4th defendants came before the Supreme Court by way of a special leave to appeal application which too was refused on 26-10-2010.

10. Consequent to the dismissal of the aforesaid revision application by the Court of Appeal with regard to incorporation of the Judgement in 327/L the land case in the partition action, on 28-07-2010, the **3rd and 4th defendants moved to execute the decree in the land case 327/L** which triggered the proceedings in issue in this appeal.

- Having heard the parties, the learned District Judge on 18-08-2011, made Order to give effect to the Judgement dated 25-04-2002 and to execute the conveyances in favour of the 3rd and 4th defendants and if the plaintiff fails to execute same for the Registrar of the Court to execute the deeds in favour of the 3rd and 4th defendants.

- Further the learned District Judge made Order, to avoid any unwarranted issues, that the writ of execution of decree in case bearing No 327/L the land case, should be effected consequent to the plaintiff taking possession of the extent of land allotted to the plaintiff in the partition action.

11. Being aggrieved by the said Order in the 327/L, the land case, the plaintiff filed two applications, a leave to appeal application and a revision application before the High Court. The status of the leave to appeal application filed in the High Court has not been appraised to this Court.

12. In the revision application, based upon the written submissions filed, the learned Judges of the High Court set aside the Order of the learned District Judge dated 18-08-2011 and that is the impugned Order that is now before us for determination.

Upon the said background, let me now advert to the two questions of law raised before this Court. Are the said two cases, distinct and different and the Judgements mutually exclusive; can the Judgement in 327/L the land case, assail the Judgement in 317/P the partition action; and can the extra-ordinary remedy of revisionary jurisdiction be resorted to by the plaintiff, to go before the High Court and challenge the Order made in 327/L, the land case.

Let me examine the jurisdiction issue first.

Does the High Court have jurisdiction to set aside the Order of the learned District Judge by way of a revision application?

It is settled law that the exercise of the revisionary powers of the appellate court is limited to instances in which exceptional circumstances exist, warranting its intervention.

This Court has time and again opined with regard to the exercise of revisionary powers and the observations of Ismail, J., in **Rustom Vs Hapangama and Co. [1979] 1 SLR 352** and Athukorale, J., in **Hotel Galaxy (Pvt) Ltd. and others Vs Mercantile Hotels Management Ltd. [1987] 1 SLR 5** are watershed decisions in respect of such revisionary powers.

Similarly, in **Perera Vs People's Bank [1995] 2 SLR 84** G.P.S. de Silva CJ observed:

> "In any event revision is a discretionary remedy and the conduct of the defendant is a matter which is intensively relevant."(page 87)

The Court of Appeal too in many an illuminating Judgements have considered the scope of revisionary jurisdiction and observed thus-

In **Sikander Abdul Samadh Vs Musajee [1988] 2 CALR 147,**

> "Revision is a discretionary remedy and cannot be exercised except where there is no right of appeal or there is no alternative remedy and exceptional circumstances exist to invoke the jurisdiction of the Court of Appeal." (page 148)

In **Caderamanpulle Vs Ceylon Paper Sacks Ltd [2001] 3 SLR 112,**

> "No exceptional circumstances are disclosed why this application for revisionary relief should be entertained… The existence of exceptional circumstances is a pre-condition for the exercise of powers of revision." (pages 112 - 113)

In **Dharmaratne and another Vs Palm Paradise Cabanas Ltd and others [2003] 3 SLR 24**,

> "existence of exceptional circumstances is the process by which courts select the cases in respect of which the extraordinary method of rectification should be adopted. If such a selection process is not there, revisionary jurisdiction of this Court will become a gateway of every litigant to make a second appeal in the garb of a Revisionary Application or to make an appeal in situations where the legislature has not given a right of appeal.
>
> The practice of court to insist in the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which would not be lightly disturbed." (page 24)

In **Wijesinghe Vs Tharmaratnam Srikantha's LR (IV) at page 47,**

> "Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of court." (page 49)

In **Bank of Ceylon Vs Kaleel and others [2004] 1 SLR 284,**

> "In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it; the order complained of is of such a nature which would have shocked the conscience of court." (page 284)

The observations of the appellate courts in the plethora of Judgements referred to above, which I concur with, shed light to the guiding principles an appellate court should follow when granting relief by way of a revision application.

It is observed, that although the 3rd and 4th defendants have relied on many of the above reported Judgements in the written submissions filed before the High Court and has raised a number of preliminary objections to the maintainability of a revision application, specifically that no exceptional circumstances exist to invoke the revisionary jurisdiction when the plaintiff has already exercised the right of appeal (within time) against the impugned Order of the

learned District Judge dated 18-08-2011, none of the preliminary objections raised nor the cases cited, have been referred, analysed or considered in the impugned Order of the learned Judges of the High Court.

The most significant fact in this appeal to me, is that the plaintiff did not challenge before any forum, either by way of an appeal or revision application, the **original Judgement of the District Court dated 25-04-1992 in 327/L** the land case, by which the prayer of the plaintiff for a declaration of title to the lands possessed by the 3rd and 4th defendants (referred to in the 3rd and 4th schedules to the plaint) and the ejectment of the 3rd and 4th defendants was refused by the learned District Judge.

Whilst the Judgement of the District Court in the land case, did not allow the prayer of the plaintiff, it made order in favour of the 3rd and 4th defendants, that the said defendants were entitled to obtain the deeds executed in their names upon payment of the balance sums of money to the plaintiff. **The Order of the District Court dated 18-08-2011 is with regard to the execution of the writ pertaining to the said judgement and decree**. The plaintiff being aggrieved by the said Order exercised his right of appeal and filed a petition of appeal in the High Court and a revision application in which the impugned Order was made.

Hence, on one hand there is a Judgement, which the plaintiff decided not to appeal or move in revision, and on the other hand there is an Order against which the plaintiff had already lodged an appeal and which is pending before the High Court for determination.

In the said background, I see merit in the submission of the learned Counsel for the 3rd and 4th defendants, that there was no reason or necessity and in deed no exceptional grounds or circumstances, for the plaintiff, to invoke the revisionary jurisdiction of the High Court, since the right to appeal to the High Court against the impugned Order of the learned District Judge dated 18-08-2011 was duty exercised by the plaintiff within time. In any event, no specific reasons or grounds were given nor referred to in the petition filed in court, for the plaintiff to resort to the extra-ordinary revisionary jurisdiction of the High Court.

I wish to consider invocation of the revisionary jurisdiction of the High Court, from another perspective, i.e. even if the plaintiff has resorted to and exercised the right of appeal, were there exceptional grounds or reasons that shocks the conscience of court to merit, revising the Order of the District Court to ensure the appeal is not rendered nugatory.

In a case decided by this Court in 1939, **Atukorale Vs Samynathan 41 NLR 165,** it was held that the powers given to the Supreme Court by way of revision are wide enough to give it the right to revise any order made by the original court, whether an appeal had been taken against it or not, in exceptional circumstances, only to ensure that the decision given on appeal is not rendered nugatory. Based upon the said reasoning Soertz, J., who delivered the Judgement in the said case, stayed the writ of execution which was for recovery of damages, pending the hearing of the appeal.

The Court of Appeal in **Rasheed Ali Vs Mohammed Ali [1981] 2 SLR 29,** considered the above referred case and while re-echoing the words of Soertz, J., held that the facts of the **Rashid Ali** case, did not merit indulgence of the court to exercise the revisionary powers.

Thus, the ratio of the decisions of the Appellate Courts lays down the principle, whether an appeal lies or not, the revisionary jurisdiction of a court can be exercised only when there are exceptional grounds that shocks the conscience of court or which merits the intervention of the appellate court. The **Athukorale case** referred to above emphatically states the basis to resort to filling a revision application is not to render the appeal nugatory, when exceptional circumstances exist. Hence, the underlying requirement in a revisionary jurisdiction is exceptional grounds and circumstances.

In **Attorney General Vs Gunawardena [1996] 2 SLR 149,** a case in which the Attorney General sought to revise an order of the High Court when no provision for appeal was available, a divisional bench of this Court, analyzing the provisions of the Administration Justice Law and Section 753 of the Civil Procedure Code held,

> "that revision like an appeal is directed towards the correction of errors but it is supervisory in nature and **its object is the due administration of justice** and not primarily or solely the relieving of grievances of a party." (page 149) (emphasis added)

Hence, when exercising this special mechanism, the revisionary jurisdiction, the pivotal issue and the most essential element a court should evaluate and ascertain is 'exceptional circumstances' in order to duly administer justice.

If there are no exceptional grounds, my considered view is that revisionary jurisdiction will not lie. The correctness of an order challenged, can be determined in the appeal filed and it is not essential to resort to another channel, i.e. revisionary jurisdiction.

In the instant appeal as was discussed earlier, when the plaintiff failed to obtain the relief prayed for from the District Court, the plaintiff did not challenge the said Judgement dated 25-04-2002. But when the District Judge made Order to execute the writ, pertaining to the said Judgement and its decree, the plaintiff thought it fit to challenge the said Order, by way of a leave to appeal application and a revision application.

It is a matter of interest that in the revision application filed before the High Court, by the plaintiff, almost all the paragraphs referred to the partition action and not to the land case 327/L of which the revision was sought. The substantial relief prayed for as prayer (b) (c) and (d) were-

- revise the Order dated 18-08-2011 filed of record in this case 327/L;
- direct the learned District Judge to make an order in line with the Judgment and the orders dated 27-07-2004 and 09-09-2004 entered in the partition action in District Court, Pugoda case No 317/P and the Orders of the Court of Appeal in

CA/Rev/1832/2004 and Order of the Supreme Court dated 26-10-2010 in SC/SPL/LA 238/2009;

- call for and examine the record in the District Court Pugoda case bearing No 317/P.

It is observed that relief (c) and (d) pertains to the partition action. Moreover, the principle relief sought by the plaintiff was to revise the Order of the learned District Judge dated 18-08-2011 and not to set aside the said Order, though the learned High Court Judges by its impugned Order, thought if fit to set aside the Order of the Learned District Judge.

The said High Court Order also referred to the contention of the plaintiff that the interlocutory decree is final and conclusive and held that the learned District Judge was misconceived in directing the plaintiff to execute the deeds in favour of the 3rd and 4th defendants.

It is observed that the said Order of the High Court is devoid of any reasoning. It does not refer to the contention of the 3rd and 4th defendants; to the preliminary objections raised with regard to the maintainability of this application; to the extra-ordinary circumstances that necessitates the invocation of revisionary jurisdiction; facts that shocks its conscience; facts that would make the appeal nugatory; or even to the substantive relief referred to above and prayed for by the plaintiff, when it allowed the plaintiffs' application for revision and set aside the District Court Order.

It is also observed that the learned Judges of the High Court, by determining the revision application not in the manner prayed for, but by setting aside the Order of the learned District Judge dated 18-08-2011, in effect and in one stroke determined the pending leave to appeal application of the plaintiff pertaining to execution of the decree and negated the Judgement of the District Court delivered a decade ago, which the plaintiff in any event did not proceed to challenge or revise before any forum.

Thus, my considered opinion is that the learned Judges of the High Court exercised the revisionary jurisdiction where no exceptional circumstances existed; and which necessitated such a course of action to be followed to administer justice and hence acted in a palpably wrong and erroneous manner especially, when the essential element of facts that shocks the conscience of court or which would make an appeal nugatory were not in existence.

Thus, in my view the facts of this case, does not merit the invocation of the revisionary jurisdiction and hence, resorting to same by the plaintiff is a fundamental vice and is not warranted especially when such a right is not available to the plaintiff.

However, in the instant appeal, the revisionary jurisdiction has been invoked and a decision made. Hence, in order to determine the 1st question of law raised before this Court, the next issue that has to be answered is, **whether the learned Judges of the High Court, correctly exercised the revisionary jurisdiction to the benefit of the plaintiff**.

In order to ascertain an answer to such question, I wish to examine the 2nd question of law in detail now, since it is directly linked and interwoven with such query.

Are the two cases referred to in the Order of the High Court inter-connected or are the two cases distinct and different and mutually exclusive? If the two cases are mutually exclusive, then has the High Court correctly exercised its powers in determining the revision application to the benefit of the plaintiff or has the High Court erred in arriving at a decision, which would render the question to be determined and to be answered, in favour of the appellant.

If I may repeat the factual matrix, to recapture the most relevant issues, the plaintiff filed two cases against the 3rd and 4th defendants. One a partition action filed in 1994 and the other a land case filed in 1997 the genesis of this appeal. The partition action was in respect of partitioning a larger land in extent 3 acres, 2 roods 33 perches and by Judgement dated 22-06-2001, the plaintiff was allotted 158.6 perches for his share of the corpus and a final plan prepared incorporating the defined allotment. In the said partition Judgement, the learned District Judge made order not to dispossess the 3rd and 4th defendants who were in possession of a part of the corpus until the Judgement in the land case was determined by the same judge.

As stated in detail at the beginning of this Judgement, in the land case the plaintiff moved for a declaration of title to a land in extent 3 roods 14 perches (approximate to his allotment of land from the partition action) with metes and bounds based upon the survey plan prepared for development and sale of the said land. It is a matter of interest that prior to filling both these cases, the plaintiff handed over this land for development and sale and it was surveyed and divided into nine lots. The plaintiff re-possessed seven lots except the defined two lots the 3rd and 4th defendants were in possession from which the ejectment was sought by the plaintiff. The learned District Judge did not grant the order of ejectment in the land case but made order for the plaintiff to execute the deeds in favour of the 3rd and 4th defendants with regard to the said two lots. Subsequently, the 3rd and 4th defendants moved to execute the said decree and the learned District Judge directed the decree be executed upon the date or on a subsequent date to the plaintiff obtaining possession of the allotment of land in the partition action in order to avoid any practical problems and issues.

From the facts of these two cases, it is clearly seen that the said two cases are not inter connected. The two cases are distinct and different and the Judgements are mutually exclusive.

In the **partition action 317/P,** the plaintiff named the 3rd and 4th defendants who were in possession of a part of the corpus as defendants but did not move for any relief against them. Hence, no shares were allotted to the said two defendants.

It is settled law and the gamut of cases pertaining to partition of lands has categorically held that a transferee of a yet undermined right is not a necessary party to determine a partition action. It is also not in dispute that the rights of the parties in a partition action is determined at the time of filling of the plaint and that partition action is an action *in rem* and not an action *in personam.* Thus, with the entering of interlocutory decree followed by final decree the rights of the respective parties with regard to the shares of the corpus are determined. I do not intend to go on an academic exercise in respect of the case law governing the law of partition of land,

suffice it to say by the final decree in the partition action, the plaintiff has been allotted a defined portion of the larger land, in extent 158.6 perches.

In the **land case 327/L,** in the plaint filed, independent to the partition action, the plaintiff categorically defined the extent of land which the 3rd and 4th defendants possessed and moved that a declaration of title be entered in favour of the plaintiff which was not granted by the District Court. Instead the learned District Judge made order for the plaintiff to execute the deeds conveying the said lots to the 3rd and 4th defendants. The contention of the plaintiff was that this was an interference with the partition action. I cannot accept the said submission.

The Judgement of the learned District Judge which was (neither challenged by an appeal or a revision application) was to execute the deeds in respect of the defined two lots, possessed by the 3rd and 4th defendants more fully referred to in the respective schedules to the plaint. When the 3rd and 4th defendants moved to execute the writ in the land case, the learned District Judge made Order to do so, after the execution of the final decree in the partition action. Thus, in my view the said Order in the land case is not an interference with the partition action. It should be complied with only after the final decree in the partition action is executed. The reference to partition action is only to indicate the time frame. First, the decree in the partition action has to be executed. Thereafter, only the execution of decree in the land case should take place. One should follow the other. Thus, in my view the two cases are mutually exclusive and are distinct and different. Hence, the two questions of law should be answered accordingly.

However, when this appeal was heard before us, the learned Counsel for the Plaintiff/Respondent, defending the High Court Order, relied on the observations in three reported Judgements to elaborate his contention that the order in the land case is an interfearence with the partition decree which is an action *in rem.*

I wish to examine the said cases now.

> *Firstly*, the observation of Weerasuriya, J., in **Jayaratne and another Vs. Premadasa and others [2004] 1 SLR 340** that,
>
> "The Court had no jurisdiction to vary the Judgement. The decree is final subject to appeal under Section 48(1) and also revision or *restitution in intergrum*. The Court may also vary the Judgement under Section 48(4) only in respect of the parties and in the limited circumstances…." (head note)

The learned President's Counsel for the plaintiff, based upon the above observation, submitted that the partition decree entered in the partition action is final and conclusive for all purposes and cannot be varied by the execution of the decree in the land case since it would interfere with the final decree of the partition action.

Whilst agreeing with the aforesaid observation made in the **Jayaratne case**, I am of the view that it cannot be taken in isolation. It should be looked at from the perspective of the facts of the said case and cannot be applied out of context in each and every circumstance.

In **Jayaratne case**, the land to be partitioned was in extent 30 acres. However, the preliminary survey depicted an extent of approximately 72 acres. Judgement was delivered, interlocutory decree entered and steps taken to partition the larger extent of 72 acres, when three persons who were not parties to the case moved court to set aside the Judgement and the interlocutory decree or in the alternative to restrict the corpus to 30 acres. The District Court permitted the said application and varied the extent of land and the Court of Appeal upheld the said decision.

This Court whilst setting aside the said Court of Appeal Judgement observed, in respect of the application made by the intervening persons, who were not parties to the original partition case, in the District Court,

> "that this application was outside the scope of Section 48(4) of the Partition Law for several reasons [ ] that District Court had no jurisdiction to entertain the application of the petitioner ….to seek the relief…..and the application was misconceived. The Court of Appeal has taken the erroneous view that notwithstanding the provisions of Section 48…. the District Judge was justified in restricting the corpus to 30 acres using the inherent powers of court in terms of Section 839 of the Civil Procedure Code." (page 344)

In the instant appeal, unlike in the case referred to above, the 3rd and 4th defendants who were not strangers or 3rd parties but were parties to the partition action moved court (though unsuccessfully) to vary the partition Judgement, interlocutory decree and the final decree in the partition action. In my view that course of action of the 3rd and 4th defendants in the partition action, does not debar the 3rd and 4th defendants from taking steps to execute the decree in the land case, as provided for by the Civil Procedure Code or resorting to the due process of the law in the land case. Hence, the said course of action followed by the 3rd and 4th defendants in the partition action, should not be held against them. It has no relevance to the appeal before us. The impugned Order of the District Court is only to execute the decree in the land case, subsequent to the execution of the final decree in the partition action and thus the observation made in the **Jayaratne case** quoted by the learned Counsel for the plaintiff, should be considered in the context of the facts of the said case and specifically where the Court of Appeal referred to the inherent powers of court. Hence, in my view **Jayaratne case** can be distinguished from the instant appeal and has no relevance to the matter in issue.

The 2nd case , relied upon by the learned Counsel for the plaintiff before this Court, to substantiate that the final decree of the partition action wiped out all effects of the claim of the 3rd and 4th defendants in the land case was **De Costa and others Vs De Costa and others [1998] 1 SLR 107** a Judgement of the Court of Appeal. In this case the question that arose for determination was whether an order made in terms of Section 48(4)(a)(iv) of the Partition Law No 21 of 1977 as amended ("the Partition Law") is a Judgement within the meaning of section 754(1) and (5) of the Civil Procedure Code or an order made within Section 754(2) and (5) of the Civil Procedure Code read together with Section 67 of the Partition Law or in simpler words, was the impugned order, an interlocutory order or a final order. The observation of the

learned Judge of the Court of Appeal relied upon by the Counsel for the plaintiff was as follows:-

> "The finality of these orders must be determined according to the Partition Act. Under the Partition Act if no complaint was alleged with regard to the Judgement and consequential interlocutory decree, and if no steps were taken under Section 48(1)(a)(vi), the special provisions relating to decrees in Section 48(1), (2), (3) and Section 67 of the Partition Law would come to operate. In such a situation the only irresistible inference that could be drawn is that such an order finally disposed of all the rights of the parties and the suit was not alive but finally disposed of" (head note)

In my view, the said observation pertaining to the finality of an order was in relation to the question aforesaid and the said case should be considered in that perspective.

Even if the case before us is looked at from another angle, in my view it can be differentiated since the land case filed by the plaintiff did not challenge the final decree of the partition action. The Order of the land case is only a follow up action. It envisages the plaintiff to take certain steps to fulfill the Judgement which was in any event not challenged by the plaintiff. Hence the said case too, in my view has no relevance to the instant appeal and can be distinguished.

The 3rd case relied upon by the plaintiff was **Latheef and another Vs Mansoor and another reported in 2011 BLJ 189**. Marsoof J in an illuminating Judgement on *rei vindicatio* action and other legal principles, observe at page 210, that the primary duty of a court when deciding a case involving ownership of land is to consider whether the land has been clearly identified or not. The learned Counsel for the plaintiff relied on the said observation to argue that in the instant appeal, the land has not been clearly identified.

Contrary to the said assertion, it is seen that the plaintiff, in the plaint filed in court to obtain a declaration of title to evict the 3rd and 4th defendants, clearly and precisely identified the extent and the lots of land with its meets and bounds based upon a survey plan.

Thus, in my view, in the instant appeal, the land has been clearly identified and the contention of the learned Counsel for the plaintiff, that the lots have to be super imposed in the final plan of the partition action has no rational or merit. The two cases are distinct and different. In the partition action the corpus was partitioned according to the final plan and in the land case, from and out of the defined portion of the corpus carved out to the plaintiff, the conveyances for the two lots of lands possessed by the 3rd and 4th defendants should be executed, based upon the survey plan referred to by the plaintiff and clearly defined and identified in the plaint filed by the plaintiff himself.

Hence, whilst agreeing with the observations referred to in **Latheef's Case** referred to above that the identity of the land is fundamental for attributing ownership, the plaintiff in my view, cannot rely upon the said observation to justify the impugned Order of the High Court. In the instant case, the plaintiff in no uncertain terms, has clearly and precisely identified the

lots of land when moving court to obtain relief and thus, cannot now be heard to say that the land is not identified.

Thus, the three cases relied upon by the plaintiff to substantiate and defend the impugned Order of the High Court can be distinguished and has no relevance to the matter in issue and in my view does not assist the plaintiff in his contention, that the two cases are interwoven and the Judgement in the land case is an interference and assails the final decree of the partition action. The said two cases in my view, stand alone and are mutually exclusive.

Even if the two cases are looked at from the perspective of the extent of land, from the plaintiff's entitlement of 158.6 perches i.e. 3 roods 38 perches (out of a total of 3 acres 2 roods and 33 perches) only the two lots of land in possession of the 3rd and 4th defendants (19.5 perches and 15.5 perches totaling 35.0 perches) should be carved out and hence, the submission of the plaintiff that the land case assails the partition action in my view, has no merit.

Thus, the Order of the learned District Judge that the execution of the decree in the land case should take place, after the execution of the decree in the partition action is salutary and stands to reason and is a pragmatic approach to administer justice to the suitors before court.

Having considered the submissions of the plaintiff in this appeal, I will now move over to consider the submissions of the appellant.

Firstly, the contention of the learned Counsel for the appellant/the 3rd and 4th defendants before this Court that the 3rd and 4th defendants have in their favour a subsisting Judgement, the benefit of which the 3rd and 4th defendants have failed to reap up to date, in view of the impugned Order of the High Court.

The learned Counsel for the 3rd and 4th defendants heavily relied on the legal maxim ***actus curiae neminem gravabit***, that an Act of court shall prejudice no person, a guiding principle which needs no elaboration, to substantiate his submission.

The learned Counsel relied on the dicta of Sharvananda J (as he then was) in **Ittapana Vs Hemawathie [1981]2 SLR 476** as well as the observation of H.A.G de Silva, J., in **Madurasnghe Vs Madurasinghe [1988] 2 SLR 142** to justify his contention. The learned Counsel for the 3rd and 4th defendants also drew our attention to a more recent Judgement **Finance Land Sales Ltd Vs Perera [2005] 1 SLR 79** a Judgement of the Court of Appeal where too, the said legal maxim was examined and followed.

Sharvananda, J., in the **Ittapana Case** referred to above, (at page 485) echoed the words of Lord Carins in **Rodge Vs Comptoir D' Escomple de Paris [1871] 3 PC 465** as follows:-

> "one of the first and highest duties of all courts is to take care that the act of the Court does no injury to any of the suitors…."

H.A.G. de Silva, J., in **Madurasinghe Vs Madurasinghe case** referred to above (at page 150) observed,

> "The next matter that calls for consideration is the principle of *nunc pro tunc* which is really the application of the maxim *actus curiae neminem gravabit* – an act of the Court shall prejudice no man. Broome's Legal Maxims 7th edition page 97 reads, this maxim is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law".

In **Finance and Land Sales case** referred to above, Amaratunga, J., at page 82 stated as follows:-

> "However this Court has to look at the other side of the coin as well. In giving relief to the petitioner, we have to ensure that it would not result in prejudice to the plaintiff…The judgemet….is to be set aside due to the serious mistake made by Court. *Actus curiae neminum gravabit* (an act of court shall prejudice no man). Accordingly, this Court has to ensure that the Courts' mistake does not result in prejudice to the plaintiff."

I am in agreement with the said observations that the Act of Court should do no injury to the suitors before court and it is the primary duty of a court to safe guard the interests of parties before court.

Thus, in my view this proposition of the learned Counsel stands to reason. The impugned Order of the High Court has effectively negated the Judgement of the District Court and had caused grave injustice to the 3rd and 4th defendants and has given an opportunity to the plaintiff to co-laterally attack a Judgement which the plaintiff originally failed to do. It has also negated the rights of the 3rd and 4th defendants who had in their favour a legal and valid Judgement, which had not been challenged before any court by way of an appeal or a revision application.

On the other hand, the impugned Order of the High Court has effectively stalled a writ of execution of a decree, by way of a revision application, where no exceptional grounds or circumstances were pleaded, nor attributed nor found. The said Order has been made when the circumstances did not shock the conscience of Court or made the pending appeal nugatory.

Furthermore, the impugned High Court Order which set aside the District Court Order for execution of writ is a skeletal order devoid of any reasoning and is a mere repetition of facts, where no law was referred, examined nor analyzed.

It is my considered view, that the paramount duty of this Court is to safe guard the rights of the parties before Court. The legal maxim referred to above, ***actus curiae neminem gravabit*** is founded upon justice and good sense in order to administer justice. Hence, this Court must uphold and enforce the said maxim when it is evident that the act of court has caused injury to a suitor before court.

The next contention of the learned Counsel for the 3rd and 4th defendants to substantiate the appeal before this Court was that the observation of the learned High Court Judges, that the partition action and the land case cannot be reconciled, is erroneous and bad in law.

The learned Counsel submitted that the rights of the 3rd and 4th defendants to the land in issue, would only derive, from the rights of the plaintiff to the partition action and thus the rights and interests of the plaintiff and the 3rd and 4th defendants are not adverse but co-related and if the plaintiff does not obtain any right or interest, the 3rd and 4th defendants would also not derive any right or interest to the land in issue.

The learned Counsel also relied on the case of **Sirinatha Vs Sirisena and others [1998] 3 SLR 19,** a Judgement of the Court of Appeal, which examined a number of Judgements of the Appellate Courts pertaining to the provisions of the present Partition Law No 21 of 1977 as amended and the repealed Partition Act No 26 of 1951 and the earlier existing Partition Ordinances in the 1800's and also the law in respect of addition of persons as necessary parties and effect of a sale of a contingent interest and other legal issues.

The learned Counsel also made extensive submissions with regard to alienation or hypothecation of a contingent interest in a partition action viz-a-viz the prohibition of alienation or hypothecation of undivided interests referred to in section 66 of the present Partition Law, which correspond with section 67 of the earlier Partition Act and section 17 of the Partition Ordinance of 1863 and relied on many Judgements of the Court of Appeal some of which were, **Sirisoma and others Vs Saranelis Appuhamy 51 NLR 337**; **B. Sillie Fernando Vs W. Silman Fernando and others 64 NLR 401**; **Abeyratne Vs Rosalin [2001] 3 SLR 308.**

The learned Counsel drew are attention to a recent Judgement of this Court, **Abusali Sithi Fareeda Vs Mohamed Noor and another S.C. Appeal 134/2013 – S.C. Minutes dated 28-10-2014**, where it was held that the above referred prohibitions in no way affect an individual's right to alienate, obtain, transfer and hypothecate land under the common law and specifically a contingent right or a 'would acquire' right in a pending partition action, can be transferred upon the conclusion of the partition action.

I do not wish to go on an academic exercise and analyze the law pertaining to prohibition of alienation or hypothecation referred to above nor the common law right to alienate or hypothecate. Suffice is to repeat the observation of Woodrenton, A.C.J. in **Subaseris Vs Prolis 16 NLR 393** at page 394;

> "…the clear object of the enactment was to prevent the trial of partition actions from being delayed by the intervention of fresh parties whose interests had been created since the proceedings began…"

Thus, in my view, the provisions of the Partition Law should be looked at and considered from the said perspective. It is not a draconian law nor obnoxious to the common law. It only provides a mechanism to partition land among the relevant parties and is an action *in rem*. Our Courts throughout the centuries have acknowledged and accepted the said fact and there is no difference of judicial opinion with regard to it.

In the instant appeal, the rights the 3rd and 4th defendants claim, is based upon the Judgement of the land case 327/L which had not been challenged by the plaintiff. For reasons

discussed in detail earlier, the partition action and the land case are mutually exclusive. The land case 327/L does not assail the final decree of the 317/P partition action. It is a standalone case. The 3rd and 4th defendants have a legally valid and enforceable Judgement which the 3rd and 4th defendants are lawfully entitled to execute.

The learned District Judge has taken a pragmatic approach and only made order that the unchallenged Judgement of the land case 327/L, should be executed upon or subsequent to the plaintiff obtaining possession of his entitlement of land from the partition action 317/P. This is the Order the learned Judges of the High Court set aside in a revision application, where no exceptional circumstances were pleaded by the plaintiff nor existed. Thus in my view, the said High Court Order is erroneous and does not stand to reason.

In the said background, I see merit in the submission of the appellant that the impugned Order of the High Court should be set aside and the Order of the District Court pertaining to the execution of writ should be affirmed.

For the reasons adumbrated in this Judgement, I answer the two questions raised before this Court in the affirmative and set aside the Order of the Civil Appellate High Court dated 05.02.2014 holden in Avissawella.

With regard to the writ of execution of decree, I affirm the Order dated 18.08.2011 of the District Court of Pugoda in the instant land case bearing No. 327/L.

The appeal is allowed.

Judge of the Supreme Court

B.P.Aluwihare P.C. J,
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C. J,
I agree .

Judge of the Supreme Court