IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application for leave to Appeal under and in terms of Section 5 of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.

SC Appeal No. 26/2016
SC LA No. SC/HCCA/LA/41/2015
HC (Western Province) No. WP/HCCA/GAM/09/2014 Rev
DC Gampaha Case No. 42392/P

Kahandawala Arachchige Indrawansha
No. 641, Kajuhena Road, Heiyanthuduwa.

Plaintiff

Vs.

Kahandawala Arachchige Rupasiri
No. 641/B,
Kajuhena Road, Heiyanthuduwa.

Defendant

AND BETWEEN

Mahakumbure Gedara Sandamali Thilakarathne
No. 639/3, Kajuhena Road,
Heiyanthuduwa.

Petitioner

Vs.

Kahandawala Arachchige Indrawansha
No. 641, Kajuhena Road, Heiyanthuduwa.

Plaintiff-Respondent

Kahandawala Arachchige Rupasiri
No. 641/B, Kajuhena Road,
Heiyanthuduwa.

Defendant-Respondent

AND BETWEEN

Mahakumbure Gedara Sandamali
Thilakarathne
No. 639/3, Kajuhena Road,
Heiyanthuduwa.

Petitioner-Petitioner

Vs.

Kahandawala Arachchige Indrawansha
No. 641, Kajuhena Road, Heiyanthuduwa.

Plaintiff-Respondent-Respondent

Kahandawala Arachchige Rupasiri
No. 641/B, Kajuhena Road,
Heiyanthuduwa.

Defendant-Respondent-Respondent

AND NOW BY AND BETWEEN

Kahandawala Arachchige Indrawansha
No. 641, Kajuhena Road, Heiyanthuduwa.

Plaintiff-Respondent-Respondent-Petitioner

Vs.

Mahakumbure Gedara Sandamali
Thilakarathne
No. 639/3, Kajuhena Road,
Heiyanthuduwa.

Petitioner-Petitioner-Respondent

Kahandawala Arachchige Rupasiri
No. 641/B, Kajuhena Road,
Heiyanthuduwa.

Defendant-Respondent-Respondent-Respondent

Before:	Buwaneka Aluwihare, PC. J. Priyantha Jayawardena, PC. J. Murdu N.B. Fernando, PC. J.
Counsel:	Erusha Kalidasa for the Plaintiff-Respondent-Respondent-Appellant. Ananda Kasthuriarachchi for the Petitioner-Petitioner-Respondent.
Argued on:	03. 06. 2019
Written submissions:	17. 06. 2019
Decided on:	10. 07. 2020

JUDGEMENT

Aluwihare PC. J.,

Introduction

1. This case concerns a challenge to an order made by the High Court of Civil Appeals-Gampaha where the Court, exercising its revisionary jurisdiction in terms of Article 138 of the Constitution read with Section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 as amended by Act No. 54 of 2006, had set aside the interlocutory decree and the final decree of a partition action and granted right of way, on an application made by the Respondent to the instant application **who was neither a party to the said partition action, nor had any claim to the corpus, at the time the partition action was instituted.**

Factual Background

2. The Plaintiff-Respondent-Respondent-Appellant (hereinafter referred to as the Plaintiff) filed an action in the District Court against the defendant-Respondent-Respondent-Respondent Kahandawela Archchige Rupasiri, seeking to partition the subject matter of this case, which was more fully described in the 3rd schedule to the plaint.

3. The matter proceeded to trial and the learned District Judge delivered the judgement on 24.07.2001 and the final decree had been entered on 30.09.2002.

4. When the plaintiff took steps to have the writ executed (on 26.01.2003) a few parties, however, had resisted the execution. Consequently, the plaintiff had had to institute contempt of Court proceedings against ten persons who had so resisted the execution of the writ.

5. After four years, on 23.05.2007, the disputing parties reached a settlement. The parties who had resisted the execution of the writ had agreed to pay the plaintiff a sum of Rs.16, 800/=, the cost the Plaintiff had incurred due to the said resistance and the parties had been warned by the Court to abide by the settlement.

6. Accordingly, the Court, on 08.07.2007 had ordered that the writ be reissued, which had been executed on 08.08.2007. On this occasion too, several other parties had resisted the execution of the writ and contempt of Court proceedings had been filed for the second time on 10.09.2007. Subsequent contempt proceedings too had been settled between the parties on 08.07.2014 and peaceful possession had been handed over to the Plaintiff and the Defendant of the partition case.

7. During the pendency of those proceedings, but independent to and unconnected with them, one Ranjith Priyantha, who happened to be the predecessor in title of the property of the Petitioner-Petitioner-Respondent to the proceedings before us (hereinafter referred to as the Respondent), had instituted an action against the Plaintiff in the District Court seeking a right of way over the subject matter of this case. When the present matter was taken

up for argument before us, it was brought to the notice of this court on behalf of the Plaintiff that the said matter concerning the right of way is still pending before the District Court.

8. In the meantime, the Respondent to the proceedings before this Court, who was never a party to the partition action referred to, filed an application dated 21.07.2014 in the District Court in terms of **Section 325(4) of the Civil Procedure Code**, (hereinafter the CPC) claiming several reliefs in connection with the partition action, which had come to an end by then. They were *inter alia*;

    a. To dismiss and set aside the writ issued, whereby the Plaintiff was to be given possession of the subject matter of the partition case.
    b. A declaration to the effect that the Respondent was entitled to a right of way either by prescription and/or as a servitude over the land referred to in the 3rd Schedule to the plaint (the land that was subjected to partition);
    c. That the Respondent be given the possession of the land referred to in the 3rd Schedule.

    Section 325(4) of the CPC reads as follows;

    "Any person claiming to be in possession of the whole of the property or part thereof as against the judgment- creditor may file a written statement of his claim within fifteen days of the publication of the notice on such property, setting out his right or interest entitling him to the present possession of the whole property or part thereof and shall serve a copy of such statement on the judgment-creditor. **The investigation into such claim shall be taken up along with the inquiry** into the petition in respect of the resistance, obstruction, hindrance or ouster complained of, after due notice of the date of such investigation and inquiry has been given to all persons concerned. Every such investigation and inquiry shall be concluded within sixty days of the publication of the notice referred to in subsection (2)" [emphasis is mine].

9. The learned District Judge in a considered order, quite rightly dismissed the application *in limine* on 28.07.2014 on the grounds that the Respondent's

application had no legal basis and that consequently, even the need to issue notice on the parties did not arise. The learned District Judge held;

"ඉහත කී පරිදි එකී පෙත්සම්කාරිය මෙම නඩුවේ පාර්ශවයක් නොවන අතර, නඩුවක කරනු ලබන ඉල්ලීමක් පවත්නා නෙතික ප්‍රතිපාදන මත සිදු කරනු නොලබන්නේනම්, එවැනි ඉල්ලීමක වගඋත්තරකරුවන්ට නොනීසි නිකුත් කිරීමේ නෙතික අවශ්‍යතාවයක් පැන නොනගී."

10. Aggrieved by the order of the Learned District Judge, the Respondent moved the High Court of Civil Appeal by way of revision, seeking to revise the partition judgment on the basis that the Final Decree was contrary to law and against the weight of the evidence placed before the Court and *inter alia* seeking the following reliefs;
    (1) To have the partition judgment dated 24.07.2001 set aside
    (2) To have the Final Decree dated 30.09.2002 set aside and
    (3) That the Respondent be granted the relief sought by her in her application to the District Court in terms of Section 325(4) of the Civil Procedure Code.

11. After consideration of the revision application, by its order dated 13.01.2015 the Judges of the High Court of Civil Appeal held that the order of the learned District Judge was erroneous and granted all the reliefs prayed by the Respondent;

"ඒ අනුව පෙත්සම්කාර පාර්ශවය විසින් 2014.07.31 වන දින **දීසා අධිකරණයට ඉදිරිපත් කරන ලද පෙත්සමේ ආයාචනයේ ඉල්ලා ඇති සියලු සහන** ලබා දෙමින් මෙම ප්‍රතිශෝධන ඉල්ලීමට ඉඩ ලබා දෙමු".

(It should be noted here that the DC Application is dated 21.07.2014 and not 31.07.2014 as erroneously mentioned in the order of the High Court of Civil Appeal.)

Order of the High Court of Civil Appeal

12. It is the considered view of this court that, if the learned judges of the High Court thought that there was merit in the Respondent's application, the only order that the learned High Court Judges were legally empowered to deliver was to direct the learned District Judge to issue notice on the parties to inquire into the matter which he had dismissed *in limine*.

13. The above view is expressed by this court on the basis that;

(a) Section 325(4) requires an investigation in to a claim under that provision be taken up along at an inquiry before the District Court. No inquiry was held by the learned District judge in the instant case.
[Please see the cases of **Sikander Abdul Samadh v. M. M. Musajee** (1998 (2) C.A.L.R. 147) and **Setunga v. Fernando** 1982 (2) SLR 584]

(b) Article 138 which confers appellate powers on the Court of Appeal which are now exercised by the High Court of Civil Appeals as well, by virtue of section 5A of the High Court (special provisions) Act, No. 19 of 1990 (as amended in 2006). Section 5A reads as follows:
"5A(1) A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of **all errors in fact or in law,** which shall be committed by any such District Court or Family Court, as the case may be." (Emphasis added)

(c) In the instant case there could not have been any ***errors of fact*** to be corrected for the reason that the learned District Judge had not gone in to or considered the facts.
In the case of **Andradie v. Jayasekera Perera** (1985) 2 SLR 204, at page 209, it was held by Siva Selliah J. as follows:
"All these are questions of fact as is the question of fraud on which evidence will appear necessary and the petitioner herself should be made available for cross-examination and **consequently the (District) judge must make his findings on questions of fact before this court can be invited on inferences and conduct to hold that there has been fraud… it is only where**

the finding of the District Court on such application is not consistent with reason or the proper exercise of the judge's discretion or where he has misdirected himself <u>on the facts or law will this court grant extraordinary relief by way of Revision</u> **or Restitutio in Integrum** which are extraordinary remedies." [emphasis is mine]

14. Contrary however to all legal norms and betraying total ignorance of rudimentary procedure, the judges of the High Court, whilst sitting in appeal have arrogated to themselves the functions of a court of first instance and inquired into matters concerning property rights, both prescriptive and servitutal, on the basis of a bare affidavit. In one sweeping sentence, in a two-page judgement, the learned High Court Judges had granted all the reliefs sought by the present Respondent who was the petitioner to the application before the District Court in terms of Section 325(4) of the CPC.

15. This misdirection, in my view, is grievous enough for this court to set aside the order of the High Court on that ground alone.

16. This Court, however, when the matter was supported, granted leave to appeal on the questions of law set out in sub paragraphs (a) to (f), (h), (i), (j), (k) and (0) of paragraph 23 of the Petition of the Petitioner and as such this Court is obliged to consider and answer the said questions of law.

17. The reliefs sought by the Respondent before the High Court of Civil Appeal are referred to in paragraph 10 of this judgement, however, before I set down the questions of law on which leave was granted, for clarity, I wish to set down the **reliefs prayed for** by the Respondent before the learned District Judge for the reason that, in its order, the High Court has stated that, it is *<u>granting</u>* **'all the reliefs sought by the petitioner** (the present Respondent) **in her petition before the District Court'**. Thus, reference to the reliefs prayed before the District Court by the present Respondent would be necessary, to appreciate the full impact of the order made by the High Court. The reliefs prayed before the District Court were ('P12'):

- To set aside the order sought (in the partition action) by the Plaintiff (Appellant in the instant case) to have the writ executed to obtain possession of the land referred to in the second Schedule to the plaint.

- A judgment declaring that the Respondent has a right of way by prescription and/or through necessity (servitude) over the land referred to in the Third Schedule to the Petition.

- A judgment bestowing the Respondent possession of the land referred to in the Third Schedule to the Petition.

18. In filing her application under section 325(4) of the CPC before the District Court, the main grievance of the Respondent was that she was not made a party to the Partition action. From the case record, it appears, that the Partition action was filed in 1998, the interlocutory decree had been entered on 24.07.2001 and the final decree on 30.09.2002. The deed (No. 813) by which the Respondent claims title to the property had been executed only in 2012 which was ten years after the final decree was entered. [As stated by the Respondent in paragraph 3 of the affidavit she filed, along with the Petition before the District Court.]

    It is also to be noted that the Respondent's predecessor in title, Liyanage Ranjith Priyantha was cited as the 10th Respondent when the first contempt of Court application was filed by the Appellant. [vide paragraph 4 of this judgement]

    If I am to summarize, by its order, the High Court had **granted the following reliefs** to the Respondent, in allowing her application for revision.

    i. Dismissed the application of the Plaintiff (present Appellant) for the execution of the writ of possession.
    ii. Granted the Respondent a right of way over the property described in the Third Schedule, by prescription and/or necessity.
    iii. The Respondent was granted possession of the property referred to in the Third Schedule.

19. The High Court Judges by their order dated 13.01.2015, had formed the view that the Plaintiff had made an application to have the writ (of possession) executed on 11.07.2014, which the High Court Judges held, was after a lapse of 10 years after the decree was entered. They had further held that the law does not provide for the execution of a writ of possession, after a lapse of 10 years from the date of the decree and that Section 337 of the Civil Procedure Code expressly prohibits granting of a writ after the expiration of ten years from the date of a decree.

20. The High Court Judge had relied on the decision of **Kamanie Alles de Silva v. Wijewardane** (2002) 3 SLR 236. Considering the facts of the present case which are totally at variance with those of the case that was cited above, I am at a loss to understand as to how the High Court Judges came to this conclusion. **The plaintiff (the present Appellant) had sought to have the writ executed by his application filed on 28.07.2003 (Journal entry No. 46 of 28.07.2003) which was less than a year after the final decree (dated 30.09.2002).** The execution was resisted (Journal entry No. 47 dated 26.09.2003). The journal entry clearly shows that the fiscal had reported, that he could not hand over possession to the Plaintiff as a crowd of people resisted it (Journal entry No. 47 dated 26.09.2003). This was settled between the parties on 23.05.2007 (Journal entry No. 77 dated 23.05.2007). Thereafter, the Plaintiff sought to have the writ of possession executed for the second time on 09.07.2007 (Journal entry No. 81 of even date) which had been executed on 08.08.2007 (Journal entry No. 82 dated 17.08.2007). It appears from the proceedings of 10.09.2007 that on the very day the writ was executed, some people had removed the fencing and had disturbed the peaceful possession of the impugned property of the Plaintiff. This had led to the filing of contempt proceedings and those had ended only in July 2014. Thus, it is clear from the sequence of events referred to, that the writ had been originally sought within a year of the final decree.

21. I am compelled to conclude that the Learned Judges of the High Court had either neglected to refer to the case record or were oblivious of it or failed to consider matters of such crucial importance.

22. Ironically, referring to the case of **Kamanie Alles de Silva v. Wijewardane** (supra) the High Court Judges have stated that there is nothing to indicate that the execution of the writ had come to a halt, due to any fraud or force of the kind referred to in the case cited. The judges, however have not stated the nature of the fraud or force contemplated in the case of **Kamanie Alles**, they relied on.

23. It would be relevant at this point to make reference to subsection 2 of Section 337 of the Civil Procedure Code;

(2) Nothing in this section shall prevent the Court from granting an application for execution of a decree ***after the expiration of the said term of ten years,*** *where the* ***judgment-debtor has by*** *'fraud or* ***force'*** *prevented the execution of the decree at some time within ten years immediately before the date of the application. (Emphasis is mine)*

24. In the instant case, the writ has been taken out on three occasions between 2002 and 2014. On two of the such occasions, there had been resistance to the execution of the writ and according to the fiscal report ('P9') when he went to execute the writ on 08.08.2007, there had been a crowd of people at the location, who had resisted the execution, but after explaining the consequences of such resistance, the fiscal had been allowed to carry on with his tasks. It was on this occasion that the Plaintiff had erected barbed wire posts. According to the Plaintiff, on the same night, the persons who were cited as Respondents in the contempt proceedings, had damaged the fence he had so erected.

25. Before I deal with the questions of law, I wish to consider both the oral and written submissions made on behalf of the **Respondent**:

(i) In fairness, it must be said that, the learned Counsel for the Respondent, at the outset conceded, that the filing of the application before the District Court (invoking jurisdiction under Section 325(4) of the Civil Procedure Code) was not the correct remedy or the procedure the Respondent ought to have adhered to.

(ii) It was submitted that the High Court in the exercise of its revisionary jurisdiction held that fraud had been perpetuated, and set aside the

judgement, but there is no mention of "fraud" anywhere in the impugned order. As such the said contention on behalf of the respondent is bereft of any merit.

(iii) It was also contended on behalf of the Respondent that the learned trial judge erred in not following the mandatory pre-trial steps. The application filed by the Respondent before the District Court does not refer to any such non-compliance, nor does it appear to be a matter considered by the High Court.

(iv) It was also contended that the judgement and the interlocutory decree made in the case is not final as the entitlement of the parties was contingent upon the production of a deed marked and produced as 'V1'. It was argued that, as the said deed has not been produced up to date, both the judgment and the decree are conditional and not conclusive. This again was not a matter urged before the High Court and the application filed by the Respondent makes no reference whatsoever to any of these matters.

(v) Interestingly the Respondent takes up the position (which is elaborated in paragraphs 2.7 and 2.8 of the written submissions) that her predecessor-in-title, Ranjith Priyantha in fact had instituted the action (No.1307/ZL) in the District Court of Gampaha claiming a roadway.

(vi) The Respondent also takes up the position that, during the Contempt of Court proceedings, one Magilin giving evidence, had admitted the fact that a case was pending before the District Court (No.1370) to claim a roadway, and the Respondent's position is that she did not take part in those proceedings.

(vii) It is to be observed that, it was not a case of the Respondent not taking part in the proceedings. The Respondent *could not* have had any claim to the property at the time the action (relating to the roadway) was filed in the District Court, as she had gained title to the property from her father M. Tillakaratne by way of a gift only in 2012, which was four years after the commencement of the contempt proceedings.

(viii) The father of the Respondent had acquired three properties (lands), one in 2005 (Deed No. 15466) another in 2006 (Deed No. 2490) and the third one in 2011 (Deed No. 4759).

(ix) In 2012, by Deed No. 813, ten perches had been gifted to the Respondent and this extent of land, it appears from the schedule to the said deed, has been carved out from and out of the amalgamated and consolidated lands referred to in the schedules of the deeds referred to [in (vii)] above.

(x) Other than the Deed No. 15466, the other two deeds have not been made available to this Court. A list of documents pleaded by the Respondent before the High Court is given on page 3 of the application, but neither of those two deeds are referred to in that list. Thus, it appears that the Respondent had suppressed those two deeds when she made the application before the High Court.

(xi) What is significant is that, Deed No. 15466 does not make any reference to a roadway, however, the Deed of Gift No. 813 refers to a roadway as per Survey Plan No. 3640 dated 04.02.2005, which was after both the Judgement (2001) and the Final Decree (2002) of the partition case in the District Court.

Questions of Law

26. I shall now set down the questions of law on which leave to appeal was granted in this matter. (Questions of law set out in sub paragraphs (a) to (f), (h), (i), (j), (k) and (0) of paragraph 23 of the Petition are re-produced verbatim below)

(a) The said order is contrary to the law relating to Revision.

(b) The learned High Court Judges by their order has granted final reliefs sought in the Petition filed in the District Court without any evidence thus has erred in law.

(c) The learned High Court judges have granted prescriptive rights to a purported road access without leading any evidence and without any demarcation of the road.

(d) The learned High Court Judges have erred in law by granting main reliefs as well as alternative reliefs sought by the Respondent by their order.

(e) By the impugned order the learned judges have set aside the judgement, interlocutory decree and final decree and now the case stands as there is no decree, thus has erred in law.

(f) By the said impugned order the Petitioner's and the Defendant's right to the property had been taken away without any reason whatsoever.

(h) The learned High Court Judges have erred in law by their finding that the writ has been executed after a lapse of ten years, whereas there was no executable decree for a period of 10 years.

(i) The learned High Court Judges erred in law by their finding that the Respondent had not been made a party to the partition action, whereas she was not the owner of the property at the time of the institution of the action.

(j) The learned High Court Judges have erred in law by allowing the Respondent's application for revision and granting reliefs thereof.

(k) The learned High Court Judges have failed to consider that the fact that the Respondent has an adequate alternative remedy provided by statute, therefore not entitled to invoke the revisionary power.

(o) The said judgement violates the Partition Law, No. 21 of 1977 and affect the finality attached to the partition decree thus could have serious impact on the law of partition.

27. The question of law embodied in sub-paragraph (a) of paragraph 23 of the Petition is a general question of law; '*the order is contrary to the law relating to revision*'. I shall not endeavour to answer this question as it will be automatically answered in deciding the other specific questions of law on which leave had been granted.

28. I wish to consider questions of law referred to in sub-paragraphs (b) and (c) jointly, for the reason that these two issues are interwoven. Both questions raise the issue as to whether the High Court erred in granting final relief, namely, granting prescriptive rights to a roadway without any evidence being led.

(i) It is settled law that both servitutal rights and prescriptive rights are required to be established through evidence. In their text, **"Servitudes"**

[1942] **Hall & Kellaway** on 'onus of proof' state that [at page 145] *"The onus is upon the person affirming the existence of a servitude to prove it. Evidence that one person has acquired a real right over the property of another must in all cases be perfectly clear, whether acquisition is claimed by virtue of a grant or prescription".*

(ii) In the case of **De Soysa v. Fonseka** (1957) 58 N.L.R 501, Chief Justice Basnayake said *"Servitudes are onerous and the law does not favour them, and it is incumbent on a person who claims a servitude to establish his claim by clear and satisfactory evidence of the* ***strongest kind."*** (emphasis is mine)

(iii) By the impugned order of the High Court dated 13.01.2015, the High Court granted the Respondent **"all the reliefs"** claimed by her, in her application filed before the District Court dated 21.07.2014 and one such relief claimed was 'a judgement to the effect that she is entitled for a servitutal right of way by prescription and/or of necessity'.

(iv) In the backdrop of the legal burden cast on the Respondent referred to above, even though no evidence was placed before the High Court, it's important to consider the material the Respondent placed before the Court. She based her case on a single affidavit supported by certain documents that she pleaded as part and parcel of the said affidavit.

(v) There is no ambiguity whatsoever that the Respondent got the title to this property only in 2012 [Deed No. 813], just two years prior to the filing of the District Court application. As such, it is clear that she could not have claimed prescriptive rights to a roadway. The Respondent had neither produced any affidavits from her predecessors-in-title to establish that they had used the roadway, nor has she produced any affidavit from any of the villagers by whom this road was used, as the Respondent claimed, to justify prescriptive rights. Hence her assertion is reduced to a bare statement.

(vi) Although these aspects were starkly clear, the judges of the High Court, it appears, have wantonly and deliberately shut their eyes to these factors and had decided that the Respondent is entitled to a judgement to the effect that she has a right to use the roadway both by prescription and/or by necessity, even though there was no proof to support it. Furthermore, there was no material to say that the road claimed by the Respondent and the purported roadway depicted in the commission plan produced in the partition action is one and the same roadway that is claimed by the Respondent.

(vii) Thus, I hold that High Court erred in holding that the Respondent was entitled to a servitutal right of way without any evidence, and as such answer the questions of law referred to in paragraphs (b) and (c) in the affirmative.

29. The next question of law on which leave was granted was that the High Court erred in granting both the main relief as well as the alternative relief. [Question of law in paragraph (d)] It was contended that; a party is not entitled to be granted a servitutal right both by way of necessity and prescription and that they are necessarily alternative remedies.

30. To my mind, the above contention appears to be a logical argument; to claim a servitutal right by necessity, a claimant is not required to prove possession or that he used a particular roadway over the servient property. But what needs to be established is, that the geography of his land is such that the only route, without having to undergo difficulty or unreasonable inconvenience, to access a public road or another road that connects to a public road, is by traversing over the servient property.

31. **Hall and Kellaway**, in their text **"Servitudes"** [1942 at page 65-66] state; *"A way of necessity (via necessitates, or noodweg) is a right of way granted in favour of a property over an adjoining one, constituting the only means of ingress to an egress from the former property to some place with which it must be of necessity have a communication link.".*

32. Commenting on the right of way by necessity and by prescription, Justice Prasanna Jayawardena P.C. in the case of **Maddumage Sulochana Perera v. Maddumage Nimal Gunasiri Perera and other** [SC Appeal 59/2012 SC minutes 18.01.2018 at page 12] held that *"It is clear from the aforesaid description that, the basis on which a plaintiff may claim a cause of action for right of way by prescription, is* ***quite different*** *to the basis on which a plaintiff may claim a cause of action for a right of way of necessity. The first claim founded on undisturbed and uninterrupted possession and use, which* is adverse to and independent of the rights of the owner of the *servient tenement. The latter claim is based only on necessity and does not require any prior possession and use of the right of way."*

33. I note with regret that the High Court judge has not paid any attention to any of these fundamental matters, before holding that the Respondent is entitled to what she claimed before the District Court; a *declaration, that the Respondent has a right of way by* ***prescription and/or through necessity*** *(servitude) over the land referred to in the Third Schedule of the Petition.* Thus, the High Court clearly erred when it held that the Respondent was entitled to right of way both by prescription as well as by necessity. Considering the above, I answer the question of law referred to paragraph (d) in the affirmative.

34. It was also urged before this Court that the judges of High Court erred when the Court set aside both the judgement and the interlocutory decree and it resulted in the Plaintiff losing his property rights. (Questions of law referred to in sub paragraphs (e) and (f)).

It was argued on behalf of the Plaintiff that the revision application before the High Court was a collateral challenge to the partition judgement and the Decree, which defeats the very objective of the Partition Law, namely the conclusive effect of the partition decree embodied in Section 48 of the Partition Law, No. 21 of 1977.

I am mindful of the decision in the landmark case of **Somawathie v. Madawela and Others** (1983) 2 SLR 15, where the Supreme Court held that the legality of

an interlocutory decree can be challenged by way of revision to prevent a miscarriage of justice.

I do not think the factual situation in the said case has a parallel to the case before us. Narrative of facts, to an extent, of the case of **Somawathie** (supra) might be necessary, not only to distinguish the said case *vis a vis* the one at hand, but also to highlight the grave error made by the judges of the High Court. As this is a landmark case in our jurisprudence relating to partition, I presume that the judges of the High Court were very much alive to the rationale of the judgement in **Somawathie v. Madawela** (supra).

> One Ensina Perera by Deed No. 2124 (1942) became owner of the entire land sought to be partitioned which comprised several allotments of land amalgamated and consolidated as one land depicted as Lots 1 to 10 of a total extent of 18 acres 3 roods 05 perches in plan No. 2646. Said Ensina Perera by Deed No. 2828 (1943) conveyed to Madawela "all that divided and defined allotment of land in extent three acres **from and out of all those lots marked 10 and 9 in plan No. 2646".**
>
> Lot 10 was an extent of 2 acres 3 roods 22 perches and lot 9 was in extent of 2 roods 12 perches. Therefore, an extent of land had to be carved out from lot 9 so as to make up the three acres conveyed on the Deed No. 2828. In these circumstances, the extent conveyed by Deed No. 2828 (to Madawela) had to be regarded as **undivided and undefined, despite the asseverations of the grantor to the contrary**.
>
> In the partition action filed by the heirs of Ensina, no notice was taken of the claim of Madawela and he was lost sight of. The trial was held and on 5.5.1972 interlocutory decree was entered. When the surveyor went to the land to partition it in accordance with the interlocutory decree, Madawela found lot 4 (of the commission plan) which was possessed by him and which had been excluded at the first survey, being treated as part of the corpus to be partitioned.

On the very day on which the final plan of partition was filed of record, namely, 6.11.1972, Madawela's proxy was filed by his Attorney-at-Law and an application for permission to intervene in the action was made on his behalf. Although the judge did not order him to be added, Madawela's name was entered on the caption of the case as the 7th defendant under date 6.11.1972.

On 23.3.1977 the court made order dismissing the application (of Madawela) for intervention and entered final decree.
The Court observed: "In the instant case, Madawela the original intervenient was a "person concerned". He was a necessary party. The deed in his favour would have come to the plaintiff's notice when the Land Registry was searched before plaintiff's purchase from some of Ensina Perera's heirs. She would have come to know of it had she caused a search to be made, as any prudent plaintiff should have done, before she filed the present case." The Court holding the lapse as a fundamental error observed further that, *"This glaring blemish taints the entire proceedings. It amounts to what has been called 'fundamental vice'. It transcends the bounds of procedural error."*

While concluding that a miscarriage of justice had resulted, the Court held: *"If as a result of such persistent and blatant disregard for the provisions of the law a miscarriage of justice results as here, then this Court will not sit idly by. Indeed, the facts of this case cry aloud for the intervention of this Court to prevent what otherwise would be a miscarriage of justice."*

The Court, however, was mindful of the fact that the trial had proceeded and the case had reached a finality, as such the intervention of the Supreme Court was only to the extent required to rectify the error. Thus, the Court observed;

> ***But in the circumstances of this case the extent to which the Court should intervene in the exercise of its revisionary powers should be given some thought. To set aside all the proceedings would be too sweeping and cause unnecessary hardship, inconvenience and delay.*** *The substantial relief which R. B. Madawela wanted when he first intervened was the exclusion of lot 4 in plan No.3392 ot 17.8.1970 made by S. T. Gunasekera Licensed Surveyor marked X9…Accordingly, it would meet the ends of justice* ***if without setting aside the interlocutory decree it is only amended by excluding from the corpus decreed to be partitioned.***

In the instant case, however, it was unfortunate that the judges had paid scant attention to the relief prayed, which was only a roadway. The High Court, however, in one sentence wiped out both the interlocutory decree and the judgement. In the present case, for the reasons stated earlier in this judgement, the Respondent could not have been made a party to the partition action and as such the learned District Judge could not be faulted. Even applying the rationale of the case of **Somawathie v. Madawela** (supra), the Respondent was not entitled to any relief.

I also wish to cite with approval the observation made by Justice Vythialingam in the case of **Gunatillake v. Muriel Silva and Others** (1974) 79 NLR 481, at page 496, where in his dissenting judgment, his Lordship observed:

".. ***Nor can a stranger to a partition action move the Supreme Court in revision to set aside an interlocutory decree*** *which has already been entered, on the ground that his claim has not been investigated or on the ground that the title of the parties to the action has not been adequately investigated, because, if there has been an investigation of title though it is inadequate the decree is final and conclusive. The difference is that where there is an appeal "nothing in the partition action can be final or conclusive." Section 48(1) of the Partition Act makes this quite clear when it sets out that "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, be good*

and sufficient evidence of title..." This is not so where there is an application in revision. The interlocutory decree remains final and conclusive where there has been no appeal, and the interlocutory decree cannot be set aside in such a case on the ground that there has been an inadequate investigation of title."

As far as the partition case in question was concerned, the Respondent was nothing but a stranger. The High Court erred in setting aside the judgement and the interlocutory decree, and considering the reasons set out above, I answer the questions of law referred to in sub paragraphs (e) and (f) of paragraph 23 of the Petition in the affirmative.

35. The main ground on which the High Court granted relief to the Respondent was that the writ was executed after a lapse of 10 years from when the decree was entered, and the Plaintiff argued that the High Court judges erred in holding so, when there was no executable decree for a period of ten years. [Question of law referred to in sub-paragraph (h)]. I have dealt with this issue extensively in paragraphs 19 to 24 of this judgement and it is very clear that the High Court has misdirected itself in coming to such a conclusion. I regret to say that the High Court had paid scant regard to the material produced before it, but had conveniently overlooked the most relevant material on that issue. I do not wish to reiterate those facts here, but suffice it to say that, after the decree was entered in 2002, on three occasions in 2003, 2007 and 2014 the Plaintiff had applied for a writ of execution, but succeeded only in 2014 as on the two previous occasions there had been resistance to the execution of the writ of possession. As such I hold the said question of law referred to in sub-paragraph (h) also in the affirmative.

36. It was also contended on behalf of the Plaintiff that the High Court erred in holding that the Plaintiff had failed to make the Respondent a party to the Partition action, whereas she had had no title to the purported dominant property when the action was instituted. The High Court had observed in the order that the Plaintiff had failed to cite the people who used the roadway as Defendants, and **no reference was made to the Respondent, not being made a party to the partition action.** Considering the above, I answer the question of law

referred to in sub paragraph (i) of paragraph 23 of the Petition in the negative. I wish to state, however, that even the observation made by the High Court, of not having made the villagers parties to the action, is based on conjecture and that there was no material whatsoever before Court to make such an observation, other than the sole affidavit of the Respondent.

37. Although leave to appeal was granted on the question of law referred to in sub paragraph (j) of paragraph 23 of the Petition, I do not endeavour to answer the said issue as there is no question of law raised in the said paragraph, but a general statement; that the High Court judges erred in law *"by allowing the Respondent's application for revision and granting relief thereof"*.

38. It was also argued on behalf of the Plaintiff that the High Court erred in failing to consider the fact that ***the Respondent has an alternative remedy provided by statute*** and as such the Respondent was not entitled to invoke the revisionary jurisdiction of the Court [question of law referred to in subparagraph (k) of paragraph 23 of the Petition].

(a) In the course of the submissions it was contended on behalf of the Plaintiff that the High Court erred in exercising revisionary jurisdiction vested with the Court, as revisionary powers can be exercised only in instances where exceptional circumstances exist and in instances where no other remedy is available to an aggrieved party.

(b) The Plaintiff relied on the case of **Laxman Senevirathne v. Sri Jayewardenepura Kotte Municipal Council and others** CA 1212/2003 CA minutes 12.11.2003, where their Lordships observed that where the party had a right of appeal, the reasons must be urged in the application as to why he did not exercise his right to appeal, and why he has chosen instead to invoke the exceptional jurisdiction of the revisionary powers of the Court. The Court also observed [in the case referred to] *"…In considering the application of the Plaintiff-Petitioner, it is clear that several matters which were of material importance in this case has not been disclosed in this application."*

(c) The question of law, however, that was raised in these proceedings was, **as to whether the Respondent is entitled to invoke the revisionary jurisdiction, when she had an alternative remedy**. It is a fact that the impugned revision application was filed 12 years after the final decree in the partition action was delivered, and it is also correct that the revision application does not disclose the fact that an action before the District Court of Gampaha was pending over the disputed road way. I shall, however, confine myself to answering the issue, purely from the perspective of the question raised.

(d) The learned counsel for the Plaintiff (Appellant) relied on the decision in the case of **Rustom v. Hapangama & Co.** (1978/79) 2 SLR 225 where the court held that "*in a case where the Appellant had not indicated to Court that any special circumstances exist which would invite Court to exercise its powers of revision, particularly since the Appellant had not availed himself of the right of appeal under Section 754(2) which was available to him, no relief could be granted by way of revision*".

(e) It was also pointed out that the only remedy available to the Respondent is in terms of Sections 48(1) and Section 48(5) of the Partition Act.

(p) The Respondent on the other hand submitted that the present trend of the recent decisions is that, the Court of Appeal has the power to act in revision if the existence of special circumstances are urged, even though the procedure by way of appeal was available but was not availed of, and relied on the decision in **Rustom v. Hapangama & Co.** (supra). It was also argued on behalf of the Respondents that where delay would render the ultimate decision futile, that would be an exceptional circumstance calling for interference of the court by way of revision even in instances where appeal is available. [**Rasheed Ali v. Mohamed Ali and Others** (1981) 2 SLR 29.]

Considering the above, I am of the view that a party cannot be shut out from invoking revisionary jurisdiction purely on the ground that an alternative remedy is available to that party by virtue of statute. Accordingly, I answer the

question of law referred to in sub-paragraph (k) of Paragraph 23 of the Petition in the negative.

39. The final question of law that this Court is called upon to answer is, as to whether the impugned order violates the Partition Law, No. 21 of 1977 and affects the finality attached to the partition decree [question of law referred to in subparagraph (o) of paragraph 23 of the Petition].

Section 48 of the Partition Law of 1977 refers to the finality and conclusiveness of an interlocutory decree and a final decree, subject, however, to certain exceptions and an appeal to a superior Court. In the case of **Somawathie v. Madawela** (supra) their Lordships considered the final and conclusive effect of partition (interlocutory) decrees and expressed the view that Section 48 of the Partition Act, No. 16 of 1951 (which is substantially same as Section 48 of the present Partition Law of 1977) had still failed to achieve the desired finality and conclusiveness for decrees under the Partition Act. In this regard their Lordships cited with approval the statement made by Sansoni C.J in the case of **Mariam Beebee v. Seyed Mohamed** (1965) 68 NLR 36 which is reproduced below;

> "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."

40. Thus, one cannot say that Section 48 of the Partition Law of 1977 makes an interlocutory decree final, per se, for all intents and purposes. In this regard, I wish to cite with approval the observation made by justice T.S .Fernando in the case of **Ukku v. Sidoris** (1957) 59 NLR 90;

"While that section (i.e. section 48 of the Partition Act) enacts that an interlocutory decree entered shall, subject to the decision of any appeal which may be preferred therefrom, be final and conclusive for all purposes against all persons whomsoever, I am of opinion that it does not affect the extraordinary jurisdiction of this Court exercised by way of revision or *restitutio-in-integrum* where circumstances in which such extraordinary jurisdiction has been exercised in the past are shown to exist."

In the instant case however, in my view, there were no illegalities or no circumstances whatsoever existed that warranted the exercise of the extraordinary jurisdiction to set aside the partition decree, and the impugned order made by the High Court which had the effect of setting aside the decrees, did impact upon the law of partition. Thus I answer the question of law referred to in sub paragraph (o), also in the affirmative.

41. For the reasons set out above I am of the view that the impugned order of the High Court cannot be sustained. As I have referred to earlier, servitudes are onerous and the law does not favour them. It is incumbent on the person who claims a servitude to establish the claim. In the instant case, there was only an affidavit sworn by the Respondent and several documents pleaded along with the affidavit. The Court did not have the opportunity to test the veracity of any of these materials. The High Court was put on notice of the fact that the very claim was pending for adjudication before a competent Court, where the matter could have been adjudicated after hearing the evidence and considering any other relevant material. The High Court for a reason inexplicable, overlooked it.

As I have referred to in this this judgement, save for the questions which I have not endeavoured to answer for the reasons stated [(a) & (j)] and the questions referred to in sub paragraphs (i) and (k), all other questions of law on which leave to appeal was granted, are answered in the affirmative. Accordingly the order of the High Court of Civil Appeal dated 13.01.2015 is hereby set aside.

The Plaintiff-Respondent-Petitioner-Appellant is entitled for costs in sum of Rs 275,000/= and in addition, the said party is entitled for costs in the Court below (High Court of Civil Appeal).

Appeal allowed.

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE MURDU FERNANDO PC

I agree.

JUDGE OF THE SUPREME COURT