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**MADULUWAWE SOBITHA THERO  
VS  
JOSLIN AND OTHERS**

COURT OF APPEAL.  
WIMALACHANDRA, J.  
CA 1169/2003 (REV.).  
DC MTLAVINIA 389/00/P.  
DECEMBER 8, 2004.

*Partition Law, No. 21 of 1977, sections 5, 12 and 48(4) - Judgment obtained by fraud-Evidence Ordinance, section 44 - Does section 48(3) override section 44 of the Evidence Ordinance? Revision - Applicability - Failure to make a correct section 12 declaration - Fundamental vice in the procedure adopted - Violation of provisions of Partition Law - Miscarriage of justice - Finality of the final decree - Civil Procedure Code, section 403- Abatement.*

The petitioner filed action for a declaration of title and ejection of the plaintiff respondent. This action was abated but later restored. Whilst the said case was pending the plaintiff respondent instituted partition action without making the petitioner, a party, but had made her daughters the only defendants. The land to be partitioned is the same land which was the subject matter in the earlier case. The plaintiff respondent had executed a deed of declaration to claim ownership to the property and relied on this deed to prove her title and final decree was entered on 08.11.2002.

The petitioner moved in revision.

**Held :**

- (1) Section 48(3) of the Partition Law overrides section 44 of the Evidence Ordinance; accordingly even a judgment obtained by fraud or collusion would have the final and conclusive effect provided by section 48(1).

**Held further :**

- (2) It is to be noted that the plaintiff respondent failed to disclose the name of the petitioner who has title to the entire land. The failure to make a correct declaration under section 12(1) of the Partition Law amounts to a procedural irregularity which results in a miscarriage of justice.

(3) Per Wimalachandra , J.

"It is the duty of the plaintiff- respondent's attorney -at-law, after the registration of the *lis pendence* to personally inspect the entries in the Land Registry that relate to the land. The section 12 declaration filed failed to disclose the petitioner's name although his title deed is duly registered. This is a violation of the provisions of the Partition Law and callous disregard of the provisions of the Partition Law which caused a miscarriage of justice and in my view amounts to the fundamental vice".

(4) A person who had right title or interest in the subject matter not being made a party to a partition action is a victim of a miscarriage of justice. He can always invoke the powers of revision and restitution *in integrum*.

(5) If the Court of Appeal fails to invoke its power of revision, grave injustice will result to the petitioner.

(6) Fraud vitiates all proceedings and a judgment obtained by fraud cannot stand.

**APPLICATION** in revision from an order of the District Court of Mt. Lavinia.

**Cases referred to :**

1. *Suppramaniam et el vs. Erampakurukkal* - 23 NLR 417 at 438
2. *Rustom vs. Hapangama and Co.* 1978/79/80 1 Sri LR 352
3. *Somawathie vs. Madawala and Others* 1983 2 Sri LR 15
4. *Madina Bee vs. Seyed Mohamed* 1965 68 NLR 36 at 38
5. SC Appeal 20/2003 - CALA 28/2000 - D. C. Ratnapura 940/P

*Ranjan Suwandaratne* for petitioner

*H. G. Hussain* for 1st - 4th respondents.

*Cur.adv. vult.*

May 04, 2005.

**WIMALACHANDRA, J.**

This is an application in revision filed by the petitioner from the judgment and the interlocutory decree dated 26.12.2000 and the final decree entered on 08.11.2002.

The facts of this case as set out in the petition are briefly as follows :

The petitioner, who is the Viharadhipathi of Nagaviharaya Temple, Pagoda, Nugegoda, filed action bearing No. 765/96/L in the District Court of Mount -Lavinia on 31.12.1996 for a declaration of title and ejectment of the plaintiff - respondent from the land described in the schedule to the plaint and to recover damages. The land, which is the subject matter of the aforesaid action, described as a divided portion of the land called Kekunagoda Kurunduwatte bearing assessment No. 162 Thalawathugoda Road, Pitakotte depicted in plan No. 103 dated 02.09.1963 made by the Licensed Surveyor N. G. G. Wijeratne is in extent of 30.75 perches. The petitioner became the owner of the said property by virtue of deed No. 1629 dated 22.10.1977 attested by W. Kaluarachchi N. P. (a certified copy of the deed marked A3 in annexed to the petition). The petitioner states that on several occasions the plaintiff - respondent had entered the said property disputing the petitioner's title to the same. However the petitioner's predecessor in title to the said property from time to time had leased the said property to the plaintiff - respondent's husband, Gangodawilage Abraham Perera. The petitioner has annexed the said lease bonds bearing No. 11491 dated 10.09.1963 attested by H. W. Senanayake N. P., No. 12343 dated 02.10.1964 attested by the same notary and lease bond No. 932 dated 04.04.1976 attested by W. Kaluarachchi N. P. After the petitioner had become the owner he too had leased this property by lease No. 6192 dated 10.02.1987 attested by W. Kaluarachchi, N. P.

As the petitioner failed to take steps in the aforesaid case No. 765/96/L upon an application made by the plaintiff - respondent, who was the defendant in that case she moved Court through her Attorney -at- Law for the abatement of that action and consequently the Court made order of abatement of the said action. Thereafter the petitioner made an application under section 403 of the Civil Procedure Code to vacate the said order of abatement and the Court after considering the submissions made by counsel vacated the order of abatement on 06.04.2002. In the meantime whilst the said case was pending, the plaintiff - respondent instituted the partition action No. 389/00/P on 26.02.2000, without making the petitioner

a party. The plaintiff - respondent made her three daughters the only defendants in the said partition action. As such the plaintiff - respondent instituted the said partition action together with her daughters as the only co-owners of the land to be partitioned.

It appears that the plaintiff - respondent instituted the said partition action with the view to defeat the title of the petitioner to the land in question. The land to be partitioned in the partition action is the same land which is the subject matter in the aforesaid D. C. Mount Lavinia Case No. 765/96/L filed by the petitioner against the plaintiff respondent. It is to be observed that the plaintiff - respondent executed a deed of declaration bearing No. 8504 dated 10.04.1996 attested by Neville Amarasinghe, N. P. to claim ownership to the property which is the subject matter in the aforesaid declaratory action filed by the petitioner. The plaintiff - respondent relied on the said deed of declaration made in 1996 to prove title to her and to her children in the partition action.

In the circumstances, it is crystal clear that the plaintiff respondent filed the said partition action to defeat the petitioner's title to the said property and the plaintiff - respondent along with her children filed the said partition action fraudulently and collusively to conceal from Court the petitioner's title to the said land to be partitioned in the partition action. It is settled law that fraud vitiates all proceedings and a judgment obtained by fraud cannot stand. "fraud is not a thing that can stand even when robed in a judgment" (*Suppramaniam et. al Vs. Erampakurai ukal* <sup>(1)</sup> at 438).

Section 44 of the Evidence Ordinance provides, that

**"any party to a suit or other proceeding may show that any judgment, order, or decree which is relevant under sections 40, 41, 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion."**

However, section 48(3) of the Partition Law overrides section 44 of the Evidence Ordinance. Accordingly, even a judgment obtained by fraud or collusion would have the final and conclusive effect provided by section 48(1).

Nevertheless, the petitioner has filed this application in revision invoking the revisionary jurisdiction of this Court. The petitioner raises an important question as to the finality of the interlocutory and final - decree entered in this partition action in view of a miscarriage of justice and the proceedings tainted due to a fundamental defect which goes to the root of the case. The Supreme Court observed in *Rustom Vs. Hapangama and Co.*<sup>(2)</sup> that the trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked, the practice has been that these powers will be exercised only if the existence of special circumstances are urged necessitating the indulgence of this Court.

The land described in the plaint filed by the petitioner in the District Court case No : 765/96/L for a declaration of title and ejection of the plaintiff - respondent is the same land for which the partition action bearing No. 389/00/P has been filed by the plaintiff - respondent. The petitioner has pleaded in the aforesaid District Court case the title deeds to establish his title to the land. The petitioner has pleaded that at one time he had leased the said land to the plaintiff - respondent's husband, Gangodawilage Abraham Perera by deed No. 6192 dated 10.02.1987 attested by W. Kaluarachchi, N. P. In these circumstances the plaintiff - respondent cannot say that she was not aware that the petitioner has claimed ownership to the said land, which is the subject matter of the partition action. Accordingly, the plaintiff - respondent should have included the petitioner as a necessary party in her plaint in terms of section 5 of the Partition Law. In the circumstances, it appears to me that the plaintiff - respondent did not deliberately make the petitioner a party to the partition action. In the District Court case No. 765/96/L, the petitioner is the plaintiff and the plaintiff - respondent is the defendant. That case is still pending. The subject matter in case No. 765/96/L and in the partition action 389/00/P is the same land.

In the circumstances, I am of the view that the petitioner is a victim of a miscarriage of justice. The question that arises is whether the petitioner can invoke the powers of revision and *restitutio in integrum* vested in the Court of Appeal. I find the answer to this question in the celebrated judgment of the Supreme Court in the case of *Somawathie Vs. Madawela* and others<sup>(3)</sup> Soza, J. delivering the judgment in this case stated as follows at page 23 :

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“But although the Act stipulated that decrees under the Partition Act are final and conclusive even where all persons concerned were not parties to the action or there was any omission or defect of procedure or in the proof of title, the Supreme Court continued in the exercise of its powers of revision and restitution in integrum to set aside partition decrees when it found that the proceedings were tainted by what has been called fundamental vice.”

In his judgment Justice Soza, J. held the view that a person who had right title or interest in the subject matter not being made a party to a partition action is a victim of a miscarriage of justice. He can always invoke the powers of revision and *restitutio in integrum* vested in the Court of Appeal. In support of his view he cited the following passage from the judgment of Sansoni, J. who delivered the majority decision of *the Divisional Bench in the case of Madina Beebee Vs. Seyed Mohamed* at 38.

“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. 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.”

At page 30 Justice Soza states as follows :

“ The pronouncement of Sansoni, C. J. in regard to the revisionary powers of the Court in *Mariam Beebee Vs. Seyed Mohamed* (supra) , therefore remain applicable even after the enactment of the Administration of Justice (Amendment) Law No. 25 of 1975 and the Partition Law No. 21 of 1977. The powers of revision and *restitutio in integrum* have survived all the legislation that has been enacted upto date. These are extraordinary powers and will be exercised only in a fit case to avert miscarriage of justice. The immunity given to partition decrees from being assailed on the grounds omissions and defect of procedure as now broadly defined, and of the failure to make

**“persons concerned” parties to the action should not be interpreted as licence to flout the provisions of the Partition Law. The Court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred.”**

In the instant case as I stated above, the plaintiff - respondent was aware of the deeds which are in favour of the petitioner in respect of the corpus in the partition action filed by the petitioner. Moreover the plaintiff - respondent would have noticed it when a search was made at the Land Registry. It is imperative to make a declaration under section 12(1) of the Partition Law after the partition action is registered as a *lis pendens*. Section 12(1) stipulates that after the registration of the *lis pendens*, the plaintiff must file or cause to be filed in Court a declaration under the hand of an Attorney-at-Law certifying that he personally inspected all the entries relating to the land to be partitioned in the register maintained under the Registration of Documents Ordinance, stating the names of all persons found, upon the inspection of those entries, to be added as necessary parties to the action under section 5 of the Partition Law, No. 21 of 1977. It is to be noted that in the instant case the Attorney -at - Law of the plaintiff - respondent failed to disclose the name of the petitioner who has a title deed for the entire land to be partitioned, which has been duly registered in the Land Registry. (See the chain of deeds produced marked 'A'3 to 'A6'). The failure to make a correct declaration under section 12(1) of the Partition Law, amounts to a procedural irregularity which results in a miscarriage of justice, in that the petitioner who has a title deed duly registered to the entire property, which is the subject matter of the said partition action, was kept out without being made a party. This amounts to what is called a *fundamental vice*. In an unreported Supreme Court case Justice T. B. Weerasuriya made the following observation with regard to the power of revision and *restitutio in integrum* of the Court of Appeal.

**“The revisionary powers of the Appellate Court, are unaffected although section 48 of the Partition Law invests interlocutory decree entered under the Partition Law with finality. Thus the exercise of powers of revision and *restitutio in integrum* to set aside a partition decree when it is found that the proceedings were tainted by what has been called a fundamental vice is available to the Appellate Court”.**

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In the instant case, the petitioner was not made a party despite the fact that he had right title and interest in the subject matter. The plaintiff - respondent knew the title deed of the petitioner which is referred to in the plaint filed in the Mount Lavinia D. C. Case No. 765/96/L where the plaintiff - respondent is the defendant.

Moreover, the deed No. 1629 dated 22.10.1977 attested by W. Kaluarachchi, N. P. which is registered in the Land Registry in Folio M 1173/43, would have come to the plaintiff - respondent's notice if she had instructed her Attorney-at-Law to do a search in the Land Registry. It is the duty of the plaintiff - respondent's Attorney-at-Law, after the registration of the *lis pendens*, to personally inspect the entries in the Land Registry that relate to the land. The declaration filed by the plaintiff - respondent's Attorney-at-Law failed to disclose the petitioner's name although the deed No. 1629 which is in favour of the petitioner is duly registered. This is a clear violation of the provisions of the Partition Law and callous disregard of the provisions of the Partition Law which caused a miscarriage of justice and in my view amounts to a fundamental vice. In these circumstances, if this Court fails to invoke its power of revision, grave injustice will result to the petitioner.

For these reasons, I am of the strong view that this is a fit case for this Court to intervene in the exercise of its revisionary powers to avert a miscarriage of justice. Accordingly, I set aside all the proceedings in the District Court up to the stage of the plaint and permit the petitioner to intervene in the partition action No. 389/00/P and to file a statement of claim. The petitioner is entitled to recover Rs. 10,500 as costs of this inquiry from the plaintiff - respondent.

*Application allowed*

*Petitioner permitted to intervene.*