VELUN SINGHO AND ANOTHER
v
SUPPIAH AND OTHERS

COURT OF APPEAL
EKANAYAKE, J.
SARATH DE ABREW, J.
CA 1200/89
DC MT. LAVINIA 19/93 P
DECEMBER 11, 2002
SEPTEMBER 12, 2006
OCTOBER 13, 2006

Partition Law 21 of 1977 amended by Act 17 of 1997 – Section 22, section 48(3), section 49, Fraud and collusion, alleged by persons who were not parties – Revisionary jurisdiction invoked ? – Finality of a partition decree – Could it be assailed? Duty to investigate title – Laches – Exceptional circumstances – Restitutio in Integrum – Is it available only to a party? Severability. - Evidence Ordinance – Section 44.

The petitioners who were not parties sought to revise the judgment, interlocutory decree and the final decree and also sought Restitutio in integrum – on the basis of fraud and collusion on the part of the respondents, under section 48(3) of the Partition Law.

Held:

(1) The powers of revision and Restitutio in integrum are not affected by the provisions of section 48(3) Partition Law. When a partition decree obtained by fraud or collusion has occasioned a failure of justice, the Superior Courts are empowered to set aside and strike off such impugned decree in achieving the objective of due administration of justice and and correction of errors in order to avert a miscarriage of justice.

Per Sarath de Abrew, J.

"The concept of finality which was unknown to the Roman Dutch Law, has been incorporated into our law borrowed from the English Law drawing inspiration from the English Statute of 1677, however utilizing the proviso to section 48(3) a long line of authorities of the Supreme Court and the Court of

Appeal acting in revision and *Restitutio-in-integrum* has tendered to erode the finality of a partition decree, in order to avert a failure of justice for good and valid reasons".

(2) Revisionary jurisdiction can be invoked even by a person who was not a party to the case in the original Court provided he is an aggrieved person but relief by way of *Restitutio in integrum* cannot be granted if the petitioner has not been a party to the action.

Per Sarath de Abrew, J.

"The petitioners are placed in the jeopardy of forfeiture of their right title and interest in the land in suit due to the impugned partition decree and therefore qualify as aggrieved persons, even though they had no opportunity to participate in the original court proceedings, therefore notwithstanding the relief claimed by way of *Restitutio in integrum*, the relief by way of revision does lie to the petitioners".

(3) On a consideration of the totality of the repelling circumstances, the balance of proof title in favour of the petitioners in that on a strong *prima facie* case emerges leading to the conclusion that the respondents acting in collusion among family members have contrived to obtain partition title to the *corpus*; when the deeds establish the fact that the legal ownership of the land is in the petitioner.

(4) The trial Judge has also failed to discharge his paramount duty to investigate title.

(5) Although the revision application has been filed around 3 years and 7 months later, the circumstances which led to this delay have been explained in the pleadings, therefore the facts and circumstances do not preclude the petitioners' right to relief by way of revision due to laches having regard to the exceptional circumstances that have surfaced which has occasioned a failure of justice.

Per Sarath de Abrew, J.

"A separate case for damages under section 49 is now not possible as more than 5 years have elapsed since the entering of the final decree, in view of section 22 of the Amendment 17 of 1997, therefore injustice will result unless the extra ordinary power of revision is exercised to avoid miscarriage of justice.

APPLICATION in revision to set aside the final decree in a partition action entered in the District Court of Mt. Lavinia.

Cases referred to:

1. *Soysa* v *Silva* – 2000 – 2 Sri LR 235
1a. *Piyasena Perera* v *Margaret Perera* – 1984 – 1 Sri LR 57.
2. *Fernando* v *Marshall Appu* – (1923) – 23 NLR 370.

3. *Piyaseeli* v *Mendis and others* – 2003 – 3 Sri LR 273.
4. *D. Wanigabahu* v *R. Mahindapala and another* – CA 1812/2001 – CAM of 14.12.2005.
5. *Kannangara* v *Silva* – 35 NLR 1.
6. *Somawathie* v *Madawala* – 1983 – 2 Sri LR 15.
7. *Ratnawalie Hemaratne* v *Wadugiyapillai and another* – CA 1340/90 (Rev._ – CAM of 26.3.92.
8. *Mariam Beebee* v *Seyed Mohammed and others* – 1965 – 68 NLR 36.
9. *Dissanayake* v *Elsinahamy* – (1978-79) – 2 Sri LR 118.
10. *Kularatne* v *Ariyasena* – 2001 – 4 Sri LR 118
11. *Galagoda v Mohideen* – (1987) 40 NLR 92.
12. *Sumanawathie and others* v *Andreas and others* – 2003 – 3 Sri LR 324.
13. *Gnanapandithan and another* v *Balanayagam and another* – 1998 – 1 Sri LR 391 (S,C,)

Dr. Jayatissa de Costa for 1st and 2nd petitioners.
Nihal Fernando PC for 1st, 2nd and 3rd respondents.

May 12, 2007.

SARATH DE ABREW, J.

This is an application for revision and/or Restitutio in integrum filed by the petitioners to set aside the judgment, Interlocutory Decree and Final Decree of the learned District Judge of Mt. Lavinia in a partition action filed by the Plaintiff-Respondent who sought to apportion the 10.4 perch corpus equally between himself and the 1st defendant-respondent subject to the life interest of the 2nd defendant-respondent. The petitioners, who were not parties to this partition action, have sought this relief on the basis of fraud and collusion on the part of the respondents referred to above under section 48(3) of the Partition Law. The 2nd defendant-respondent has been substituted in place of the now deceased 1st defendant-respondent. The learned District Judge, having recorded the evidence of the plaintiff-respondent, had made order on 09.08.1994 apportioning 1/2 share each of the land in suit equally between the plaintiff and the defendant and accordingly Interlocutory Decree and Final Decree had been entered respectively on 09.08.1994 and 12.02.1996. Being aggrieved of the above impugned orders, the petitioners have invoked the revisionary jurisdiction of this Court.

The petitioners have filed their petition on 08.12.1999 with documents marked A-Z and AA and in response to the objections filed by the respondents on 07.05.2000, have filed their counter objections on 20.06.2000. Both parties have filed two sets of written submissions in 2002 and 2006.

The salient facts relating to this dispute in briefly set out as follows. According to the 1st petitioner he had become the owner of the land called Kandawalawatte Lot 17B, in extent 10.4 perches, situated at Jaya Mawatha, Ratmalana by virtue of Deed No. 2160 dated 12.09.1984, the property described in the schedule to the petition and the *corpus* of the partition action in question. The 1st petitioner had transferred 6 perches of the aforesaid land to one W.A. De Silva by Deed No. 994 of 04.03.1997. The said W.A De Silva had transferred this 06 perches to the 2nd petitioner by Deed No. 329 of 01.10.1998. The contention of the petitioners was that the (now deceased) 1st defendant-respondent was occupying the said land with the leave and licence of the petitioners' predecessor in title, and continued to occupy the same with the permission of the 1st petitioner having accepted his title once the 1st petitioner became the owner. The 1st petitioner used to visit the land periodically and on one such visit on 17.08.98, the 1st petitioner had observed a fence erected by the 1st defendant-respondent obstructing free movement and entry to the land. As the 1st defendant-respondent refused to remove this obstruction, the 1st petitioner lodged a complaint at the Mt. Lavinia Police Station on 19.08.1998 and thereafter filed as 66(1) B application in Mt. Lavinia Magistrate Court on 03.09.98. During the course of this inquiry, the petitioners contend, they became aware for the first time of the collusive partition action filed by the respondents where the Final Decree had been entered on 12.02.96. After the culmination of the 66 application on 04.05.99 where the respondents were confirmed in their possession, the petitioners have filed this revision application on 08.12.99 as title holders to the land in suit in order to vindicate their rights by having the partition decree set aside on the basis of fraud and collusion under section 48(3) of the Partition Law.

On the statement of objections filed by the defendants on 07.05.2000 they have taken up the position that the 1st defendant-

respondent came into occupation and possession of the land in question on or about 1960, built a permanent structure there, and lived therein continuously and uninterruptedly till their possession was disturbed by the 1st petitioner around August 1998. The 1st defendant-respondent has further denied that he entered the land and continued in possession as a licensee under the 1st petitioner or his predecessor in title. The contention of the 1st defendant-respondent was that he had acquired prescriptive title over the land and gifted on undivided 1/2 share of the *corpus* by Deed No. 5991 of 29.06.1990 to the plaintiff-respondent who in turn filed the partition action in District Court, Mt. Lavinia on 16.06.1993 to equally apportion the undivided 1/2 shares between themselves. In answering the averments on paragraph 07 of the petition, the respondents in their statement of objections neither specifically deny the allegation of fraud and collusion raised by the petitioners nor specifically challenge the title to the land of the 1st petitioners but has prayed for the dismissal of the application and confirmation of the impugned partition decree. It is also pertinent to observe that in their statement of objections the respondents have chosen not to disclose the deed of declaration No. 5880 dated 22.02.1990 given in evidence and marked P1 at the trial in the partition case where the 1st defendant-respondent had got a deed of declaration written in his name. On an examination of the plaint filed in the partition action on 17.06.93 it is also significant to note that the plaintiff-respondent has taken the precaution not to reveal the degree of relationship among the respondents, whereas the substitution papers filed of record indicate that the 2nd defendant-respondent (Gurusamy Sinnakka) is the wife of the now deceased 1st defendant-respondent (Suppan Suppiah Mukan).

On a perusal of the petition of the petitioners together with documents marked A-Z and AA, the counter objections and the written submissions tendered to Court, the following contentions raised by the petitioners arise for consideration and adjudication.

(1) The petitioners are the legitimate holders of legal title to the land in suit.

(2) The 1st defendant-respondent entered the land and continued in possession with the leave and licence of the predecessors in title of the 1st petitioner and continued in

occupation with the permission of the petitioners, and therefore the respondents could not have acquired prescriptive title.

(3) By suppressing the 1st petitioners title to the land, and by the promulgation of a self-serving deed of declaration No. 5880 and deed of gift No. 5991, the respondents acted in fraud and collusion to obtain partition title.

(4) The learned trial judge had totally failed to investigate title.

(5) The conduct of the respondents by making contradictory statements on different occasions as to the circumstances of entry into the land and continuation in possession thereof are glaring pointers to the fact that they acted in fraud and collusion to obtain partition title fraudulently, which has occasioned a failure of justice.

(6) The fact that all deeds through which the petitioners claim title to the land in suit are duly registered in the volume. Folio M 1280/142 of the Land Registry (document AA), whereas the purported self serving deeds of the respondents are not so registered.

On the strength of the above contentions, the petitioners have urged that notwithstanding the finality of the partition decree envisaged in section 48 of the Partition Law, this is a fit and proper case for this Court to exercise its wide powers of revision in order to avoid a miscarriage of justice.

On the other hand, the respondents have raised the following contentions in their statement of objections and written submissions.

(1) The deed upon which the 2nd petitioner claims title is subsequent to the entering of the Partition Decree.

(2) The petitioners are both guilty of laches and therefore not entitled to any relief by way of revision.

(3) The petitioners application for *restitutio in integrum* should fail as they were not parties to the original partition action and relief had not been sought with promptitude.

(4) No evidence of possession of the corpus has been set out by the petitioners and as such failed to set out a *prima facie* case for relief.

(5) Petitioners cannot move in revision as revision will lie only at the instance of a party to an action.

(6) Vague allegations of fraud is not sufficient to vitiate the finality attached to a partition decree.

Having perused the entirety of the pleadings, documentation, written submissions and case law authorities submitted by both parties, I now propose to analyse the same in order to arrive at a just and fair conclusion in this case. The petitioners in this case have sought to set aside an interlocutory and final decree of partition. The finality of such decrees is embodied in section 48 of the Partition Law No. 21 of 1977.

However section 48(3) of the Partition Law reads as follows:

"The interlocutory decree and the final decree of partition entered in a partition action shall have the final conclusive effect declared by section (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.

The powers of the Supreme Court by way of revision and restitutio in integrum shall not be affected by the provisions of this section."

Section 44 of the Evidence Ordinance states as follows:

"Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41 or 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, the proviso to section 48(3) of the Partition Law has made it abundantly clear that the superior courts in exercising broad powers of revision and restitutio in integrum are not inhibited by this qualification in that, where a partition decree obtained by fraud or collusion has occasioned a failure of justice, the superior courts are empowered to set aside and strike off such impugned decree in achieving the objective of due administration of justice and correction of errors in order to avert a miscarriage of justice.

This sound principle is succinctly stated in *Soysa* v *Silva*[1] where it was held that "The power given to Superior Court by way of revision is wide enough to give it the right to revise any order made by the original court. Its object is the due administration of justice and correction of errors sometimes committed by the court itself in order to avoid a miscarriage of justice."

Therefore where it is manifestly clear that the impugned partition decree has been obtained by fraud or collusion resulting in a failure of justice, the finality attached to such decree could be assailed by the exercising of broad revisionary powers, in a fit and proper case.

The concept of finality which was unknown to the Roman-Dutch Law, has been incorporated into our law borrowed from the English Law, drawing inspiration from the English statute of 1677. However, utilizing the proviso to section 48(3), a long line of authorities of the Supreme Court and the Court of Appeal, acting in revision and restitutio in integrum, has tended to erode the finality of a partition decree, in order to avert a failure of justice, for good and sound reasons, as enumerated below.

(a) The *corpus* not being sufficiently identified.
(*Piyasena Perera* v *Margret Perera* [1a])

(b) Decree obtained by fraud and collusion.
(*Ennis J.* in *Fernando* v *Marshall Appu*[2])

(c) Lack of proper investigation of title.
(*Piyaseeli* v *Mendis and others*[3])

(d) Order of trial judge manifestly erroneous.
(*D. Wanigabahu* v *R. Mahindapala and another*[4])

(e) Decree entered without trial and without notice to parties.
(*Kannangara* v *Silva*[5])

Therefore if is now settled law that the finality of a partition decree can be assailed in exceptional circumstances in order to avert a miscarriage of justice (eg. *Somawathie* v *Madawala*[6]). Having reached this conclusion, it is now left to examine the several contentions raised by both parties in this case.

It is now opportune to consider the contention of the Respondents that the Petitioners cannot succeed as they were not parties to the original partition action.

In *Ratnawalie Hemaratne* v *Wadygiyapillai and another.*(7) it has been held that revisionary jurisdiction can be invoked even by a person who was not party to the case in the original Court provided he is an aggrieved person.

In the Supreme Court 05 Judge Bench judgment in *Mariam Beebee* v *Seyed Mohamed and others*(8) Sansoni, J. held that, "when an aggrieved person who may not be party to the action, brings to the notice of court the fact that unless the revisionary power is exercised, injustice will result, the extraordinary power of revision may be exercised in order to avoid a miscarriage of justice."

However in *Dissanayake* v *Elisinahamy*(9) the Court of Appeal has taken the view that relief by way of restitutio-in-integrum could not be granted as the petitioner had not been a party to the action.

The petitioners in this application are placed in the jeopardy of forfeiture of their right, title and interest in the land in suit due to the impugned partition decree, and therefore qualify as aggrieved parties even though they had no opportunity to participate in the original court proceedings. Therefore notwithstanding the relief claimed by way of restitutio-in-integrum, on the strength of the authorities cited above, I am inclined to reject the contention of the respondents that relief by way of revision does not lie to the petitioners.

On a consideration of the above authorities, it is abundantly clear that, even though the petitioners were not parties to the original action, if they were sufficiently aggrieved by the partition decree entered by the trial judge which occasioned a failure of justice, the petitioners were entitled to claim relief by way of revision, provided they satisfy court that the respondents had obtained the impugned decree by way of fraud and collusion, and thereby inducing the trial judge to enter interlocutory decree without a proper investigation of title.

I now propose to deal with the contention of the respondents that vague allegations of fraud are not sufficient to vitiate the finality

attached to the impugned partition decree. Paragraph 07 of the petition of the petitioners raises a definite allegation of fraud and collusion, supported by other averments in the petition. Paragraph 07 states "in the course of the said application, the petitioners for the first time came to know that a fraudulent and collusive partition action bearing No. 19/93/Partition had been filed by Mukkan Suppiah, Suppan Suppiah Mukkan and Gurusamy Sinnakka – the members of the same family suppressing and willfully concealing the petitioners ownership of the land in question." Rule 04 of the Court of Appeal (Appellate Procedure) Rules of 1990 has provided the respondents the opportunity to meet the averments and allegations in the petition by filing a comprehensive statement of objections. However, on an examination of the statement of objections filed by the respondents on 07.05.2000, especially paragraph 07 of the said objections that had answered the averments in paragraph 07 of the petition, the following matters come to light.

(a) There is no specific denial of the allegation of fraud and collusion, on which the respondents have chosen to remain silent.

(b) There is no specific denial of the petitioners allegation that the 03 respondents are members of the same family.

(c) There is no special denial of the petitioners allegation that the respondents willfully suppressed the petitioners ownership of the land.

(d) There is no specific denial that the petitioners for the first time came to know of the respondents partition action during the course of the section 66 application filed by the petitioners.

If the respondents were truthful and genuine, it is quite questionable and irrational as to why the respondents chose to remain silent or advert a low profile on crucial issues which they could have easily vehemently denied in detail, which inescapably generates a grave doubt as to the credibility of the respondents.

Furthermore, a perusal of the pleadings and the proceedings gives a clear insight as to the implied attempt on the part of the respondents to steadfastly hide the fact that they are members of the same family. Perusal of the plaint filed in the partition action, the

evidence given in court by the plaintiff-respondent at the trial, other pleadings in the partition action and the section 66 application, and the statement of objections filed in this revision application substantiates this position. The substitution papers filed in this court on the demise of the 1st defendant-respondent indicate that he is the husband of the 2nd defendant-respondent. Applying the objective test of a normal course of conduct of a rational human being, it is difficult to refrain from arriving at an adverse inference as to why the respondents repeatedly failed to disclose their family relationship, if not for an ulterior motive, fearing that collusion will be spotlighted.

One other aspect that springs to the eye is that the respondents in their statement of objections have not disclosed the deed of declaration No. 5880 of 22.02.90 which has been marked P1, and given in evidence at the partition trial. This declarative deed apparently was the bedrock upon which the 1st defendant-respondent founded his ownership to the land in suit from which he gifted an equal 1/2 share to the plaintiff respondent 04 months later by deed No. 5991 of 29.06.90, paving the way for the partition action that ensued 03 years later. While the latter deed has been prominently mentioned in paragraph 7(a) of the statement of objections of the respondent, the former deed No. 5880 has been left out. If the 1st defendant-respondent was absolutely convinced about his prescriptive title and the validity of the declarative deed No. 5880, it is nothing but reasonable to infer that he would display it in his statement of objections as the source of deriving of title, unless in his own mind he knew it was a self serving instrument which the 1st defendant-respondent was loath to flout around in adversity.

Last but not the least, when one examines the various contradictory statements made by the respondents at different intervals at different forums as to the circumstances the 1st defendant-respondent entered the *corpus* and continued in possession, one cannot turn a blind eye on the thread of fraud and collusion weaving through entire transaction. These inconsistent instances may be enumerated as follows.

(a) Partition plaint 9 (marked B) – obtained ownership by lengthy possession and due to inheritence.

(b) Evidence in partition trial – prescriptive title by lengthy possession and by way of deed of declaration No. 5880.

(c) Police statement of 19.09.98 (marked U) – entered the land as licensee of original owner one Chettiyar and thereafter filed partition action and obtained decree.

(e) Petition in the section 66 application (marked N) – purchased the land from one Chettiyar.

(f) Statement of objections in the Court of Appeal – lengthy possession and obtained prescriptive title.

It is very pertinent to observe that the 1st defendant-respondent had volunteered to admit to the Mt. Lavinia police that he entered the land in suit as a licensee of the original owner one Chettiyar and continued in occupation in such circumstances that he could not have acquired prescriptive title.

On the consideration of the totality of the repelling circumstances illustrated above, the balance of proof tilts in favour of the petitioners in that a strong *prima facie* case emerges leading to the conclusion that the respondents acting in collusion among family members have contrived to obtain partition title to the corpus, whereas examination of deed Nos. 2160, 994 and 329 produced by the petitioners establish the fact that legal ownership of the land has devolved on the 1st petitioner even before the purported partition action.

Irrespective of the question of fraud and collusion, the petitioners have raised another contention in their written submissions, namely the failure on the part of the trial judge to properly examine title. After the evidence of the plaintiff-respondent was recorded without a contest, the trial judge in his order of 09.08.94 has stated as follows.

"පැමිණිලිකරු සාක්ෂි දෙන ලදී. මෙම නඩුවේ බෙදා වෙන්කිරීමට ඉල්ලා ඇත්තේ. ජය මාවත අංක 31/21 දරණ දේපලයි. එය ජේ. එන්. වික්‍රමරත්න මිනින්දෝරු මහතා විසින් අංක 104 දරණ පිඹුරේ පෙන්වා ඇති අතර එම පිඹුර "X" වශයෙන් ද අදාල වාර්තාව "X1" වශයෙන් ද පෙන්වා ඇත. පැමිණිලිකරු සාක්ෂි දී ඇති අතර නඩුව භබයකින් තොරව විභාග විය. මෙම සාක්ෂිය ගැන සැහීමකට පත් වී ඒ අනුව පහත සඳහන් ආකාරයට බෙදා වෙන් කරමි ....."

It is quite apparent that learned judge had based his findings on the admissions made in evidence of the plaintiff-respondent. There had been no attempt to examine whether the corpus mentioned in the schedule to the plaint tallies with the extent and boundaries of the land mentioned in deed No. 5880 and 5991 marked in evidence. There had been no attempt to ascertain whether the above deeds

are duly registered in the proper Folio No. 1280/142 at the land registry or whether there are other deeds duly registered in the proper folio pertaining to the same land. In other words the learned trial judge had merely acted as a rubber stamp without discharging his burden under the Partition Law in properly investigating title. In such situations, it may be gainsaid, the conduct of the learned trial judge unknowingly contributes to the perpetrating of a fraud by parties acting in collusion.

In *Kularatne* v *Ariyasena*(10) it was held that "The duty of a Judge in a partition action is to ascertain who the actual owners of the land are and it is an imperative duty of the court to fully investigate and decide on the title of each party to the action on evidence and not on any admissions."

In *Galagoda* v *Mohideen*(11) it was held that "the Court should not enter a decree in a partition action unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property."

In *Sumanawathie and another* v *Andreas and others*(12) it has been further held that "On an appeal in a partition action, if it appears to the Court of Appeal that the investigation of title has been defective it should set aside the decree and make an order for proper investigation."

Further, G.P.S. De Silva, CJ in *Gnanapandithan and another* v *Balanayagam and another*(13) held that, "There was a total want of investigation of title. The circumstances were strongly indicative of a collusive action. In the result, there was a miscarriage of justice in the case, and the appellants were entitled to a revision of the judgment of the District Judge notwithstanding delay in seeking relief."

On the strength of the above authorities it is evident that the trial judge failed to discharge his paramount duty to investigate the title properly before making his order which has occasioned a failure of justice to the detriment of the petitioners. The following matters have escaped the scrutiny of the trial judge.

(a) Though the plaint in the partition action (marked B) speaks of the 1st defendant-respondent acquiring ownership by way of inheritance, the learned trial judge had failed to investigate this aspect.

(b) The respondents have failed to establish that they were in possession from 1960 by cogent evidence other than through an admission on the part of the plaintiff-respondent while giving evidence. The respondents have also failed to establish possession adverse to that of any person holding legal title to the land.

(c) Though the respondents claim that they were in possession from 1960, the extract of plan No. 865/1961 of Licensed Surveyor Dias Abeygunawardane had been prepared only on 12.02.1980, while the deed of declaration executed only on 22.02.1990, and finally the partition action filed only on 16.06.1993.

Therefore for the foregoing reasons and on the strength of the authorities cited above, I uphold the main contentions raised by the petitioners in that –

(a) The respondents were party to fraud and collusion in obtaining the impugned partition decree.

(b) The total failure by the trial judge to investigate title vitiates the finality of the partition decree.

I am also satisfied that the above two ingredients have occasioned a failure of justice to the detriment of the petitioners, in which event they are entitled to relief by way of revision.

The next question to be examined is whether the petitioners are disqualified in obtaining this relief due to laches and undue delay. The 1st petitioner has obtained legal title to the land in suit by deed No. 2160 dated 12.09.84. According to him he has permitted the respondents to continue in occupation and has periodically visited the land. He had not observed anything amiss until 17.08.93 when he saw a fence erected obstructing his ingress. Thereafter the 1st petitioner made a complaint at the Mount Lavinia police station and filed a section 66 application (Case No. 34567) in M.C. Mt. Lavinia forthwith. During the course of this inquiry, the respondents had produced the impugned partition decree which the petitioners had then become aware of for the first time. The section 66 case culminated on 04.05.09 and as the order was adverse to the petitioners, they filed this revision application in this court on

08.12.99, around 07 months later. The final decree in the D.C. Mt. Lavinia Case No.19/93/P had been entered on 17.04.96. Therefore the revision application to set aside this decree has been filed around 3 years and 07 months later. The circumstances which led to this delay are explained in the pleadings submitted by the petitioners. During this period, once they become aware of the actions of the respondents, the petitioners have not displayed inaction over their rights but have filed a police complaint and a section 66 case and awaited its outcome before invoking the revisionary powers of this court. Therefore the facts and circumstances of this case do not preclude the petitioners right to relief by way of revision due to laches having regard to the exceptional circumstances that have surfaced in this case which has occasional a failure of justice.

In this context, it is appropriate to quote from *His Lordship former Chief Justice G.P.S. De Silva, CJ* in the case of *Gnanapandithan* v *Balanayagam (supra)* where he held

> *"The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to the very special and exceptional circumstances of the case, the appellants were entitled to the exercise of the revisionary parties of the Court of Appeal."*

Therefore for the foregoing reasons, I reject the contention of the respondents with regard to laches and undue delay and hold that the petitioners are entitled to relief by way of revision.

The petitioners have lost their opportunity to appeal against the impugned partition decree for no fault of theirs. A separate case for damages under section 49 of the Partition Law is now not possible as more than 05 years have elapsed since the entering of the final decree, in view of section 22 of Partition (Amendment) Act No. 17 of 1997. Therefore injustice will result unless the extraordinary powers of revision are exercised to avoid miscarriage of justice.

Therefore, acting in revision I make order setting aside the judgment and other proceedings, interlocutory Decree and the Final Decree in District Court Mt. Lavinia Case No. 19/93 Partition as prayed for in sub-paragraph (1) of the prayer to the petition. I make further order directing the learned District Judge of Mount Lavinia to commence partition proceedings *de novo* on the plaint filed by the

respondents while allowing the petitioners too to intervene in the action and file their statement of claims and thereafter fully investigate title and make an order and enter interlocutory decree and final decree according to law in compliance with the provisions of the Partition Law. On a consideration of all the circumstances of this case I award costs in sum of Rs. 25,000/- to the petitioners.

Accordingly Application is allowed.

EKANAYAKE, J. – I agree.

Application allowed.
Trial de novo ordered.

Editors Note:

Special leave to appeal No. SC Spl. LA 158/2007 to the Supreme Court was refused by the Supreme Court on 6.9.2007.