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

In the matter of an Application for Revision and/or Restitution - in -Intergrum.

Kulathunga Mudalige Don Albert
No.67 Mulleriyawa Road,
Thalahena,
Malabe.

Plaintiff

Vs

C.A. Revision Application No. 1140/2001
D. C. Mt. Lavinia Case No.13219/P

1. Lokugonaduwage Marthina Perera
   Of Thalahena, Malabe.
   And thirty three (33) Others

Defendant

And Between

1. Dissanayake Simon Dharmadasa
   23rd Defendant- Petitioner
2. Somawathie Dissanayake
   24th Defendant- Petitioner

Vs

1. Kulathunga Mudalige Don Albert
   No.67 Mulleriyawa Road,
   Thalahena,
   Malabe.

Plaintiff - Respondent

2. Lokugonaduwage Marthina Perera
   Of Thalahena, Malabe.

And Others

Defendant -Respondent

BEFORE	:	**S. SRISKANDARAJAH, J (P/CA)**
COUNSEL	:	Rohan Sahabandu for the 23rd and 24th Defendant -Petitioners M.U.M.Ali Sabry with Miss.Shazina Razeen for the Plaintiff Respondent.
Argued on	:	23.08.2010
Written Submission on	:	28.01.2011 (23rd and 24thDefendant-Petitioners) 27.01.2011 (Plaintiff - Respondent)
Decided on	:	20.01.2012

S.Sriskandarajah.J

The Plaintiff -Respondent instituted an action in the District Court of Mt. Lavinia Case No.13219/P to partition a land. The Plaintiff in his plaint set out his pedigree and had sought that the corpus should be partitioned between himself and the 1st to 22nd Defendant -Respondents with 90/1260 shares to be left unallotted. The 1st to 22nd Respondent did not file their statement of claim. The 23rd and 24th Defendant - Petitioners were not parties to the action sought to intervene to the said action and filed their statement of claims.

The 23rd and 24th Defendant - Petitioners were absent and unrepresented on the trial date, the trial was concluded and the Judgment was delivered on 11.06.1980. Accordingly Interlocutory Decree was entered and the commission was issued to prepare the final scheme of partition. The Interlocutory Decree was amended on 9th of January 1981.

The 23rd and 24th Defendant - Petitioners on 10.03.87 filed papers under Section 48(4) of the Partition Law giving reasons for their default. Their reasons were:

a) That the Attorney -at- Law had died in 1978.

b) The Partition Action was in respect of 1 Acre but after the survey it had become 2 Acres and 13 Perches. No *lis pendents* has been registered in respect of the larger land.

c) That they were unable to participate at the trial as the 23rd Defendant was ill, and no notice was sent to him.

Written submissions were filed by parties to this application and the learned Judge delivered his order on 22nd January 1996 rejecting the Petitioners application.

The Petitioners in this Revision application has sought to set aside the order dated 22.01.1996. He has also challenged the Judgment dated 11.01.1980and has sought to set aside this Judgment and the Interlocutory Decree.

Section 48(1) of the Petition Law provides that the Interlocutory decree entered under Section 26, subject to Subsection 4 of this section be final an conclusive for all purpose against all persons whomsoever, whatever right, title or interest they have, or claim to have to or in the land to which that decree relates and notwithstanding any omission or defect of procedure or in any proof of title adduced before the Court or the fact all persons concerned are not parties to the action.
Subsection 4 of Section 48 provides:

4. (a) Whenever a party to a partition action-

(i) has not been served with summons, or

(ii) being a minor or a person of unsound mind, has not been duly represented by a guardian ad litem, or Paragraph (iii) Repealed by [Â§ 21, 17 of 1997]

(iv) being a party who has duly filed his statement of claim and registered his address, fails to appear at the trial,

and in consequence thereof the right, title or interest of such party to or in the land which forms the subject-matter of the interlocutory decree entered in such action has been extinguished or such party has been otherwise prejudiced by the interlocutory decree, such party or where such party is a minor or a person of unsound mind, a person appointed as guardian ad litem of such party may, on or before the date fixed for the consideration of the scheme of partition under section 35 or at any time not later than thirty days after the return of the person responsible for the sale under section 42 is received by court, apply to the court for special leave to establish the right, title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered.

(b)..

(c) If upon inquiry into such application, after prior notice to the parties to the action deriving any interest under the interlocutory decree, the court is satisfied-

(i) that the party affected had no notice whatsoever of the said partition action prior to the date of the interlocutory decree or having duly filed his statement of claim and registered his address, failed to appear at the trial owing to accident, misfortune or other unavoidable cause, and

(ii) that such party had a prima facie right, title or interest to or in the said land, and

(iii) that such right, title or interest has been extinguished or such party has been otherwise prejudicially affected by the said interlocutory decree,

(d)..

(e)..

The Petitioners had invoked the above provision and filed papers in the District Court for special leave to establish their right, title or interest. The Petitioners main contention was that at the time of the trial the 23rd Petitioner was living in Balangoda and the 24th Petitioner was not well and their Attorney -at- Law died without their knowledge thus they were unaware about the trial dates. The learned

District judge after due consideration of the application had observed that the said Attorney at Law who died had revoked his proxy on the 21st of April 1976 four years prior to the 1st date of trial (19th November 1979). As the Petitioners had failed to satisfy the court that the failure to appear at the trial was owing to accident, misfortune or other unavoidable cause as set out in Section 48(4)(c) the learned judge has dismissed the said application by order dated 22.01.1996.

The Petitioners in this application has not only failed to satisfy this court that the order of the learned District Judge is erroneous but also has not explained the inordinate delay in filing this application. Therefore I dismiss the application to revise the order dated 22.01.1996.

The Petitioners have also sought an order in this application to set aside the judgment dated 11th June 1980 on the ground; that the Plaint gives the land as a land of 1 Acre in extent but the Primary Plan No. 1049 gives an extent of 2 Acres 13 Perches, the interlocutory decree and the allotting of shares is on this basis. Hence a larger land had been partitioned without following the proper procedure and investigation of title.

The Respondent's position is that the extent stated in the schedule to the Plaint as 1 Acre more or less. The pedigree to the said corpus devolves up to far back as to 10 decades (100) years. It is a fact that at that time no proper mode of survey was executable therefore the extent of the land is generally described with boundaries. Even if the extent is doubled in the preliminary plan the schedule referred to in the plaint refers to the same corpus. As the *lis pendens* had been registered as 1A more or less the Respondents submitted that the *lis pendens* is duly registered.

Sirimane J in *Don Sadiris v Heenhamy 68 N.L.R17* stated: A *lis pendens* is duly registered when it is registered in the folio (or a continuation of it) in which the oldest deed relating to the land is registered. This is usually referred to as the "correct folio ".

In this instant case the *lis pendens* is registered in the correct folio. The purpose of registering a *lis pendens* is twofold; firstly, that all parties who have registered documents may have notice of action; secondly, that intending purchasers of undivided shares may be made aware of the partition action that is pending.

In the instant Case the *lis pendens* is correctly registered and the said registration is sufficient to serve the above purpose. It is settled law that revision will lie to set right a miscarriage of justice in the event of there being in the proceedings a fundamental vice which transcends the bounds of procedural error."; *W.G.Roslin v H.B.Maryhamy [1994] 3 Sri LR 262 at 268.* But the facts of this case enumerated above do not warrant an intervention of this court by way of revision. Therefore this court dismisses this application without costs.

President of the Court of Appeal