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

In the matter of an application for the exercise of power of Restitutio in Intergrum and/or Revision under Article 138 of the Constitution read with Section 48(3) of the Partition Law No 21 of 1977.

Wilegodage Mendis of Ittegalagodawatta,
Panagamuwa, Wanchawela .

Plaintiff- Respondent

C.A.(Revision) Application No: 2213/2002
D.C.Galle Case No.7899P

Vs

1. Thomas Udugampola of
   Panagamuwa, Panagamuwa, Wanchawela.
   And twenty six others (26) others.

Defendants- Respondent

Now Between

Somawathie Weerasinghe of
Ittegalagodawatta, Panagamuwa,
Wanchawela.

2nd Defendant- Petitioner

Vs

Wilegodage Mendis of Ittegalagodawatta,
Panagamuwa, Wanchawela .

Plaintiff- Respondent

Thomas Udugampola of
Panagamuwa, Panagamuwa, Wanchawela.
And twenty six others (25) others.

Defendants- Respondents

BEFORE	:	**S. SRISKANDARAJAH, J.**
COUNSEL	:	M.R.de Silva PC, for the Petitioner Anurudatha Dharmaratne for the Respondents.
Argued on	:	05.08.2010
Written Submission	:	7.02.2005 (Petitioner) 01.02.2005 (Respondent)
Decided on	:	16.03.2011

S.Sriskandarajah.J

The Plaintiff instituted a partition action to partition a land called Ittegalagodawatta and in the plaint the 2nd Defendant Petitioner (here in after referred to as Petitioner) and her brothers and sisters the 3rd ,4th , 5th and 6th Defendants were allotted 58/288 shares of the soil rights. The Petitioner submitted that the Petitioner and the 3rd to 6th Defendants filed answer claiming the share allotted and a further share inherited from their grandfather Caronchiappu. The judgement in this partition action was delivered on 06.11.1998. The Petitioners contention is that at the trial the Plaintiff had produced her documents and gave evidence. Throughout the trial the 2nd Defendant Petitioner was ill and due to poor health and old age she was unable to attend court and was unable to produce any deeds. In view of this the shares that should have been allotted to her and the 3rd ,4th 5th and 6th Defendants have been allotted to the Plaintiff and his sister the 7th Defendant by an error in the judgement.

In the above circumstances the Petitioner filed an application under Section 48 of the Partition Law by purging her default by producing medical certificates. Section 48(4)(a)(iv) provides that 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 may 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. If upon inquiry into such application the court is satisfied that the Petitioner 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 that such party had a prima facie right, title or interest to or in the said land, and that such right, title or interest has been extinguished or such party has been otherwise prejudicially affected by the said interlocutory decree. This application of the Petitioner was considered by court and the court by its order dated 17.07.2002 refused the said application.

The 2nd Defendant-Petitioner in this application has sought to revise the said order The learned Judge in his order has observed that the Petitioner did not appear in court even on days that he was in good health. Further the Petitioner had made her claim with her brother and sister who are also parties to the case and hence her rights cannot be prejudicially affected. After making these observations the learned District Judge had dismissed the Petition among other grounds. It is a requirement of law that the trial judge has to satisfy himself that the facts pleaded by the Petitioner exist at the relevant time namely: owing to accident, misfortune or other unavoidable cause that the Petitioner could not attend the trial and due to this fact , her right, title or interest has been extinguished or she has been otherwise prejudicially affected. The Petitioner has failed to establish this fact before the learned District Judge and hence there is no error

in the order of the learned District Judge dated 17.02.2002 and it cannot be subjected to review by this court.

The 2nd Defendant Petitioner in this application has also challenged the Judgement and the Interlocutory decree dated 6.11.1998. The Petitioner submitted that the learned District Judge erred in allotting to the Plaintiff Respondent and his sister the 7th Defendant Respondent the shares conveyed by the deeds marked P2 and P3. The Petitioner contended that the learned Judge had not considered the oral evidence of the Plaintiff who produced the said deeds and the evidence of 1st Defendant, pedigree and answer submitted by him. The Petitioner further contended that the judge has not paid due attention to the deeds especially P1 to P9 produced by the Plaintiff and has miscalculated the shares.

The Respondents contended that the 2nd Defendant Petitioner had admitted paragraphs 1 to 8 of the plaint, and thereby admitted the devolution of title as set out by the Plaintiff and hence she is not entitled now in law to take a position contrary to the admission. The 2nd Defendant Petitioner by admitting the said deeds have inter alia , admitted that undivided shares owned by the said Cathrinahamy, Dineshamy and Punchihamy devolved on the Plaintiff and the 7th Defendant. Hence the 2nd Defendant is not entitled in law to question the 15556/9216 shares each, allotted to the Plaintiff and the 7th Defendant by the learned Additional District Judge.

The main challenge of the Petitioner to the validity of the said Judgement and the Interlocutory Order is on the basis that the shares that should have been allotted to her and the 3rd 4th 5th and 6th Defendant-Respondents have been allotted to the Plaintiff and his sister the 7th Defendant by an error of judgement. It is pertinent to note that the 6th Defendant -Respondent, a sister of the 2nd Defendant-Petitioner, who derives title on the same pedigree as the 2nd Defendant-Petitioner had made an application to the District Court under Section 189 of the Civil Procedure Code, purportedly to rectify the

errors found in the judgement regarding calculation and awarding soil rights. The said application has been dismissed by the learned District Judge after considering the merits of the application stating that the trial judge had given plausible reasons for his judgement.

In *Perera And Others V Adline And Others [2000] 3 Sri L R page 93* at 99 The court upheld a preliminary objection that a party to a partition action is estopped from denying the validity of the Interlocutory Decree. The Court Held:

> "According to Section 48(5) of the Partition Act the interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by Section 48(1) as against a person who, "not having been a party" to the partition action, claims any such right, title or interest to or any land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree has been entered by a Court without competent jurisdiction. According to the Provisions of the Partition Act, a partition decree could not be challenged even on the grounds of fraud or collusion.
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> In the instant case, the Defendants who disclosed the names of the Petitioners did not raise any issue on that basis and went along with the Plaintiff and participated in the trial and judgment was delivered accordingly. When one takes into consideration the above facts and law it is abundantly clear that the Petitioners have accepted the finality of the judgment and the interlocutory decree in this action.
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> Hence the preliminary objection of the Learned Counsel for the Plaintiff-Respondent, that the Petitioners are now estopped from denying the validity of the interlocutory decree is upheld."

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, Somawathie v Madawela and Others [1983]2 Sri .L.R15.*

In this case the 2nd Defendant Petitioner was a party to the Partition action and she was represented by a counsel but she has deliberately not shown due diligence in persuading her rights in the said action. Further the 2nd Defendant Petitioner has failed to show any ground that would have caused miscarriage of justice. In these circumstances this court dismisses this application without costs.

Judge of the Court of Appeal