

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

In the matter of an application for
Revision in terms of Section 753 of the
Civil Procedure Code.

CA. Rev. No. 137/2003

D.C. Balapitiya No. 3139/P

1. Agampodi Gerty Premalatha De
Zoysa,
2. Agampodi Sudath De Zoysa,
3. Agampodi Lionel De Zoysa,
4. Agampodi Mani De Zoysa,
5. Agampodi Piyawathie De Zoysa,
6. Agampodi Padmawathie De Zoysa
(deceased),
- 6A. Agampodi Piyawathi De Zoysa,
Nape, Kosgoda.

Substituted 6A Petitioner

7. Agampodi Jagath Kumara De
Zoysa,
8. Agampodi Nihal Athula De Zoysa,
9. Agampodi Madura Iranganie De
Zoysa,
10. Agampodi Monika Priyangani De
Zoysa,
11. Wijemuni Somawathie De Zoysa
(deceased),
- 11A. Agampodi Sam Chemley Mendis

Of 172A, Nape, Kosgoda.

Substituted 11A Petitioner

12. Agampodi Wasana Hemanthi De
Zoysa,

13. Agampodi Akman De Zoysa,
All of Nape, Kosgoda.

Petitioners

-Vs-

1. Porawagoda Samson De Silva
(Deceased),
Nape, Kosgoda.
Porawagoda Sudith Wasantha De
Silva,
181A, Nape, Kosgoda.

Substituted-Plaintiff-Respondent

2. Hakkimuni Adlin De Silva
(Deceased)
02A. A.A. Dislon De Silva,

Substituted 2A Defendant-Respondent

03. Agampodi Sumith De Zoysa,
Both of Nape, Kosgoda.
04. Agampodi Luwanis Zoysa,
Boraluketiya, Kosgoda.
05. Agampodi Beatuy Ratnawalie De
Zoysa,
06. Agampodi Lak Kapila De Zoysa
Both of Nape, Kosgoda.

Defendant - Respondents

BEFORE : Dr. Ruwan Fernando J. &
M.Sampath K.B. Wijeratne J.

COUNSEL : Rohan Sahabandu, P.C. with S.
Senanayake for the Petitioners
S.N.Vijith Singh for the 1A Plaintiff-
Respondent

ARGUED ON : 08.09.2020

WRITTEN SUBMISSIONS
: 17.07.2019 (by the Petitioners)
10.10.2018 (by the 1A Plaintiff-
Respondent)

DECIDED ON : 19. 02.2021

Dr. Ruwan Fernando, J.

Introduction

[1] This is an application in revision filed by 14 Petitioners to set aside the judgment of the learned District Judge of Balapitiya dated 26.11.2002 and the interlocutory decree based thereon in Case bearing No. 3139/P of the District Court of Balapitiya. By the said judgment, the learned District Judge of Balapitiya decreed to partition the land called “Madinagedarawatta” between the Plaintiff-Respondent and the 1st Defendant-Respondent.

Summary of the Plaintiff-Respondent’s Case

[2] The Petitioners stated in their Petition dated 27.01.2003 *inter alia*, that:

- (a) One Hakkuni Adlin De Silva instituted a Partition action in the District Court of Balapitiya Case bearing No. 1411 seeking to

partition a land called “Madinagedarawatta”, containing in extent of 2 Acres morefully described in paragraph 2 of the Plaint dated 10.12.1986;

- (b) According to the chain of title set out in the Plaint of the said case, the said Plaintiff, Hakkmuni Adlin De Silva claimed that the parties were entitled to undivided rights in the following manner:

The Plaintiff	-	undivided 1/108
The 1 st Defendant	-	undivided 105/108
The 2 nd Defendant	-	undivided 1/108
The 3 rd Defendant	-	undivided 1/108

- (c) At the Preliminary Survey, 20 persons, including the Petitioners and their predecessors in title claimed rights to the said land and after the Preliminary Plan was prepared, the Plaintiff made an application to re-issue the commission on the Commissioner to mark the permanent road that served as access to the corpus;
- (d) The notices were ordered to be issued on the said 20 new claimants to the land and accordingly, the notices were issued on the 3rd and 9th claimants, but no steps were taken to issue notices on the other claimants;
- (e) No steps were taken thereafter, with regard to the said case by the Plaintiff in the said case and the case was neither laid by nor dismissed;
- (f) In early January 2003, the Petitioners became aware that the land called “Madinagederawatta” was to be sold and on inquiries being made, they found that one Porawagoda Samson Silva had instituted a partition action bearing No. 3139/P in the District Court of Balapitiya to partition the same land called “Madinagedarawatta” in extent of 2

acres and obtained a partition decree without a contest to partition the said land;

- (g) The Plaintiff in Case No. 3139/P is the son of the Plaintiff in the previous Case No. 1411/P, who was named as the 1st Defendant in the previous case No. 1411/P and the 2nd Defendant is his brother-in-law while the 3rd Defendant in Case No. 3139/P is the brother of the Plaintiff in the previous case;
- (h) None of the Defendants named in the previous case, apart from Luwinis Silva had been made a party to the partition case No. 3139/P and none of the 20 new claimants in the previous case were made parties to the said case;
- (i) There was no Preliminary Survey done in respect of the said land or procedure followed to advertise the land sought to be partitioned in Case No. 3139/P in terms of the provisions of the Partition Law and the land surveyed in the Preliminary Plan No. 851 made by Sisira Amendra, Licensed Surveyor is only 1 acre, whereas the land sought to be partitioned is 2 acres;
- (j) 1/4th share of the land called “Madinagederawatta” was owned by one Heen Appu Zoysa and his 6 brothers, including A. Guneris De Zoysa, Rathu Appu De Zoysa, Sarnelis Hamy De Zoysa and Martin De Zoysa;
- (k) The Petitioners are the heirs of the said original owners of 1/4th share, according to the pedigree pleaded in paragraph 14 of the Petition and thus, the Petitioners are entitled to undivided rights of the said original owners;

- (l) The house situated in the corpus of the action had been built by the said Heen Appu Zoysa and the 1st and the 2nd Petitioners and the 5th Respondents are his children;
- (m) The partition decree had been obtained in Case No. 3139/P by fraud perpetrated by the Plaintiff in collusion with the other Defendants who are his close relations and, in the result, the Petitioners' land, including the house and the plantation that stood on the land had been partitioned between the Plaintiff and the 1st Defendant who are the son and the mother respectively.

Objections of the Plaintiff-Respondent

[3] The Plaintiff-Respondent (hereinafter referred to as the Plaintiff) filed objections and while denying all and singular the averments contained in the Petition of the Petitioners, stated *inter alia*, that the land sought to be partitioned in D.C. Balapitiya Case No. 1411/P is situated within the Grama Sevaka Division No. 18 whereas the land sought to be partitioned in Case No. 3139/P is situated within the Grama Sevaka Division No. 16. The Plaintiff denied that the land referred to in Case No. 1411/P is the same land referred to in Case No. 3139/P and prayed for the dismissal of the Petitioners' Application.

Hearing of the Revision Application

[4] This case was fully argued before a Bench comprising Justice Shiran Gooneratne and myself and as Justice Shiran Gooneratne has been elevated to the Supreme Court, this Court on 03.02.2021, inquired from the Attorneys-at-law for the Petitioners and the 1A Substituted Plaintiff whether they wished to re-argue this matter before the present Bench or invite the present Bench to deliver the judgment on the written submissions. All Counsel, representing the Petitioners and the 1A

Substituted Plaintiff invited the present Bench comprising the remaining Judge before whom the case was argued, to deliver the judgment upon the written submissions filed by the parties without any further re-argument.

Main complaint of the Petitioners

[5] The main complaint of the learned President's Counsel for the Petitioners, Mr. Rohan Sahabandu is that the Plaintiff has instituted the Partition action bearing No. 3139/P in collusion with the other Defendants and obtained a partition decree by fraud perpetrated on the Petitioners without notice to them and their predecessors-in-title who claimed their rights to the same land in the previous Partition action bearing No. 1411/P.

[6] Mr. Sahabandu has drawn our attention to the Preliminary Plan and the Journal Entries made in the previous Partition action bearing No. 1411/P and submitted that almost 20 new claimants, including the Petitioners and their predecessors-in-title who made their claims to the same land in the previous partition action bearing No. 1411/P were deliberately not made parties by the Plaintiff in the subsequent partition action bearing No. 3139/P instituted to partition the same land. In the result, he submitted that the Petitioner's house and their plantation stood on the land have also been partitioned between the Plaintiff and the 1st Defendant in the case bearing No. 3139/P causing a grave miscarriage of justice to the Petitioners.

[7] The learned Counsel for the Plaintiff has conceded that the earlier partition action was filed by the mother of the Plaintiff in the present action bearing No. 3139/P and submitted that although it was not proceeded with, it is not a bar to institute a fresh action. He has further submitted that the persons who made their claims in the earlier partition action were fully aware of the present partition action, but they were absent at the preliminary survey and kept quiet. Accordingly, he has submitted that the

Petitioners cannot be given any relief now for their own folly, negligence and laches.

Subject Land in Case No. 1411/P and 3139/P

[8] It is not disputed that the District Court of Balapitiya Case bearing No. 1411/P was instituted by the Plaintiff's mother, Hakkimuni Adlin de Silva and the Plaintiff, Porawagoda Samsan De Silva in D.C. Balapitiya Case bearing No. 3139/P was the 1st Defendant in Case bearing No. 1411/P. It is also not disputed that the said Hakkimuni Adlin de Silva who was the Plaintiff in D.C. Balapitiya Case bearing No. 1411/P is the 1st Defendant in D.C. Balapitiya Case bearing No. 3139/P instituted by her son, Porawagoda Samsan De Silva. It is not in dispute that after the initial steps were taken, the said D.C. Balapitiya Case bearing No. 1411/P was not proceeded with in the District Court of Balapitiya.

[9] The Plaintiff has, however, taken up the position in his objections that the land sought to be partitioned in D.C. Case bearing No. 1411/P is not the same land referred to in D.C. Partition Case bearing No. 3139/P (Vide-paragraph 10 of the objections). In view of this position of the Plaintiff in her objections, the first matter that arises for consideration is whether the land depicted in the Preliminary Plan No. 104 filed in D.C. Balapitiya Case No. 1411/P is the same land depicted in the Preliminary Plan No. 850 filed in D.C. Case No. 3139/P.

Land sought to be partitioned in the District Court of Balapitiya Case No. 1411/P

[10] The land sought to be partitioned called "Madinagedarawatta" in D. C. Balapitiya Case No. 1411/P is in extent of 2 acres and the boundaries of the said land are morefully described in paragraph 2 of the said Plaint dated 10.12.1986 (P1) as follows:

- North - Agampodigedera watta and Welbima adjoining it.
- East - Welbima called Thanateriyana and land where Wijemuni Adiris de Soysa resided.
- South - Thodige Liyadda *alias* Boamaluwatta
- West - Palugedarawatta.

[11] The Preliminary Plan No. 104 made by C.T.S. Manukulasuriya, Licensed Surveyor dated 08.10.1987 depicts a land called “Madinagedarawatta” in extent of 1 acre and 1.25 perches and the boundaries are described in the said Plan (See- Annexure “A”) as follows:

- North - Agampodigedera watta and Welbima adjoining it.
- East - Katheranage Welbima.
- South - Boamaluwatta, a land where Kodhi resided and land of Adiyarage.
- West - Palugedara watta.

[12] The Plaintiff, Porawagoda Samsan De Silva has instituted D.C. Balapitiya Case bearing No. 3139/P to partition the identical land called “Madinagedarawatta” and the boundaries are described in the schedule to the said Complaint as follows:

- North - Agampodigedera watta and Welbima adjoining it and Bogahawatta and Galmencheyagewatta.
- East - Kodigeliyadda *alias* Boamaluwatta, Welbima called Kanneriya and land where Wijemuni Sandiris de Soysa resided and Thodige Liyadda *alias* Boamaluwatta.
- South - Welbima called Thanneriya and land where Wijemuni

Adiris de Soysa resided and kodiyeiyedda *alias* Bomaluwewatta.

West - Palugedara watta *alias* land where Sandiris resided.

[13] The Preliminary Plan No. 851 dated 08.01.1999 made by Sisira Amendra, Licensed Surveyor depicts a land called “Madinagedarawatta” in extent of 1 acre (See- Annexure “B”) and the Surveyor has identified the boundaries of the said land as follows:

North - Agampodigedera watta and Welbima adjoining it and Bogahawatta and Galmencheyagewatta.

East - Kodigeliyadda alias Boamaluwatta, Welbima called Kanneriya and land where Wijemuni Sandiris de Soysa resided

South - Welbima called Kanneriya and land Thodige Liyadda *alias* Bomaluwewatta where Wijemuni Adiris de Soyza resided

West - Palugedara watta *alias* land where Sandiris resided.

[14] A perusal of both Preliminary Plans Nos. 104 and 851 and the two Plaints filed in both Partition Cases reveals that the extent and the boundaries of the land depicted in Plan No. 104 filed in D.C. Balapitiya Case No. 1411/P sufficiently tally with the extent and the boundaries of the land depicted in Plan No. 851 filed in D.C. Balapitiya Case No. 3139/P. A perusal of both Plans and Plaints further reveals that the “Madinagedarawatta” described in both Plaints and Plans is situated in Nape in Kosgoda in the Bentota Walalawiti Korale in the Galle District and identical buildings and two houses are situated within the corpus of the action depicted in both Plans.

[15] It is crystal clear that both partition actions had been filed to partition the same land called “Madinagedarawatta” and therefore, the position taken by the Plaintiff in his objections that the land referred to in D.C. Case No. 1411/P is not the same land referred to in D.C. Balapitiya Case No. 3139/P has no merit and ought to be rejected.

Miscarriage of justice resulted from non-compliance with the provisions of section 5 of the Partition Law

[16] A Plaintiff in a partition action is obliged under section 5 of the Partition Law to make all persons, parties to the action whether they are in actual possession thereof or not, if they are having any right or interest in the land sought to be partitioned according to the knowledge of the Plaintiff. Section 2 provides as follows:

“The Plaintiff in a partition action, shall include in his plaint as parties to the action all persons who whether in actual possession or not, to his knowledge are entitled or claim to be entitled-

(a) any right, share or interest to, of, or in the land to which the action, whether vested or contingent, and whether by way of mortgage, lease, usufruct, servitude, trust, life interest, or otherwise or;

(b) any improvements made or effected on or to the land:.....”

[17] The question that arises for decision is whether there is any non-compliance with the provisions of section 5 of the Partition Law and if so, whether any such non-compliance has caused a miscarriage of justice to the Petitioners having a right, share or interest to the land to which the action relates.

Interests of the Petitioners to the Land called “Madinagederawatta”

[18] The Petitioners have pleaded in the Petition that 1/4th share of the said land was owned by Agampodige Heen Appu De Soysa, and his 6 brothers, including Agampodige Guneris De Zoysa, Agampodige Rathu Appu,

Agampodige Saraliyes Hamy De Soysa and Martin De Zoysa and upon their demise, the Petitioners inherited the $\frac{1}{4}$ share from them according to the pedigree pleaded by them in paragraph 14 of the Petition.

[19] The Petitioners have produced the Land Registry Extracts marked P6 and Deed marked P7 to prove that the land was owned by Agampodige Heen Appu Zoysa and his brothers, the predecessor-in-title of the Petitioners. Mr. Metha has submitted in the written submissions filed on behalf of the Plaintiff that the Land Registry Extracts and the Deeds produced by the Petitioners do not relate to the land partitioned in Case bearing No. 3139/P and therefore, the said documents ought to be disregarded in deciding the rights of the Petitioners.

[20] The Plaintiffs in Case bearing No. 1411/P and Case No. 3139/P have described in their respective Plaints the land sought to be partitioned as the land called “**Madinagederawatta**” where **Kekulahandy Domis** resided (Vide- paragraph 2 of Plaint in Case No. 1411/P and paragraph 2 of the Plaint in Case No. 3139/P). The Extracts marked P6 submitted by the Petitioners clearly refer to the name of the land in folio 289 as “**Madinagederawatta where Domischige resided**”. It is crystal clear that both Partition actions had been instituted in respect of the land called “**Madinagederawatta**” where **Domis** resided and the same land is referred to in the said Extracts marked P6.

[21] Moreover, the boundaries of the land called “**Madinagederawatta**” on which **Domis** resided as referred to in the Extracts marked P6 sufficiently tally with the boundaries of the Plaintiff’s Title Deeds Nos. 7998 (P1), 16240 (P2) and 360 (P3). The boundaries of the land called “**Madinagederawatta**” referred in the Extracts marked P6 289 are as follows:

- N - Walimuni Janeris Mendis Padinchiwatta & Bogahaliyedda
- E - Talagahaliyedde **Wela**;
- S - **Adiyanagewatta** *alias* Wijemuni Hiinappu Padinchiwunuwatta
- W - **Palugederawatta.**

[22] The boundaries described in the Title Deeds Nos. 7998 (P1), 16240 (P2) and 360 (P3) are as follows:

- N - Gelemendigjegewatta and Bogahawatta
- E - Bomaliwewatta
- S - **Adiyanagewatta** and Bomaluwewatta
- W - Sandiris Padinchwatta

[23] It is not in dispute that the western boundary of the land depicted in both Preliminary Plans is Palugederawatta and the eastern boundary *inter alia* is a Wela as depicted in both Plans. Thus, it is absolutely clear that the southern and western boundaries of the land described in the said Deeds tally with the land described in the Extracts marked P6.

[24] On the other hand, the northern boundary of the land described in the Extracts is Walimuni Janeris Mendia Padinchiwatta & Bogahaliyedda and the northern boundary of the land described in the Plaintiff's Title Deeds marked P1, P2 and P3 is Bogahawatta and Gelamanchiyagewatta. The only difference is that in the Extracts marked P6, in addition to Walimuni Janeris Mendis Padinchiwatta, **Bogahaliyedda** is mentioned, whereas in the said Title Deeds, it is described as **Bogahawatta.**

[25] On the other hand, the eastern boundary of the land as described in the Extracts marked P6 is **Palugederawatta** and the said Title Deeds refer to the land where Sandiris resided. The Preliminary Plan No. 851 in Case

bearing No. 3139/P describes the eastern boundary as Palugederawatta alias land where Sandoris resided. This confirms that the eastern boundary mentions in the Extracts marked P6 is more or less the same eastern boundary described in Plan No. 851 in Case bearing No. 3139/P and Plan No. 104 in Case bearing No. 1411/P.

[26] A perusal of the Extracts filed by the Petitioner marked P6 further reveals that A.R.de Zoysa, A.C. de Zoysa, A.G. de Zoysa, A.H. de Zoysa, A. S. de Zoysa and A. J de Zoysa had become entitled to undivided $\frac{1}{4}$ share at one time together with the plantation of the land called “Madinagederawatta”. Prima facie, the Petitioners have shown that they have interests in the land called “Madinagederawatta” and that there are entitled to be made parties to the action under the provisions of section 5 of the Partition Law.

Fraud perpetrated on the Petitioners and collusive action filed by the Plaintiff

[27] Mr. Sahabandu has submitted in the written submissions that the Plaintiff had deliberately suppressed the previous case from the learned District Judge of Balapitiya and the fact that 20 new claimants, including the Petitioners and their predecessors-in-title appeared and made their claims before the Surveyor at the preliminary survey in the previous case. He has submitted that, except the close relations of the Plaintiff, all other co-owners of land in dispute were purposely and conveniently kept out by the Plaintiff as shown by the Affidavits filed by the very same Defendants in Case bearing No. 3139/P marked P3-P5.

[28] The question that arises is whether the Plaintiff in instituting the Partition Case bearing No. 3119/P purposely kept the Petitioners and their predecessors in title out of the action and if so, whether it was a deliberate

act of perpetrating fraud on the Petitioners and their predecessors-in-title, which had caused a manifest miscarriage of justice.

[29] The Plaintiff in the previous case bearing No. 1411/P was the mother of the Plaintiff in Case No. 3139/P and the Plaintiff in Case No. 3139/P was the 1st Defendant in the D.C. Case No. 1411/P. The Plaintiff in Case bearing No. 1411/P had made Samson de Silva (the 1st Defendant), Hakkimuni Misilin De Silva (the 2nd Defendant), H. Luwnis De Silva (the 3rd Defendant) and Agampodi Willie Mendis (the 4th Defendant), W. Somawathie (the 5th Defendant) and Jayamini Wilfred Zoysa (the 6th Defendant) as parties to the said action. The said Plaintiff in the previous case claimed that the following parties were entitled to undivided rights in the following parties:

The Plaintiff (H. Adlin De Silva)	- 1/108
The 1 st Defendant (P. Samson De Silva)	- 105/108
The 2 nd Defendant (H. Misilin De Silva)	- 1/108
The 3 rd Defendant (Agampodi Luwinis De Silva)	- 1/108

[30] A perusal of the case record in Case bearing No. 1411/P reveals that although the Court directed to issue notice on the new claimants, notices had not been served on all the new claimants and no steps had been taken by the Plaintiff in the previous case to serve notice on the 3rd and the 9th new claimants. As the Plaintiff in the previous case had not taken any further steps, the Court directed the Plaintiff to take steps, but the Plaintiff had not taken steps to proceed with the previous Partition action (Vide-Journal Entry No. 57 dated 13.12.1995).

[31] A perusal of the Preliminary Report filed in the previous case No. 1411/P reveals that Willie Mendis who was the 4th Defendant in the previous case had claimed the plantation and buildings in Lot “A” in Plan

No. 104. The Plaintiff had not, however, made the said 4th Defendant and the 5th Defendant (W. Somawathie) parties to the present Partition Case bearing No. 3139/P.

[32] A perusal of the Preliminary Report filed in D.C. Case No. 1411/P further reveals that at the preliminary survey, 20 new persons had claimed their rights to the land sought to be partitioned. A perusal of the said Report reveals that the 2nd, 8th, 15th and 16th claimants before the Surveyor in the said case are the 11th, 14th, 5th, 6th Petitioners in the present application.

[33] It is crystal clear that the Surveyor had reported in the previous case that 20 new claimants, including the 2nd, the 8th the 15 and the 16th Defendants had made their claims to the land in the previous case. The Plaintiff who was the 1st Defendant in the previous case should have known very well that the Petitioners and their predecessors-in title had made their claims to the land in dispute. The Plaintiff in the present case had purposely failed to make them parties to the present Partition Case bearing No. 3139/P.

[34] On the other hand, the Plaintiff in the present action did not take any step to issue notice on the Petitioners and obtained a partition decree which only allotted shares to the Plaintiff and his mother leaving out all those who made claims to the identical land in the previous action.

[35] Mr. Sahabandu has submitted that there is a fundamental vice in the procedure adopted in partition action bearing No. 3139/P for non-compliance with Section 12 and Section 19 of the Partition Law and in the result, the Petitioners had lost their inherited land, including the house and plantation standing thereon, causing a manifest miscarriage of justice to the Petitioners. Mr. Metha has however, submitted that the Surveyor had taken steps under section 17 of the Partition Law and the Surveyor had reported

that no new claimants were present at the preliminary survey and and thus, the Petitioners cannot dispute the case record that they had no notice of the action. Mr. Metha has further submitted that the section 12 declaration has been filed by the Plaintiff's Attorney-at-Law and thus, the Plaintiff has complied with the section 12(1) of the Partition Law. Mr. Sahabandu has submitted that there was no proper compliance with section 12 (1) of the Partition Law. He has submitted that it is clearly manifested from the conduct of the Plaintiff in not making the Petitioners, parties to the action that the Plaintiff had acted in collusion with the other Defendants and obtained partition decree by fraud perpetrated on the Petitioners and their predecessors-in-title.

[36] Section 12 (1) of the Partition law reads as follows:

(1) After a partition action is registered as a lis pendens under the Registration of Documents Ordinance and after the return of the duplicate referred to in section 11, the plaintiff in the action shall file or cause to be filed in court a declaration under the hand of an attorney-at-law certifying that all such entries in the register maintained under that Ordinance as relate to the land constituting the subject-matter of the action have been personally inspected by that attorney-at-law after the registration of the action as a lis pendens, and containing a statement of the name of every person found upon the inspection of those entries to be a person whom the plaintiff is required by section 5 to include in the plaint as a party to the action and also, if an address of that person is registered in the aforesaid register, that address”.

[37] Under this section, it is imperative that an Attorney-at-Law should file a declaration under his hand certifying that all such entries in the Register maintained under the Registration of Documents Ordinance as relate to the land constituting the subject-matter of the action have been personally inspected by him after the registration of the action as a *lis pendens* and giving the names and where such is registered, the addresses of every person found upon such inspection to be necessary party to the action.

[38] Had the Plaintiff's Attorney-at-Law personally inspected the entries in the Register maintained under the Registration of Documents Ordinance in respect of the land called "Madinagederawatta, he could not have missed the registration of the *lis pendens* in the previous partition action as it had not been cancelled by the time the second action was filed in the same District Court. Had he personally inspected all such entries in the register maintained under that Ordinance, he could have easily found the previous case number and ascertained that the previous action had been filed in respect of the same land with identical boundaries.

[39] Had he checked the case record in Case No. 1411/P or inquired from the Plaintiff, he could have found that 20 new claimants had been present at the preliminary survey and claimed rights and thus, the Plaintiff was required by section 5 to include in the Plaintiff as parties to the action, such persons. No attempt was by the Plaintiff or his Attorney-at-Law to disclose the names of the Petitioners and their predecessors in title who had claimed their rights in the previous action filed to partition the identical land as required by section 5. No step has been taken, at least, to issue notice on the Petitioners as persons, to the knowledge of the Plaintiff, are entitled to claim a right, share or interest in the land to which the action relate.

[40] The failure to make the Petitioners and their predecessors-in-title parties to the action in terms of section 5 and make a correct declaration under section 12(1) of the Partition Law amounts to a procedural irregularity which has resulted in a miscarriage of justice, in that the Petitioners and their predecessors-in-title who claimed a right, title and interest in the subject matter of the action had been kept out without being made parties.

[41] The Plaintiff in Case bearing No. 3139/P has claimed that the Plaintiff was entitled to undivided 7/8 share while his mother was entitled to undivided 1/8 share and thus, they were the sole co-owners of the land called “Madinagedarawatta” and obtained a partition decree in their favour in respect of the entire land in extent of 160 perches.

[42] The Plaintiff’s mother in the previous case claimed that the original owner of the land called “Madinagedarawatta” was Lamanachchira and according to the pedigree set up by her, she claimed that she was entitled to undivided 1/108 share while his son was entitled to 105/108 share, the 2nd and 3rd Defendants were entitled to 1/108 share each person. A perusal of the pedigree set up by the Plaintiff’s mother in the previous case reveals that the Plaintiff and the 1st Defendant, his mother in Case No. 3139/P are not the sole co-owners of the identical land called “Madinagedarawatta”.

[43] The Petitioners have claimed that the house No “10”, the passage No. “11” and the kitchen No. “13” in Plan No. 851 in Case bearing No. 3139/P were built by his predecessor-in-title, Agampodige Heen Appu and the Plaintiff and the 1st Defendant are not entitled to the said buildings. A perusal of the buildings in Lot 1 of Plan No. 851 reveals that a part of the house and the kitchen falls outside the corpus of the action and the mother of the Plaintiff who is the 1st Defendant had claimed the entire lot 1 including the said buildings.

[44] However, the mother of the Plaintiff who filed Partition Case No. 1411/P had not claimed the said house No. “1” and building No. “2” in Plan No. 104 at the preliminary survey. The said house No. “1” and building No. “2” in Plan No. 104 had been claimed by the 4th Defendant in the previous case, who was not made a party by the Plaintiff in Case bearing No. 3139/P.

[45] The mother of the Plaintiff, who is the 1st Defendant in Case bearing No. 3139/P had however, claimed the entire buildings in lot 1 at the preliminary survey done on 26.10.1998 and surprisingly, only the Plaintiff, his mother (1st Defendant) and the 2nd Defendant (the Plaintiff's brother-in-law) were present at the preliminary survey in the present case. It is to be observed that the Commissioner Sisira Amendra had reported that at the preliminary survey done on 26.10.1998, only the Plaintiff, the 1st Defendant and the 2nd Defendant were present.

[46] The 2nd Defendant-Respondent in Case No. 3139/P had given an Affidavit marked P4 stating that although he was made a party to the Partition action bearing No. 3139/P, no survey or beat of tom-tom was done or proper advertisement was followed in respect of the land in dispute. He has further stated in the Affidavit that the Plaintiff had obtained a partition decree by misleading the authorities. The 3rd Defendant-Respondent in Case No. 3139/P, Luwinis de Silva, who is said to be the brother of the Plaintiff's mother had also given an Affidavit (P5) stating that although he had no rights to the land in dispute, he was made a Defendant in the partition action at the instance of the Plaintiff.

[47] A perusal of the Report filed by the Commissioner in the previous action bearing No. 1411/P reveals that the Plaintiff in case No. 3139 who was the 1st Defendant in Case No. 1411/P had only claimed buildings and plantation in Lot "B" in Plan No. 104, along with his mother and the 3rd Defendant. Both the Plaintiff and his mother in the present case had not claimed lot "A" in Plan No. 104 including the permanent buildings Nos. "1" and "3" and the plantation described in Plan No. 104. It appears that only a new claimant had claimed lot "A" depicted in the said Plan (Vide-page 46 of the brief). On the other hand, the Plaintiff in Case No. 3139/P

had not claimed Lot “C” in Plan No. 104 which is in extent of 2 roods and 17 perches.

[48] However, the Plaintiff in Case No. 3139/P had claimed that the sole co-owners of the land called “Madinagederawatta” are the Plaintiff and his mother and obtained a decree to partition the said without notice to all the parties who were given shares in the previous action by his mother and the Petitioners and their predecessors-in-title who claimed their rights in the previous action.

[49] It is absolutely clear from the pedigree set up by the Plaintiff’s mother in the previous case, that apart from the Plaintiff and his mother, there are more persons, including the Petitioners and their predecessors-in-title who had claimed undivided rights to the land called “Madinagederawatta”.

[50] Mr. Sahabandu has submitted that the partition decree obtained by the Plaintiff had deprived the Petitioners’ of their ancestral house and buildings Nos. 10-13 depicted in Plan No. 851 and the same had been given to the 1st Defendant (mother of the Plaintiff) who did not even claim the same at the preliminary survey in the previous case.

[51] At the hearing on 08.09.2020, Mr. Metha conceded that some Petitioners are living in House in Lot 1 depicted in Plan No. 851 and thus, they could have been made parties to the partition action. He, however, disputed the contention of Mr. Sahabandu that the interlocutory decree ought to be set aside as he was prepared to exclude the house in Lot 1 and amend the interlocutory decree accordingly. Mr. Metha has drawn the attention of Court to the decision of the Supreme Court in *Somawathie v. Madawela and Others* (1983) 2 Sri LR 15 and submitted that justice would be served only by excluding the house No. “10” without setting aside the interlocutory decree and amending the interlocutory decree accordingly.

[52] In the case of *Somawathie v. Madawela and Others* (supra), the substantial relief which Mr. Madawela wanted was to exclude lot 4 in Plan No. 3392 as the said lot had been fenced by Mr. Madawela after he purchased lot 4 and thus, the Supreme Court could identify lot 4 and exclude it from the corpus of the action. In the present case, the Petitioners have not restricted their substantial claims to the house Nos. “10”-“13” in lot 1 of Plan No. 851. The Petitioners have claimed an undivided $\frac{1}{4}$ share inherited from their predecessors-in-title from the entire land called “Madinagederawatta”.

[53]. It is seen from the Preliminary Plan No. 851 that there are 2 houses and buildings in Lot 1 depicted in Plan No. 851 and the house and buildings Nos. “10”-“13” are part of the same house but part of the said house, namely, the kitchen No. “13” is outside the land depicted in Plain No. 851. In the circumstances, it is not possible to exclude only the house marked “10” from the corpus of the action without first giving an opportunity to the Petitioners to make their claim and establish their rights in the District Court action.

[54] The Petitioners had claimed their rights in the previous case before the Surveyor and the Plaintiff in the present case had full knowledge that they were all necessary parties, as persons who were entitled to claim a right, title or interest in the subject matter in terms of the provisions of section 5 of the Partition Law. Their rights, title or interests have been adversely affected by the partition decree fraudulently obtained by the Plaintiff without notice to them. The entire land had been partitioned between the Plaintiff and his mother (the 1st Defendant) in violation of the provisions of the Partition Law, which caused a miscarriage of justice to the Petitioners and in my view, it amounts to a fundamental vice.

[55] The Petitioners have been the victims of a miscarriage of justice and in my view, they are entitled to invoke the powers of revision vested in the Court of Appeal. *In Somawathie v. Madawala (1983) 2 Sri LR 15*, Soza J. referring to the finality clause in section 48 of the Partition Law stated at page 23:

“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”.

[56] Soza J. in the course of his judgment in the aforesaid case referred to the following statement made by T.S. Fernando J. (as he then was) in *Ukku v. Sidoris* 59 NLR 90 at page 93:

“While that section 48 (i.e. section 48 of the Partition Act) enacts that an interlocutory decree entered shall be 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 the opinion that it does not affect the extra-ordinary 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.”

[57] *In Somawathie v. Madawala (supra)*, Soza J. held that:

- (i) Although section 48 of the Partition Law invests interlocutory and final decrees entered under the Partition Act with finality, the revisionary powers of the Appeal Court are left unaffected and the position is the same under the Partition Law;

- (ii) The powers of revision and *restitutio in integrum* of the Appeal Court have survived all the legislation that has been enacted up to date.

[58] In *Appuhamy v. Weeratunga* 23 NLR 467, the Supreme Court held that it is open to the Supreme Court to exercise its powers of revision on the application of an aggrieved person not a party to the record. In *Mariam Beebee v Seyed Mohamed*, 68 NLR 36, *Sansoni C.J.* stated at page 38:

“The power of revision is an extraordinary power which is quite independent of and distinct from the appropriate 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.”

[59] In *Lazarus Estates Ltd. v. Beasley*. [1956] 1 Q.B. 702 Denning LJ. held that no court will allow a person to keep an advantage which he has obtained by fraud as fraud unravels everything and thus, the court had a jurisdiction to relieve against fraud in all cases. He stated at page 713:

“No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever.”

[60] In *Sirinivasa Thero v. Sudesi Thero* 63 NLR 31, the Court recognized the principle that a court whose act has caused injury to a suitor has an inherent power to make restitution as may be necessary to meet the ends of justice. *Sansoni J.*, stated at page 34:

“Justice requires that it should be restored to the position be occupied before the invalid order made for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position which he would have occupied if the wrong order had not been made. It is a power which is inherent in the Court itself and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act.”

[61] It is settled law that there is a paramount duty cast on the Court by the Partition Law itself to investigate the title of the land sought to be partitioned and the parties before the Court are those solely entitled to such land. The necessity for a full investigation and strict proof of title has been emphasized in a number of judgments. In *Galagoda v. Mohideen* 40 N.L.R. 92, 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.

[62] In all the attendant circumstances of this case, this Court is satisfied that the judgment complained of had been obtained by fraud perpetrated by the Plaintiff on the Petitioners and the Plaintiff had acted in collusion with the other Defendants, which had caused a manifest injustice to the Petitioners. In such instance, the Court will not sit idly by and allow the injustice to continue, simply on the ground that the Surveyor had merely reported that no new claimants were present at the preliminary survey and thus, the Petitioners now cannot contradict the Surveyor’s Report.

[63] I am of the 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. In the circumstances, this Court will not hesitate to exercise its extraordinary powers of revision where a manifest miscarriage of justice had occurred due to the conduct of the Plaintiff in obtaining a partition decree by fraud

perpetrated on the Petitioners. If this Court fails to invoke its powers of revision, grave injustice will result to the Petitioners

Conclusion

[64] In the interests of justice, I set aside the judgment of the learned District Judge of Balapitiya dated 26.11.2002 and the interlocutory decree based thereon in Case bearing No. 3139/P entered in the District Court of Balapitiya Case bearing No. 3139/P. In the result, I direct the learned District Judge of Balapitiya to have a trial de novo, after permitting the Petitioners to intervene in the action as parties and file their statements of claim and conclude the case as expeditiously as possible.

[65] The parties shall bear their own costs.

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratna J.

I agree.

JUDGE OF THE COURT OF APPEAL

