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

In the matter of an application for Revision and Restitutio in Integrum in terms of Article 138 of the Constitution.

CA. Rev. 2028/2001

DC Mt. Lavinia Case No. 1676/P

1. Nanayakkara Kariyawasam
   Dolamullage Ariyadasa,
   89, Sunethradevi Road,
   Pepiliyana, Nugegoda.
2. Omaththage Ruban Perera,
   (Deceased),
   Sunethradevi Road,
   Pepeliyana, Nugegoda

2A. Pali Munasighe (nee Perera)
   No. 83, Sirimal Mawatha,
   Pepiliyana, Nugegoda.

3. Alugaha Kankanamage
   Wimaladasa,
   No. 6, Field Mawatha,
   Pepiliyana, Nugegoda.
4. Athukoralage Dulihamy,

4A.Lechchavagoda Pathiranahalage
Gunawathie,
No. 94, Sunethradevi Road,
Pepiliyana, Nugegoda.

5. Agulugaha Kankanamge Dona
Mangonona (Deceased),
No. 04, Field Mawatha,
Sunethradevi Road,
Pepiliyana, Nugegoda.

5A. Kuruwitage Gunapala Silva,
No.4, Field Mawatha,
Sunethradevi Road,
Pepiliyana, Nugegoda.

6. Hollupathirage Ruban Caldera,
No. 10/7, Wickramaratne
Mawatha, Pepiliyana,
Nugegoda.

7. Hollupathirage Premasinghe
Caldera,
No. 10/7, Wickramaratnne
Mawatha, Pepiliyana,
Nugegoda.

8. Agulugaha Kankanamlage
Hemantha,
Field Mawatha, Pepiliyana,
Nugegoda.

Plaintiffs

-Vs-

1. Galpoththage Somawathie Perera,
   No. 256/7, Hettiyawatta,
   Hulangamuwa Road,
   Matale.
2. Devage Premawathie,
3. Galpoththage Hemalatha,
4. Galpoththage Swarnalatha,
5. Galpoththage Sriyalatha,
6. Galpoththage Oliver,
7. Galpoththage Ramyalatha,
   All of Parakrama Mawatha,
   Attidiya.
8. Galpoththage Karunasena,
9. Galpoththage Upulawathie
10. Galpoththage Dumila,
    All of No. 99/1, Sunethradevi
    Road, Pepiliyana,
    Nugegoda.
11. Gammanpilage Dona Siriyawathie,
    No. 108, Sunethradevi Road,
    Kohuwala.
12. Hollupathirage William Caldera,
13. Hollupathirage Iranganie Caldera,
14. Hollupathirage Somasiri Caldera,
    All of No. 10/7, Wickremaratne
    Mawatha, Pepiliyana,
    Nugegoda.
15. Uswaththa Liyanage Amarawathie,

16. Agulugaha Kankanamalage Dharmapala,
17. Agulugaha Kankanamalage Nimal,
18. Agulugaha Kankanamalage Nimalasiri,
19. Agulugaha Kankanamalage Ratnasiri,
20. Agulugaha Kankanamalage Chandralatha,
21. Agulugaha Kankanamalage Gunadasa,
    All of No. 6, Field Mawatha, Pepiliayana, Nugegoda.
22. Kuruppu Arachchige Gunaratna Menike,
23. Agulugaha Kankanamalage Pushpakumara,
24. Agulugaha Kankanamalage Kanthie,
25. Agulugaha Kankanamalage Premawathie,
26. Agulugaha Kankanamalge Samantha,
27. Agulugaha Kankanamalage Sisira Kumara,
    All of No. 4, Field Mawatha, Pepiliyana , Nugegoda.
28. Luvi Ramanayake

Defendants

AND NOW BETWEEN

7. Galpoththage Ramyalatha
   All of Parakrama Mawatha,
   Attidiya.

7th Defendant –Petitioner

-Vs-

1. Nanayakkara Kariyawasam
   Dolamullage Ariyadasa,
   89, Sunethradevi Road,
   Pepiliyana, Nugegoda.

2. Omaththage Ruban Perera
   (Deceased),
   Sunethradevi Road,
   Pepeliyana, Nugegoda

2A. Pali Munasighe (nee Perera)
   No. 83, Sirimal Mawatha,
   Pepiliyana, Nugegoda.

3. Alugaha Kankanamage
   Wimaladasa,
   No. 6, Field Mawatha,
   Pepiliyana, Nugegoda.

4. Athukoralage Dulihamy,

4A. Lechchavagoda Pathiranahalage
   Gunawathie,
   No. 94, Sunethradevi Road,
   Pepiliyana, Nugegoda.

5. Agulugaha Kankanamge Dona Mangonona (Deceased),
   No. 04, Field Mawatha,
   Sunethradevi Road,
   Pepiliyana, Nugegoda.

5A. Kuruwitage Gunapala Silva,
   No.4, Field Mawatha,
   Sunethradevi Road,
   Pepiliyana, Nugegoda.

6. Hollupathirage Ruban Caldera,
   No. 10/7, Wickramaratne Mawatha, Pepiliyana,
   Nugegoda.

7. Hollupathirage Premasinghe Caldera,
   No. 10/7, Wickramaratnne Mawatha, Pepiliyana,
   Nugegoda.

8. Agulugaha Kankanamlage Hemantha,
   Field Mawatha, Pepiliyana,
   Nugegoda.

Plaintiffs–Respondents

1. Galpoththage Somawathie Perera (Deceased),
   No. 256/7, Hettiyawatta,
   Hulangamuwa Road,

Matale.

1A. Piyadasa Welikandage alias
Mahawelikannage Piyadasa,
No. 258/48, Hettiyawatte,
Hulangamuwa.

Substituted 1A Defendant-Respondent

2. Devage Premawathie,
3. Galpoththage Hemalatha,
4. Galpoththage Swarnalatha,
5. Galpoththage Sriyalatha,
6. Galpoththage Oliver,
   All of Parakrama Mawatha,
   Attidiya.

8. Galpoththage Karunasena,
9. Galpoththage Upulawathie,
10. Galpoththage Dumila,
    All of No. 99/1, Sunethradevi
    Road, Pepiliyana,
    Nugegoda.
11. Gammanpilage Dona Siriyawathie,
    No. 108, Sunethradevi Road,
    Kohuwala.
12. Hollupathirage William Caldera,
13. Hollupathirage Iranganie Caldera,
14. Hollupathirage Somasiri Caldera,
    All of No. 10/7, Wickremaratne
    Mawatha, Pepiliyana,

Nugegoda.

15. Uswaththa Liyanage Amarawathie,
16. Agulugaha Kankanamalage Dharmapala,
17. Agulugaha Kankanamalage Nimal,
18. Agulugaha Kankanamalage Nimalasiri,
19. Agulugaha Kankanamalage Ratnasiri,
20. Agulugaha Kankanamalage Chandralatha,
21. Agulugaha Kankanamalage Gunadasa,

    All of No. 6, Field Mawatha, Pepiliayana, Nugegoda.
22. Kuruppu Arachchige Gunaratna Menike,
23. Agulugaha Kankanamalage Pushpakumara,
24. Agulugaha Kankanamalage Kanthie,
25. Agulugaha Kankanamalage Premawathie,
26. Agulugaha Kankanamalge Samantha,
27. Agulugaha Kankanamalage Sisira Kumara,

    All of No. 4, Field Mawatha, Pepiliyana , Nugegoda.

28.Luvi Ramanayake

Defendants – Respondents

BEFORE : Dr. Ruwan Fernando J. &

M. Sampath K.B. Wijeratne, J.

COUNSEL : Lakshman Perera, P.C. with Shalini Fernando and Niluka Dissanayake for the for the 7th Defendant-Respondent.

Rohan Sahabandu, P.C. with Chathurika Elvitigala for the 1st Defendant-Respondent.

J.C.Bowange with D.C.Bowange for the 1a and 1b Substituted-Plaintiff-Respondents.

Manohara de Silva P.C. with T. Abeysinghe for the 3rd and 4th Defendant-Respondents.

ARGUED ON **:** 11.02.2020, 27.08.2020 & 14.09.2020

WRITTTEN SUBMISSIONS

: 20.10.2020, 17.09.2018, 17.07.2014, 29.05.2013 & 14.10.2011 (by the 7th Defendant-Petitioner).

07.09.2018 & 11.03.2014 (by the 1st Plaintiff-Respondent-Respondents).

23.10.2020 & 10.10.2019, (by the 1st Defendant-Respondent).

17.07.2014 & 03.02.2021 (by the 3rd and 4th Defendant-Respondents).

DECIDED ON : 19.02.2021

Dr. Ruwan Fernando, J.

Introduction

[1] This is an application in Revision and/or Restitutio in Integrum filed by the 7th Defendant-Petitioner seeking to set aside the judgment, interlocutory decree and final decree entered by the District Court of Mt. Lavinia in Case bearing No. 1676/P. The 7th Defendant-Petitioner further seeks an order dismissing the said action filed by the Plaintiff-Respondent in the said District of Balapitiya Case bearing No. 1676/P on the ground that the entire action is a nullity.

[2] The Plaintiffs-Respondents (hereinafter referred to as the Plaintiffs) instituted action in the District Court of Mt. Lavinia seeking to partition the land called "Webodawatta" in extent of 1 acre morefully described in the schedule to the Plaint. It is an admitted fact that the case record was destroyed when the Registry of the District Court of Mt. Lavinia caught fire during the 1989 insurgency and the case record was reconstructed as per the journal entry dated 03.06.1991.

[3] It is also not in dispute that the Registered Attorney of the Plaintiffs Mr. V. S. Gunawardena tendered the Plaint, Plaintiffs' proxy, Amended Caption, Preliminary Plan No. 10477 made by the Comissioner M. D. J. V. Perera, Licensed Surveyor and his Report, papers for substitution in place of the deceased 4th Plaintiff and the

deceased 28th Defendant for the purpose of reconstructing the case record.

[4] Thereafter, the District Court issued notices on all the Defendants and on 27.01.1992, Mr. Wilfred Perera, Attorney-at-law tendered a copy of the statement of claim filed on behalf of the 1-10 Defendants. On 30.03.1992, Mr. Wilfred Perera, Attorney-at-law tendered the proxy on behalf of the 1-10 Defendants and Fiscal reported the notices were served on the 15-24, 26-27 Defendants (J.E. 5), 11-14 Defendants (J.E. 9) and 28A Defendant (J.E. 10). On 21.11.1994, the Registrar of the District Court reported that the notice was sent to the 25th Defendant by registered post (J.E. 21).

[5] After the necessary steps were taken for the reconstruction of the record and the substitution, the case was fixed for trial and when the case was taken up for trial on 14.06.1996 (J.E. 33), the Plaintiffs were represented by Mr. V.S. Gunawardene and the 1-10 Defendants were represented by Mr. Ranjan Suwadaratne. As the Plaintiffs did not lead evidence, the 8th Defendant gave evidence in support of the pedigree set up by the 1-10 Defendants, produced the Preliminary Plan No. 1028 marked 'X', the Report marked 'X1') and the Title Deeds marked 1V1-1V4.

[6] The 8th Defendant-Respondent (hereinafter referred to as the 8th Defendant) while denying the pedigree set up by the Plaintiffs stated in evidence that the Defendants agreed to give 30 perches to the Plaintiffs on the basis of their long possession and moved that the remaining portion of land be partitioned according to the pedigree pleaded by the 1-10 Defendants in their statement of claim.

[7] On 28.10.1996, the learned District Judge of Mt. Lavinia entered judgment accepting the evidence of the 8th Defendant and decreed to

partition the land according to the pedigree pleaded by the 1-10 Defendants in their statement of claim in the following manner:

The 1st to 8th Plaintiffs	-	30 perches
The 1st Defendant	-	undivided 7/24
The 2nd Defendant	-	undivided 9/24
The 3rd Defendant	-	undivided 1/24
The 4th Defendant	-	undivided 1/24
The 5th Defendant	-	undivided 1/24
The 6th Defendant	-	undivided 1/24
The 7th Defendant	-	**undivided 1/24**
The 8th Defendant	-	undivided 1/24
The 9th Defendant	-	undivided 1/24
The 10th Defendant	-	undivided 1/24

[8] The interlocutory decree was entered and the commission was issued to prepare the final scheme of partition and accordingly, G.P. Abeynayake, Licensed Surveyor blocked out the land and submitted the proposed final plan No. 2525 dated 08th and 09th January 1998 and the report to Court on 19.02.1998. The 7th Defendant-Petitioner obtained a commission and prepared alternative plan No. 3109 made by G. B. R. Silva, Licensed Surveyor.

[9] On 29.03.2000, the 7th Defendant-Petitioner made an application for special leave under section 48 (1) of the Partition Law and sought to set aside the judgment dated 28.10.1996 or amend the interlocury decree entered by the District Court for the following reasons:

(a) She was not aware of the partition action filed by the Plaintiff and that thus, she had not taken steps to appoint an Attorney-at-Law on her behalf in the present action;

(b) She became aware that a proxy had been filed on her behalf appointing an Attorney-at-Law in the present action;

(c) She did not receive any notice in respect of the final survey done and the Surveyor had failed to comply with section 32 of the Partition Law.

[10] The Journal Entires do not, however, indicate whether the said application was supported by the 7th Defendant-Petitioner in open Court. A perusal of the journal entries, however reveals that the 7th Defendant-Petitioner had submitted an alternative plan and the Court directed to amend the proposed final plan. Accordingly, P.P. Abeynayake, Licensed Surveyor prepared the proposed amended final plan No. 3051 dated 14.03.2001. Of consent, the learned District Judge inspected the land in dispute on 20.12.2000 and decided to examine both Surveyors and fixed the matter for inquiry.

[11] On 15,03.2001, the parties agreed to accept the amended final plan No. 3051 dated **14.05.2001** made by P.P. Abeynayake and accordingly, the learned District Judge confirmed the said final plan No. 3051 dated 14.05.2001 and the Report (P15 and P16).

[12] On 15.03.2001 and 7th Defendant-Petitioner filed a notice appeal against the said order, but the learned District Judge refused to entertain the said notice of appeal as an appeal could only be preferred against the said order with the leave of the Court of Appeal in terms of section 36A of the Partition (Amendment) Law No. 17 of 1997. The final decree was entered (P14) accordingly, and the same was registered in the Land Registry as per journal entries dated 07.09.2001 and 15.11.2001 (J.E. 53 & 58).

Application of the 7th Defendant-Petitioner in Revision and Restitutio in integrum

[13] On 28.11.2001, the 7th Defendant-Petitioner filed this application invoking the revisionary and restitutio in integrum jurisdiction of this Court seeking to set aside the judgment, interlocutory and final decrees entered by the District Court and also to dismiss the Plaintiff's action for the following reasons:

(a) She did not receive any summons and give any instruction to Mr. Wilfred Perera, Attorney-at-Law to appear on her behalf at the trial or she never participated in the action before the District Court;

(b) She never signed any proxy appointing Mr. Wilfred Perera, Attorney-at-Law on her behalf and the proxy filed in the District Court is a forged document;

(c) The lis pendens had not been registered and the declaration under section 12 of the Partition Law had not been filed by the Plaintiff;

(d) No proper investigation of title had been made by the District Court under section 25 of the Partition Law;

(e) Her signature had been forged on the proxy submitted to Court as clearly proved by the Report of the E.Q.D. and material presented by her with her Petition;

(f) The entire proceedings in the District Court are a nullity as the mandatory provisions of the Partition Law had not been complied with by the Plaintiff and the Commissioner; and

(g) The revisionary powers of the Court of Appeal are left unaffected by the finality attached to the Partition decree in section 48 of the Partition Law.

Objections of the 1st Plaintiff

(14) The 1st Plaintiff filed objections denying all and singular the averments contained in the Petition and Affidavit of the Petitioner save and except which were specifically admitted in his objections and stated *inter alia*, that:

(a) The 7th Defendant-Petitioner was always represented by Mr. Wilfred Perera, Attorney-at-Law and the 1-10 Defendants filed a joint statement of claim in 1989 through their Registered Attorney, Mr. Wilfred Perera and thus, she is precluded now from taking up the position that she had not given instructions to Mr. Wilfred Perera or that she was not served with summons by the District Court;

(b) The evidence of the 8th Defenant was led with the consent of the Plaintiffs and 1-10 Defendants who were all represented by the respective Attorneys-at-Law and thus, the Petitioner who was present in Court is bound by the proceedings at the trial;

(c) The Petitioner who filed objections and took part in the Scheme Inquiry had not made a proper application to the District Court in terms of the provisions of Section 48 (4) of the Partition Law and thus, the District Court was not bound to hold an inquiry under section 48 (4) of the Partition Law;

(d) The 7th Defendant-Petitioner who filed a notice of appeal against the order confirming the final partition plan in contravention of the provisions of section 36(a) of the Partition Law and thus, the District Court correctly rejected the same for not-compliance with the provisions of section 36(a) of the Partition Law; and

(e) The Petitioner had suppressed the material facts by deliberately avoiding to file the relevant journal entries and the documents filed in the District Court and thus, the Petitioner is guilty of laches.

Objections of the Substituted 1st Defendant-Respondent

[15] The 1st Defendant-Respondent (hereinafter referred to as the 1st Defendant) filed objections and denied all and singular the several

averments contained in the Petition and Affidavit of the 7th Defendant-Petitioner and stated *inter alia,* that:

(a) The 7th Defendant-Petitioner received summons and was represented by Mr. Wilfred Perera, Attorney-at-Law and sometimes appeared by herself and with her husband in Court;

(b) The trial was conducted without a contest on 14.06.1996 and the judgment was entered accordingly, and the 7th Defendant-Petitioner and her husband attended the proceedings before the District Court, submitted an alternative plan prepared by G.O.R. Silva, Licensed Surveyor;

(c) The 7th Defendant-Petitioner who is her own sister did not have a fixed signature and she used to sign in Sinhala as well.

Hearing before the Court of Appeal

[16] This case was fully argued before a Bench comprising Justice Shiran Gooneratne and myself on 11.02.2020, 27.08.2020 and 14.09.2020 and all parties have filed comprehensive written submissions. As Justice Shiran Gooneratne has been elevated to the Supreme Court and the Covid Pandemic situation disrupted the court proceedings, this matter was mentioned on 03.02.2021 before the present Bench. On 03.02.2021, the present Bench, inquired from the Attorneys-at-Law appearing for the 7th Defendant-Petitioner, the Substittued 1st Defendant, the 3rd and the 4th Defendants and the Substittued 1st Plaintiff whether they wished to re-argue this matter before the present Bench or they invite the present Bench to deliver the Judgment on the written submissions. All Counsel, representing the 7th Defendant-Petitioner, the Substittued 1st Defendant, the 3rd and the 4th Defendants and the Substittued 1st Plaintiff invited the present Bench to deliver the judgment upon the written submissions without any further re-

argument. As I was one of the remaining Judge before whom the case argued, the judgment was fixed to be delivered by me upon the written submissions.

Preliminary Objections

[17] The 1st Defendant raised several preliminary objections, *inter alia,* that (i) the 7th Defendant-Petitioner's application is misconceived and bad in law; (ii) the 7th Defendant-Petitioner has suppressed the material facts and has made false ststements; (iii) the 7th Defendant-Petitioner has not filed the materal documents to the application by violating the mandatory rules of the Supreme Court; (iv) the 7th Defendant-Petitioner is guilty of laches; (v) the 7th Defendant-Petitioner seeks to remedy for his own follies.

[18] On 04.03.2013, the learned Counsel for the 1st Plaintiff indicated to the Court that he will also be raising a preliminary objection to the maintainability of this application and sought the permission of the Court to file written submissions (Vide- JE dated 04.03.2013). The main preliminary objection raised by the 1st Plaintiff was that since Mr. Wilfred Perera, Attorney-at-Law against whom the allegation was made by the 7th Defendant-Petitioner that she never gave instructions to him to appear on her behalf, he should have been joined as a necessary party to the application. All parties agreed to file written submissions with regard to the said preliminary objections and accordingly, written submissions were filed on behalf of the 1st Plaintiff, the 7th Defendant-Petitioner, the 1st Defendant and the 3rd and the 4th Defendants.

[19] Mr. Bowanage has submitted that the failure to join Mr. Wilfred Perera as a party is fatal to this application and thus, this application ought to be dismissed *in limine*. Mr. Bowanage and Mr. Sahabandu, invited this Court to make an order on the said preliminary objection first, since, no order had

been made so far, on the said preliminary objection raised on behalf of the 1st Plaintiff.

[20] It is settled law that it is necessary, for the proper constitution of an appeal, that all parties to an action who may be prejudicially affected by the result of the appeal should be made parties, and unless they are, the petition of appeal should be rejected (*Ibrahim v. Beebee1* 19 NLR 289). Mr. Bowanage cited the decision in *Seelananda Thero v. Rajapakse* 39 NLR 361 in support of his contention that the failure to make a necessary party was a fatal irregularity and on that score alone, the application ought to have been dismissed.

[21] In *Seelananda Thero v. Rajapakse* (supra), the Plaintiff, as controlling trustee of a Vihare instituted action to be restored to the possession of a land belonging to the Vihare from which, he alleged, that the defendant had ousted him. The plaintiff, stating that he had leased the land to others, filed an amended plaint and averred that the lessees were necessary parties and thus, the lessees were added as party plaintiffs. The defendant claimed that he was entitled to possess the land as the lessee of another priest, who was the real trustee. In the course of the trial, the defendant's lessor was also added as a defendant for the purpose of deciding who was the real trustee. The District Judge held that the plaintiff was the trustee and entered judgment for the plaintiffs. It was held that the added plaintiffs were necessary parties to the appeal and that the failure to make them respondents to the appeal was a fatal irregularity.

[22] A perusal of the Plaint filed in the District Court of Mt. Lavinia in the present action, however, reveals that neither Mr. Wilfred Perera nor Mr. Ranjan Suwadaratne were parties to the Partition Action. While Mr. Wilfred Perera had acted as the Registered Attorney of the 1-10 Defendants, Mr.Ranjan Suwadaratne had only appeared for the 1-10 Defendants at the trial as their Counsel on the instructions of Mr.Wilfred Perera. Thus, Mr.

Suwadaratne in any event, cannot be said to have known anything about the signatures in the proxy or person who signed the proxy filed on behalf of the 1-10 Defendants.

[23] On the other hand, the 7th Defendant-Petitioner in this case had not made any specific allegation of fraud or professional misconduct against Mr. Wilfred Perera or Mr. Suwadaratne. Further, the 7th Defendant-Petitioner had not sought any relief from Mr. Wilfred Perera or Mr. Suwadaratne in this action. Her allegation was that she never signed a proxy and gave no instructions to Mr. Wilfred Perera or Mr. Suwadaratne to appear on her behalf in the District Court and thus, the proceedings were conducted without notice to her in contravention of the mandatory provisions of the Partition Law.

[24] The main relief sought by the 7th Defendant-Petitioner in her Petition is a declaration that the judgement, interlocutory decree and the final decree entered in the District Court is a nullity. The 7th Defendant-Petitioner further sought an order dismissing the action filed by the Plaintiff-Respondent in the District Court. If such declarations or reliefs are granted by this Court in favour of the 7th Defendant-Petitioner, it is obvious that Mr. Wilfred Perera or Mr. Suwadaratne would not be prejudiced for not before this Court.

[25] I hold that Mr. Wilfred Perera and Mr. Ranjan Suwadaratne are not necessary parties to this application and thus, their presence is not required for effectual and complete adjudication of this application filed by the 7th Defendant-Petitioner in this Court. For those reasons, I overrule the preliminary objection raised on behalf of the 1st Plaintiff.

Main Issues before Court

Reconstruction of the Case Record

[26] It is not in dispute that the Plaintiffs instituted this partition action in the District Court of Mt. Lavinia in **September 1987** seeking to partition the land

called “Webodawatta” containing in extent of 1 acre morefully described in the schedule to the Plaint. It is also not disputed that the said land is depicted in the Preliminary Plan No. 10477 made by M. D. J. V. Perera, Licensed Surveyor in extent of 1 acre and 14.20 perches.

[27] It is an admitted fact that the Registry of the District Court of Mt. Lavinia caught fire during the 1989 insurgency resulting in the total destruction of the original case record and thereafter, the record was reconstructed as per the journal entry dated 03.06.1991. In the result, the original documents contained in the case record including the original pleadings, journal entries, preliminary plan and the report, the report of the Registrar of Lands transmitted to Court after registration of the action as *a lis pendens* and the declaration of the Plaintiffs’ Attorney-at-Law under section 12 of the Partition up to the date of the reconstruction are not available in the present case record. The Court has to rely on the material submitted by the parties duly noticed for the purpose of reconstructing the case record to ascertain what procedural steps had taken place before the reconstruction of the case record.

[28] The case record and the 7th Defendant-Petitioner’s own document marked ‘P1’ reveal that the Registered Attorney of the Plaintiffs, Mr. V. S. Gunawardena, had tendered the copies of the Plaint, Plaintiffs’ proxy, Amended Caption, Preliminary Plan No. 10477 made by the Comissioner M.D.J.V.Perera, Licensed Surveyor and his Report, the statement of claim of the 28th Defendant dated 09.10.1989, papers for substitution in place of the deceased Plaintiff and the deceased 28th Defendants for the purpose of reconstructing the case record.

[29] The Journal Entry No. 2 dated 19.08.1991 of the case record reveals on 19.01.1991, Mr. Hemapala appeared for the Plaintiffs while Mr. Wilfred Perera appeared for the 1-10 Defendants (Vide J.E. No 2). On 27.01.1992,

Mr. Wilfred Perera, Attorney-at-law tendered the statement of claim filed on behalf of the 1-10 Defendants (J.E. 3) and on 30.03.1992, Mr. Wilfred Perera, tendered the proxy on behalf of the 1-10 Defendant (J.E 5).

[30] On 30.03.1992, the Fiscal reported that the notices were served on 15-24, 26-27 Defendants (J.E. 5), 11-14 Defendants (J.E. 9) and the 28A Defendant (J.E. 10). The Registrar further reported that the notice was sent to the 25th Defendant by registered post (J.E. 21). No allegation was made by the 7th Defendant-Petitioner that, all necessary parties were not noticed by the District Court for the purpose of reconstructing the case record or that co-owners other than the parties disclosed by the Plaintiffs-Respondents had not been made parties to the action.

[31] A careful perusal of the case record reveals that the District Court had issued notices on all the parties, including all 28 Defendants for the purpose of reconstructing the case record and taken all the relevant steps to reconstruct the case record.

Non-service of Summons and the residential address of the 7th Defendant-Petitioner referred to in the Plaint

[32] At the hearing, Mr. Laksman Perera, P.C. strenuously contended that the 7th Defendant-Petitioner had never received summons or notice in respect of the partition action and that she only came to know of the partition action at the time of the final survey and thus, the 7th Defendant-Petitioner for the first time sought to intervene on 29.03.2000 by filing an application in the District Court under section 48(1) of the Partition Law. Mr. Perera's submission was based on paragragraph 13(f) and (g) of the 7th Defendant-Petitioner's Petition filed in this Court and paragraphs (1) and (3) of the Petition filed by the 7th Defendant-Petitioner in the District Court on 29.03.2000.

[33] The 7th Defendant-Petitioner has stated in paragraph 13(f) and (g) of the Petition filed in this Court as follows:

(f) The summons as required by Section 13 have not been served on the Petitioner;

(g) The Surveyor has not issued notice on the Petitioner as required by Section 17 of the Partition Law.

[34] Paragraphs (1) and (3) of the Petition filed by the 7th Defendant-Petitioner in her application under section 48 (1) of the Partition Law are as follows:

(1) ඉහත සඳහන් නඩුවේ විභාගය පවත්වන අවස්ථාව වන විට පෙත්සම්කාරිය සම්බන්ධයෙන් නීතිඥවරයෙකු පත් කිරීමට හෝ නැතහොත් ඉදිරිපත්වීමට හෝ මෙවැනි නඩුවක් පිළිබඳව පෙත්සම්කාරිය දැන නොසිටි අතර, පෙත්සම්කාරිය කිසිදු නීතිඥයෙකු පත් නොකරන ලදී.

(3) කුමන තත්වයක් යටතේ හෝ නඩුව තීන්දු කිරීමෙන් පසුව වුවද සිදුකළ මැනීම සම්බන්ධයෙන් පෙත්සම්කාරියට නිසි දැනුම්දීමක් නොලැබුණු අතර, මානක තැන බෙදුම් නඩු විධිවිධාන පනතේ 32 වගන්තියට සාරාණුකූලව ක්‍රියාකර නැති බවට පෙත්සම්කාරීට උපදෙස් ලැබී ඇති බැව් ප්‍රකාශ කර සිටී.

[35] Mr. Perera further submitted that the 7th Defendant-Petitioner's residential address referred to in the Plaint is No. 2, Parakrama Mawatha, Attidiya whereas her actual place of abode at the time of the said action was No. 22, Parakum Mawatha, Attidiya as shown in the Electoral Registers marked P6 (a) -P6 (f) and thus, she could not have received summons issued by the District Court under section 13 of the Partition Law.

[36] I shall now consider the question whether the complaint of the 7th Defendant-Petitioner that she never received summons and that she became aware of the partition action for the first time at the time of the final survey is credible in the context of the material submitted by the parties and the contents of the District Court case record.

[37] The 7th Defendant-Petitioner has pleaded in paragraph 5 (1) of the Petition that her permanent residence is at No. 22, Parakum Mawatha, Attidiya, Dehiwela at all times material to this action and presently, resident at No. 99/2, Sunetradevi Road, Pepiliyane, Nugegoda and that she was never at No. 2, Parakrama Mawatha, Attidiya, Dehiwela as referred to in the Plaint. According to the Plaint filed in September 1987, the joint address of the 2nd to 7th Defendants was No. 2, Parakrama Mawatha, Attidiya. In the joint statement of claim filed by the 1-10 Defendants in **1989,** the joint address of the 2-7 Defendants including the 7th Defendant-Petitioner was at No. 2, Parakrama Mawatha, Attidiya.

[38] On the other hand, the proxy in question marked 'P1' refers to the address of the 7th Defendant-Petitioner and her brothers and sisters at No. 22, Parakrama Mawatha, Attidiya, Dehiwela. In the Electoral Registers marked P6 (c) -P6 (f), the joint address of the 2-4, 6-8 Defendants including the 7th Defendant-Petitioner from **1988-1991** was **No. 22, Parakum Mawatha, Attidiya**. The 7th Defendant-Petitioner has, however, stated in paragraph 6 of her Affidavit dated 25.10.2001 filed in this application that she was residing at **No. 22, Parakum Mawatha, Attidiya, Dehiwela at all times relevant to this action and presently, resident at No. 99/2, Sunethradevi Road, Pepiliyana, Nugegoda and was never at No. 2, Pepiliyana Mawatha, Attidiya, Dehiwala**. A perusal of the Electoral Registrers marked P6 (a) -P6 (d) and P6 (f) for 1984, 1987, 1988, 1989 and 1991 do not however, refer to the 7th Defendant-Petitioner's name at No. 22, Parakum Mawatha, Attidiya as claimed by her in the said Affidavit. Her name appears only on the Electoral Register for 1990 marked 'P6 (f)' which refers to her address in **1990** at **No. 53B,Parakum Mawatha**.

[39] Although the 7th Defendant-Petitioner had claimed in her Affidavit dated 25.10.2001 that from 1984-1990, she was living at No. 22, Parakum

Mawatha, Attidiya, the marriage certificate of her own sister, Galpotthage Hemalatha Perera dated 21.05.1987 (which was produced by the 7th Defendant-Petitioner by motion dated 07.01.2003) reveals that the 7th Defendant-Petitioner had signed as one of the attesting witnesses to her sister's marriage which had taken place in Sri Lanka on **21.05.1987**. As per the said marriage certificate No. 44, her address was **No. 53/1, Parakum Mwatha, Attidiya, Dehiwela** and not at **No. 22, Parakum Mwatha, Attidiya, Dehiwela**. This confirms the fact that the 7th Defendant-Petitioner was living in Sri Lanka on or about **21.05.1987** and that she not working in Saudi Arabia as she had claimed in her Affidavit.

[40] According to the proxy filed on behalf of the 7th Defendant-Petitioner in the District Court on **07.06.1999**, her address was **No. 99/2, Sunetradevi Road, Kohuwela, Nugegoda** (Vide- page 248 of the record). However, a perusal of the 7th Defendant-Petitioner's own **Proxy, Petition and affidavit** dated **29.03.2000** filed in the District Court in support of her application under section 48 of the Partition Law reveals that her address on 29.03.2000 was **No. 2, Parakrama Mawatha, Attidiya.** The Affadavit at page 279 of the record reads as follows:

> අත්තිඩිය, පරාක්‍රම මාවත, අංක 02හි පදිංචි ගල්පොත්තගේ රම්‍යලතා වන මම බෞද්ධයෙකු හැටියට අවංකවත්, සත්‍ය ලෙසත් ගාම්භීරතා ප්‍රතිඥා දී ප්‍රකාශ කර සිටිමි.

[41] It is a clear admission by the 7th Defendant-Petitioner that at one point of time, she had been residing at **No. 2, Parakrama Mawatha, Attidiya** and thus, it is crystal clear her version that she had never resided at No. 2, Parakrama Mawatha, Attidiya is not credible.

[42] On the other hand, the address of the 7th Defendant-Petitioner in her proxy, the Petition and the Affidavit dated 28.11.2001 filed in this application only refers to **Parakrama Mawatha, Attidiya** without referring to any number of her residence. The 7th Defendant-Petitioner has avoided a number

of her residence being given when she filed this application in this Court. It seems to me that although 7th Defendant-Petitioner had resided at various places, her ancestral house was **No. 22, Parakum Mawatha, Attidiya, Dehewela** as shown by her own marriage certificate dated 24.03.1977. The 7th Defendant-Petitioner's own documents clearly establish that she had resided both at No. 22, Parakrama Mawatha, Attideya and No. 2, Parakrama Mawatha, Attidiya at the relevant period and thereafter, she had moved to No. 99/2, Sunetradevi Road, Pepiliyane, Nugegoda.

[43] In the circumstances, the 7th Defendant-Petitioner' has failed to satisfy that she never resided at No. 2, Parakrama Mawatha, Attidiya at the time of the institution of the action in the District Court of Mount Lavinia by the Plaintiffs. For those reasons, I hold that the 7th Defendant-Petitioner's position that she could not have received summons at the address referred to in the Plaint is not credible and that assertion ought to be rejected.

Presence of the 7th Defendant-Petitioner at the Preliminary Survey

[44] Section 13 of the Partition Law requires the District Court to issue summons together with the copies of the plaint and the copies of the notices under sub-section (2) of section 12 to the defendant. Section 16 of the Partition law requires the Court to issue a commission under section 16 of the Partition Law to a Surveyor directing him to survey the land to which the action relates.

[45] There are 28 Defendants in the present case and no party other than the 7th Defendant-Petitioner complained to this Court that summons was not served on them or that the Preliminary Survey was conducted by the Surveyor without notice to them in contravention of section 16 of the Partition Law. It is not in dispute that the Preliminary Survey was done in **1988** and the Preliminary Plan No. 10437 made by M. D. J. D. Perera, Licensed Surveyor, dated 15.08.1988 was submitted to the District Court prior to the destruction

of the case record. The Commissioner has clearly stated in his Report that notices were sent to all the parties by registered post on 04.08.1988 informing the parties that (i) the Preliminary Survey would be conducted on 15.08.1988; (ii) the beat of tom-tom was done on 05.08.1988; and (iii) the Preliminary Survey was done on 15.08.1988.

[46] As per the Preliminary Plan No. 10437, the land had been surveyed on **15.08.1988** and the Commissioner has clearly stated in his Report that the **1-3, 5-7 Plaintiffs and 2-10, 12-15, 22-22 and 24 Defendants** who were present at the Preliminary Survey showed the land and identified the boundaries of the land sought to be partitioned (**පැමිණ සිටි පාර්ශවකරුවන්: 1 සිට 3, 5 සිට 7 පැමිණිලිකරුවන් සහ 2 වෙනි සිට 10 වෙනි, 12,13,15,21,22 සහ 24 වෙනි විත්තිකරුවන් පැමිණ සිටියහ. මැනූ ඉඩම පැමිණිලිකරුවන් සහ විත්තිකරුවන් මායිම් ඉදිරිපත් කළෝය.**) As per the said Report, the 7th Defendant-Petitioner had claimed the **house marked '7' and the foundation marked '8' at the Preliminary Survey.** No credible explanation was offered by the 7th Defendant-Petitioner as to why her presence and her claims at the Preliminary Survey should have been wrongly recorded by the Commissioner in his Report.

[47] The 7th Defendant-Petitioner has stated in her Petition, however, that the Surveyor's statement that she was present at the Preliminary Survey and that she claimed buildings is wrong as she was working in Saudi Arabia at that time. In support of her position, she has produced a photocopy of her passport marked P7a. She has further filed an Affidavit marked P7b and stated therein that from 1981 to 1989 November, she was working in a Middle East Country.

[48] A perusal of a photocopy of her passport marked P7a reveals that the said passport was issued on **21.04.1981** and expired on **20.04.1986** and that there is no endorsement on the said passport to the effect that it was renewed after 20.04.1986. On the other hand, the entries made in the said photocopy of

the passport relate to a period from **15.09.1981 to 01.07.1986** and no entry is available thereafter.

[49] Moreover, the 7th Defendant-Petitioner's own passport produced in Court by motion dated **07.01.2003** reveals that she had obtained a new passport on **12.01.1994** and it expires on 12.01.1999. Thus, it is crystal clear that no document is available to substantiate the 7th Defendant-Petitioner's position taken in her Affidavit dated 25.10.2001 that after she left Sri Lanka in 1981 for an employment in Middle East, she returned to Sri Lanka only on 02.11.1989 and thus, she could not have participated in the Preliminary Survey or signed a proxy appointing Mr. Wilfred Perera as her attorney. The Petitioner's own documents contradict her assertions taken in her Affidavit dated 25.10.2001.

Presence of the parties at the trial

[50] Mr. Manohara de Silva, the learned President's Counsel for the 3rd and the 4th Defendant-Respondents has submitted in the written submissions that without sending the notices or summons to parties, the case had been fixed for trial on 24.04.1995 for 21.07.1995 and thus, the 8th Defendant having known that the other parties were not before Court, compromised to give 30 perches to the Plaintiffs and sought to partition the corpus according to the 8th Defendant's pedigree.

[51] A perusal of the original case record however, reveals that the District Court had issued notices on all the parties (Vide- J.E. No. 3 dated 28.10.1991) and on 30.03.1992, the proxy had been filed by Mr. Wilfred Perera on behalf of the 1-10 Defendants. The Fiscal had repoted that the notices had been served on the 15-24 Defendants (Vide- J.E dated 30.03.1992) and the 28(a) defendants (Vide- JE No. 10). The The Registrar has further reported that the notice had been sent to the 25th Defendant by Registered Post (Vide- J.E No. 21). Accordingly, on 24.04.1995, the learned District Judge fixed the matter

for trial for 21.07.1995 (Vide-J.E No. 23). In the meantime, Mr. V.S.Gunawardena had filed the list of witnesses and documents on behalf of the Plaintiffs and Mr. Wilfred Perera had filed an Additional list of witnesses and documents on behalf of the 1-10 Defendants (Vide- J.E. dated 24, 27 and 29).

[52] When the case was taken up for trial on **14.06.1996**, the learned District judge has recorded that all the parties were present and the Plaintiffs were represented by Mr. V.S. Gunawardena while the 1-10 Defendants were represented by Mr. Ranjan Suwadaratne. The 7th Defendant-Petitioner's own Affidavit dated 25.10.2001 does not state that she was out of the country on **14.06.1996** and thus, apart from her mere oral statement, the 7th Defendant-Petitioner has failed to produce a single document to contradict the case record and satisfy that she could not have appeared in Court on **14.06.1996.** It is to be noted that the 3rd and the 4th Defendant who now complain for the first time in this Court that the case was heard on 14.06.1996 without notice to the parties, had not however, made any allegation in the District Court in subsequent proceedings that the case was heard without notice to them.

[53] The judgment was delivered on **28.10.1996** (J.E. 37) and after the interlocutory decree was entered, it was registered in the Land Registry as seen from J.E dated 12 on 13.08.1997. The Final Survey was done on **28.11.1997** and the proposed Final Plan was submitted to Court on 19.02.1998 by G.P. Abeynayake, Licensed Surveyor.

[54] Mr. Sahabandu has submitted in the written submissions filed on behalf of the Substituted 1st Defendant that the affidavit filed by the 7th Defendant-Petitioner's husband, one Madawala Vidanaarchchige Jayantha Chandrasiri dated 21.06.1999 (Vide- page 80 of the documents marked 'P1' and page 215 of the case record) further contradicts the 7th Defendant-Petitioner's assertion

that she was not aware of the present partition action until final scheme of partition.

[55] The said Madawala Vidanaarchchige Jayantha Chandrasiri while making an allegation against the 1st, 9th and 10th Defendants that the signature of the 7th Defendant-Petitioner was made by the 1st, 9th and 10th Defendants, admits that (i) the 1st, 9th and 10th Defendants convinved the District Judge and proved at the trial as to how the land should be partitioned; (ii) in the result, an injustice was caused to the 7th Defendant-Petitioner but she kept silent as she has to respect the judgment. It reads as follows:

> මේ අධිකරණයේ පෙනී සිටින නීතිඥ මහත්වරු කීප දෙනෙක් ලඟටම ගියා මැයගේ දුක් ගැනවිල්ල ඉදිරිපත් කිරීමට මේ අය නොයෙකුත් කරුණු ගෙනහැර පා ප්‍රතික්ෂේප කළා මැය වෙනුවෙන් පෙනී සිටින්න.
> මේ නඩුවේ 1 වෙනි විත්තිකාරියත් 9 වෙනි විත්තිකාරියත් 10 වෙනි විත්තිකරුත් ගිවිසුමට බැඳී මේ නඩුව අධිකරණය ඉදිරියට ගෙන ඇවිත් සම්පූර්ණයෙන් ම මේ නඩුවට ඉදිරිපත් වී වීත්තිය වෙනුවෙන් පෙනී සිටි ගරු නීතිඥ මහත්මයන්ලාවත් සෘජුව හා වක්‍රව මෙහෙයවමින් මේ නඩුව සඳහා ඉදිරිපත් වීමට ඇති අයිතිවාසිකමුත් සම්පුර්ණයෙන්ම උදුරාගෙන ඉවරයි.
>
> **මෙයින් නොනැවතුන මේ අය ගරු අධිකරණය නොමගයවා මෙහි විනිශ්චයකරන විනිසුරුතුමාට ඒත්තු යන විදියට ඔප්පු කළා මේ නඩුවේ බෙදුම මෙසේ විය යුතුයි.**

[56] As he has admitted that the said Defendants proved at the trial and convinced the District Judge as to the manner in which the land was to be partitioned, it is crystal clear that unless he was present in Court to witness the proceedings, he could not have said as to how the Defendants proved at the trial about the manner in which the land should be partitioned. Accordingly, the 7th Defendant-Petitioner and her husband were fully aware of the partition case filed by the Plaintiffs and that the Defendants proved at the trial as to the manner in which the land should be partitioned but they kept silent.

[57] Accordingly, there is no truth in the assertion of the 7th Defendant-Petitioner that she was unaware of the partition action or no summons or notice was served on the 7th Defendant-Petitioner before the Preliminary Survey or the 7th Defendant-Petitioner was absent at the Preliminary Survey. In my view, there is no credibility in her assertion that the proceedings in the District Court were conducted without her knowledge or participation.

[58] On 29.03.2000, the 7th Defendant-Petitioner made an application in the District Court under section 48 of the Partition Law seeking to set aside the judgment or amend the judgment. The 7th Defendant-Petitioner has further complained that no notice was served on her by the Surveyor under section 32 of the Partition Law before the Final Survey was done. After the commission was issued directing the Commissioner to prepare the scheme of partition, the Commissioner had fixed a date for the final Survey, issued notices on the parties, made the oral proclamation and conducted the Final Survey on 27.11.1997 and **28.11.1997** (Vide- Report of Commissioner G.P. Abeynayake at page 203 of the record). The Commissioner has reported that the **Plaintiffs and the 1-10 Defendants were present at the final survey**. In fact, the 7th Defendant-Petitioner who was present at the Final Survey had signed the document dated 28.12.1997 together with other Defendants accepting the blocking out of the land and the original Final Plan No. 2525 (Vide- page 208 of the record).

[59] By letter dated 28.12.1997, all the Defendants, including the **7th Defendant-Petitioner** had agreed to accept the lots as per the scheme of partition made at the Final Survey and signed the said letter (Vide- second name (**Galpoththage Ramyalatha Perera**) and the signature of the 7th Defendant-Petitioner). The relevant parts of the said letter at page 208 of the record read as follows:

1676/P නඩුවට යටත් කොළඹ දිස්ත්‍රික්කයේ සල්පිටි කෝරළයේ පල්ලේ පත්තුවේ පැපිලියාන යන ගම පිහිටි වෑබඩ වත්ත බෙදා වෙන් කිරීමේදී ගරු මිනින්දෝරු මහතා විසින් සකස් කරන ලද සැලසුමට පහත ලියා අත්සන් කරන ලද අප සියළු දෙනාම කැමති බව මෙයින් සහතික කරමු.

[60] No explanation was given by the 7th defendant-Petitioner as to why she signed the said letter attached to the Final Plan No. 2525, if the trial was conducted, the judgment was entered in her absence and the two Surveys were conducted without notice to her. In my view, there is no truth whatsoever in the assertion of the 7th Defendant-Petitioner that the trial was conducted in her absence and the Commssioner had not given notice to her under section 32 of the Partition Law when the 7th Defendant-Petitioner herself was present at the Final Survey and signed the document dated 28.12.1997 accepting the scheme of partition as set out in Plan No. 2525.

[61] It is crystal cleaer that after the institution of the partition action in 1987, the summons had been duly served on the 7th Defendant-Petitioner and the 7th Defendant-Petitioner having received summons and notice under section 17, had appeared and participated in the Preliminary Survey and trial conducted on 14.06.1996. Accordingly, the assertion of the 7th Defendant-Petitioner that she was not aware of the proceedings conducted by the District Court is totally unacceptable and ought to be rejected.

Signature on the Proxy marked 'P1' and the Appearance of Mr. Wilfred Perera on behalf of the 7th Defendant-Petitioner

[62] The 7th Defendant-Petitioner's second contention is that she never gave a proxy to Mr. Wilfred Perera to appear to her and therefore, she did not come to Court, but at a subsequent stage, she found that her signature had been fraudulently inserted in the proxy. She has produced a number of documents to prove that she only signed documents in English and as the proxy in

question refers to a signature in Sinhala, she has taken up the position that her signature had been forged.

[63] Upon an application made by the 7th Defendant-Petitioner, this Court on 12.09.2003 directed Examiner of Questioned Documents (EQD) to examine the original proxy that was held in the reconstructed case record in D.C Mt. Lavinia Case bearing No. 1676/P and the 7th Defendant-Petritioner's signature, photo copies of the specimen signatures. Acccordingly, the proxy (P1) filed in the District Court by the 1-10 Defendants was sent to the EQD together with the specimen signatures of the 7th Defendant-Petitioner (X1) taken in the presence of the Registrar, District Court of Mt. Lavinia. The EQD submitted the Report dated 07.10.2003 marked 7V1.

[64] This Court on 23.02.2007 directed the learned District Judge of Mt. Lavinia to examine and submit to Court the recorded evidence and accordingly, the EQD was examined by the parties before the District Judge of Mt. Lavinia and his recorded evidence was submitted to this Court.

[65] The EQD Report (7V1) states that (i) that the signature of the Galapotthage Ramyalatha (7th Defendant-Petitioner) appearing on the Proxy marked P1 is different from the specimen signatures of Galapotthage Ramyalatha (7th Defendant-Petitioner) marked X1; (ii) the signature of G. Hemalatha Perera appearing on the said proxy marked 'P1' is consistent with the signature of the person called "Galapotthage Ramyalatha". The opinion of the EQD as stated in his Report and evidence was that (i) the person who signed as 'Galapotthage Ramyalatha' in the specimen signatures had not placed the signature in question on the proxy marked 'P1'; and (ii) the signature of 'G. Hemalatha Perera' and 'G. Ramyalatha Perera' had been placed by one person (Vide- page 331-332 of the record). It reads as follows:

"මාගේ නිගමනය වූයේ,

6.1 ඩ1 හි ආදර්ශ අත්සන් තබා ඇති පුද්ගලයා පී1 හි පී1අ ප්‍රශ්නගත අත්සන තබා නැති බවත්,

6.2 පී1 හි පී1අ ප්‍රශ්නගත අත්සන සහ ඊට වම්පසින් වූ අංක 3ට අදාල පී.හේමලතා පෙරේරා යන අත්සන එකම පුද්ගලයෙකු විසින් ලියා ඇති බවත් ය.

[66] Section 45 of the Evidence Ordinance provides:

"When the court has to form an opinion as to foreign law, or of science, or act or as to identity or genuniness of handwriting or finger impressions, palm impressions or foot impression, the opinion that point of persons specicially skilled in such foreign law, science or art, or I questions as to identity or geneuniness of handwriting or finger impressions, palm impressions or foot impressions, arer relevant facts."

[67] The expert evidence is admitted to assist the Court on issues that go beyond the Court's ordinary competence and experience, but the question what weight will be attached to the evidence of an expert is a matter for the judge to decide on the particular facts and circumstances of each case. It is settled law that it is the function of the Court, with the assistance of an expert, to decide on the question that go ordinarily beyond the competence and experience of the judge, but it is not proper to act solely on the opinion of the expert (*Gratian Perera v The Queen,* 61 NLR 522). Thus, the evidence of the expert is relevant, but it is not conclusive and thus, the primary responsibility of deciding the matters in dispute rests on the judge, he cannot delegate his functions to the expert.

[68] While the trial judge would not be justified in brushing aside the expert's opinion lightly, without adequate reason, this does not mean that the trial judge is prevented from himself making comparisons and bringing an independent mind to bear on the question in decing whether the reasons given

by the expert were acceptable or not (*Samarakoon v Public Trustees* 65 NLR 100).

[69] In *Charles Perera v. Motha* 65 NLR 294, it was held that the evidence of a handwriting expert must be treated as only a relevant fact and not as conclusive of the fact of the genuineness or otherwise of the handwriting in question. Thus, the expert's opinion is relevant but only in order to enable the judge himself to form, his own opinion. Basnayake C.J. held at page 295 that:

1. *It is important to remember that it is the Court that is called upon to decide the question of identity or genuineness of handwriting and not the "expert". The expert's opinion is only a relevant fact to be taken into account in forming the opinion of the Court. Cases which have come up before us in appeal indicate a tendency on the part of Judges to regard the opinion of persons who describe themselves as handwriting experts as conclusive on the question of identity or genuineness of handwriting and not merely as a relevant fact, like any other such fact, to be taken into account in arriving at the Court's opinion as to the identity or genuineness of the handwriting in question. A Court should guard against that tendency. The duty of forming the opinion as to the identity or genuineness of the handwriting is on the Court and the Court alone;*

2. *The expert's opinion on the points of identity or genuineness of the writing is a relevant fact in forming its opinion. The weight to be attached to such a fact would depend on the circumstances of each case.*

[70] In *Gratiaen Perera v. The Queen*, Sinnatamby J. considered the question whether expert's evidence should be accepted only if it is supported by independent evidence and expressed the modern view as follows:

1. *The modern view is to accept the expert's testimony if there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct, provided of course the Court, independently of the expert's*

opinion, but with his assistance, is able to conclude that the writing is a forgery;

2. *The Judges of our Courts as well as of the Indian Courts, have made it clear that it is the function of the Court, with the assistance of an expert, to decide on the similarity of handwriting, and that it is not proper to act solely on the opinion of the expert;*

3. *Where a handwriting expert testifies of forgery, his testimony should be accepted only if there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct;*

4. *A handwriting expert should draw the attention of the Judge to the details which influence him in reaching his decision, and the Judge must not accept the expert's opinion without making an attempt himself to decide whether the grounds on which the expert's opinion is formed are satisfactory;*

5. *The opinion of the expert is relevant, but the decision must, nevertheless, be the* Judge's.

[71] No doubt, for the determination of the question whether the 7th Defendant-Petitioner signed the proxy marked 'P1', the opinion of the EQD is relevant, but his opinion may only be accepted if there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the EQD is correct. The proxy in question (P1) which is filed of the reconstructed case record is not dated but the J.E. No. 5 dated **30.03.1992** states that Mr. Wilfred Perera filed a proxy of the 1-10 Defendants after the Court made order to reconstruct the case record. The specimen signatures of the 7th Defendant-Petitioner had been taken **in Sinhala** before the Registrar of the District Court of Mt. Lavinia on **24.09.2003.** Thus, the specimen signatures in Sinhala had been taken for comparison after a long period of about 10 years from the date on which the proxy in question was tendered to the District Court by Mr. Wilfred Perera on **30.03.1992.**

[72] The EQD had compared the signature of G. Ramyalatha Perera that appears on the proxy in question (P1(a) only with the specimen signatures of the 7th Defendant-Petitioner that has been taken before the Registrar, D.C. Mt. Lavinia (X1), 10 years after the proxy in question was tendered to the District Court. The order dated 12.09.2003 made by the Court of Appeal reads as follows:

1. *The original of the proxy that is held presently in District Court of Mt. Lavinia in a case bearing No.1676/P and the petitioner's signature, photocopies of specimen signatures have been submitted.* ***But if original signatures are needed further, he is directed to obtain the same and the petitioner is directed to comply with the obtaining of these signatures.***

[73] It seems that apart from the specimen signatures taken 10 years after the proxy in question was tendered to Court, the original signatures of the 7th Defendant-Petitioner placed in the oridinary course of business during the relevant period had not been submitted to the EQD and thus, he had only compared the signature in question with the specimen signatures of the 7th Defendant-Petitioner taken 10 years after the proxy in question was tendered to the District Court. As the sample signatures had thus been taken from the 7th Defendant-Petitioner for the purpose of testing her signature that appears on the proxy, there is every possibility that the 7th Defendant-Petitioner will not place the same signature in the same style unless sample signatures of the 7th Defendant-Petitioner placed during the relevant period are also submitted to the EQD for comparison.

[74] As Sinnatamby J. held in *Gratiaen Perera v. The Queen*, the opinion of the expert is relevant, but not conclusive and his opinion can only be accepted if it is supported by independent and credible evidence, direct or circumstantial before deciding that the signature on 'P1' was a forgery. The crucial point is whether the signature of the 7th Defendant-Petitioner had been

placed by someone with the intention of depriving the 7th Defendant-Petitioner of her lawful rights as a co-owner in the land sought to be partitioned. If someone had placed her signature on the proxy marked 'P1' as alleged by the 7th Defendant-Petitioner, what was she doing for the last 10 years until her husband filed an affidavit on **21.06.1999** that someone had signed for her in the proxy?.

[75] If she had not appointed Mr. Wilfred Perera and instructed him to appear on her behalf, she could have easily retained a lawyer and file a separate statement of claim after having claimed her rights before the Surveyor at the Preliminary Survey held on **15.08.1988**. Her explanation that she was not in the country on **15.08.1988** was proved to be false in view of the Preliminary Report of the Court Commissioner dated 15.08.1988. On the other hand, the 7th Defendant-Petitioner's husband in his Affidavit dated 21,06.1999 has clearly admitted that he witnessed how the Defendants led evidence and convinced the District Judge to accept their pedigree and that the judgment was entered accordingly. If it was the position of the 7th Defendant-Petitioner that the lawyers in Mt. Lavinia refused to appear for her, she could have complained to the District Court at that time, retained another lawyer from a different area and filed a separate statement of claim to safeguard her rights.

[76] If the 7th Defendant-Petitioner had not signed a proxy with her siblings appointing Mr. Wilfred Perera to appear to her and her signature had been forged and in the result, her rights were affected, why did she jointly sign the document dated 28.12.1997 together with her siblings accepting the scheme of partition proposed by G.P. Abeynayake?

[77] Even if it is assumed that the proxy was signed by one of the 7th Defendant-Petitioner's siblings on her behalf, it does it necessarily constitute a forgery when the silent conduct of the 7th Defendant-Petitioner clearly

leads to the inference that she had clearly consented to all the acts done by Mr. Wilfred Perera on behalf of all the Defendants. By her silent conduct, the 7th Defendant-Petitioner had approved all the steps taken on her behalf without raising any objection at least when she knew that the evidence was led at the trial and the judgment was entered by the District Court.

[78] The assertion of the 7th Defendant-Petitioner that he never signed a proxy and appointed Mr. Wilfred Perera is further contradicted by her own letters signed and given to the District Court on **07.06.1997** and two other undated letters filed of record at pages 390 of the record. By letter dated **07.06.1999** (page 394) of the record, the 7th Defendant-Petitioner had sought permission of Court to revoke the proxy given to her Attorney Mr. Wilfred Perera. The said letter signed by the 7th Defendant-Petitioner reads as follows:

> **ඉහත නම සඳහන් 7 වන විත්තිකාරිය වන මා වෙනුවෙන් පෙනී සිටීම සඳහා මා වෙනුවෙන් නීතිඥ විල්ෆ්‍රඩ් පෙරේරා මහතාට බලය දෙන ලද පෙරකලාසිය අවලංගු කරන මෙන් මෙයින් ඉල්ලා සිටිමි.**

[79] By letter signed by the 7th Defendant-Petitioner and filed of record at page 390 of the record, she had sought to revoke the proxy given to Mr. Winfred Perera. It reads as follows:

> **මෙම නඩුවේ ඉහත නම සඳහන් 7 වන විත්තිකාරිය වූ ගල්පොත්තගේ රම්‍යලතා වන මම මෙම නඩුවේ මා වෙනුවෙන් පෙනී සිටීම සඳහා නීතිඥ විල්ෆ්‍රඩ් පෙරේරා මහතා වෙත බලය දෙන ලද පෙරකලාසිය මෙම අධිකරණයෙන් ලබා ගත් පූර්ව අවසරය මත අවලංගු කොට ඇති හෙයින් මින් ඉදිරියට මෙම නඩුවේ 07 වන විත්තිකාරිය වන මා වෙනුවෙන් පෙනී සිටීම සඳහා එකී නීතිඥ මහතාට බලය හා අධිකාරිය නොමැති බවත් එකී පෙරකලාසිය අවලංගු හා බලරහිත බවත් සියල්ලෝම මෙයින් දැනගනිත්වා.**

[80] It is crystal clear that the proxy of Mr. Wilfred Perera was in existence on or about **07.06.1999** and during that period, the final partition survey was done in **1997** and the alternative plan sought by the 7th Defendant-Petitioner was also made at her request on **22.01.1999** until the 7th Defendant-Petitioner

revoked his proxy on **07.06.1999** by appointing Mrs. Shamalie Inoka as her new Registered Attorney (Vide-page 248 of the record).

[81] The 7th Defendant-Petitioner has clearly admitted in the said two letters that she had given a proxy to **Mr. Wilfred Perera** and sought permission to revoke it on **07.06.1999** and thus, she is now estopped from taking a different position as she cannot blow hot and cold. The maxim of '*approbate and reprobate'* reflects the principle whereby a person cannot both approve and reject an instrument, often more commonly described as blowing hot and cold, or having one's cake and eating it too.

Doctrine of 'approbation and reprobation'

[82] Mr. Sahabandu has heavily relied on the principle of approbation and reprobation and argued that the 7th Defendant-Petitioner is now estopped from taking a new position against her own conduct and her own documents filed in the record. It is to be noted that the phrase "**Approbate** and **Reprobate**" is apparently borrowed from the Scottish Law, where it is used to express the principle accepted in the **Doctrine of Election** -namely, that no party can accept and reject the same instrument (*Chanchal Kumar Chatterjee v. State of West Bengal & Ors* decided on 29.08.2018, paragraph 10). In *Shyam Telelink Ltd. v. Union of India* reported in 2010 (10) SCC 165, the supreme Court of India examined the principles relating to the doctrine of approbate and reprobate and held that:

> *"23. The maxim qui **approb**at non **reprob**at (one who **approb**ates cannot **reprob**ate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the **doctrine** of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot **approb**ate and **reprob**ate or accept and reject the same instrument.*

[83] In *Dwijendra Narain Roy v. Joges Chandra De,* 39 CLJ 40 at 52 (AIR 1924 Cal 600), Justice Ashutosh Mookerjee held that it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent.

[84] In *Ranasinghe v Premananda* 1985 (1) Sri LR 63 at 70, where Sharvananda C.J. observed that:

> *"The rationale of the above principle appears to be that a defendant cannot approbate and reprobate. In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one he cannot afterwards assert the other; he cannot affirm and disaffirm. Hence a defendant who denies tenancy cannot consistently claim the benefit of the tenancy which the Rent Act provides. For the protection of the Rent Act to be invoked the relationship of landlord and tenant, between the plaintiff and him which is governed by the Rent Act should not be disputed by the defendant".*

[85] I am inclined to agree with the submission of Mr. Sahabandu that the doctrine of 'approbate and reprobate' applies which forbids the aforesaid assertions of the 7th Defendant-Petitioner. In the circumstances, she is estopped by record or her conduct or silence or admissions or representations made by her during litigation by asserting that that she never received a summons and participated in the case or she never instructed Mr. Wilfred Perera to appear for her or she was absent at the Preliminary Survey or she became aware of the case only during the final partition survey.

[86] The attendant circumstances together with the admissions, conduct and silence of the 7th Defendant-Petitioner tend to show that the opinion of the EQD in the present case is not conclusive. The facts and circumstances of the case as described, do tend to show that the 7th Defendant-Petitioner

together with the other Defendants (1-6 and 8-10) had appointed Mr. Wilfred Perera and instructed him to appear for her and accordingly, Mr. Wilfred Perera had filed a joint statement of claim and at the trial, they had been represented by Mr. Ranjan Suwadaratne as their Counsel. The 7th Defendant-Petitioner, in my view is now estopped from approbating and reprobating by asserting that she never appointed Mr. Wilfred Perera to appear for her.

Investigation of Title

[87] Mr. Lakshman Perera has submitted that no points of contest had been raised by the parties or by the Court on its own accord contrary to the principles set out in *Hanafi v. Nallamma* 1996 (1) Sri LR 73 and *Bank of Ceylon v Chelliahpillai* 64 NLR 25. Mr. Perera then submitted that no evidence was adduced by the Plaintiffs in support of their pedigree and the evidence led by the 8th Defendant with regard to the Title was contrary to the matters set out in her own statement of claim and the pedigree pleaded by the Plaintiff. Mr. Perera finally submitted that the judgment was only a statement made by the learned District Judge on the basis of a purported settlement between the parties which is contrary to section 25 of the Partition Law. He relied on the decisions in *Kumarihamy v. Weragama* 43 NLR 265 and *Mather v. Tamotharam Pillai 6 NLR 246).*

[88] On the other hand, Mr. Manohara de Silva has submitted that the Court could not have come to the conclusion that all the parties have consented to the settlement put forward by the 8th Defendant when the parties have not signed the case record. His submission was that as the settlement was not valid without the consent of the parties, the judgment entered on the basis of such settlement cannot stand in law.

[89] Mr. Perera has conceded that it is possible for the parties in a partition action to compromise their disputes, but his submission was that Court has to investigate the title of each party and satisfy itself as to the respective rights and allotment of shares upon the compromise reached by the parties. Section 25 of the Partition Law imposes on the Court the obligation to examine carefully the title of each party to the action. Section 25 (1) of the Partition Law provides that: -

> *"(1) On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made".*

[90] Section 25 of the Partition Law imposes on the Court the obligation to examine carefully the title of each party to the action. It is settled law that a partition action cannot be the subject of a private arrangement between the parties on matters of title, which the Court is bound by law to examine the title of the parties (*Juliana Hamine v. Don Thomas* 59 N.L.R. 549). There is a paramount duty cast upon the District Judge himself to ascertain who are the actual owners of the land as collusion between the parties is always possible and as they get their title from the decree of the Court, which is made good and conclusive as against the world (*Mather v. Tamotharam Pillai 6 NLR 246).*

[91] There is nothing in the Partition Law however, to prohibit compromises or prevent the settlement of a dispute between the parties who are before Court. The Partition Law does not prohibit an agreement, which is entered into in a partition action, affecting only the rights of parties *inter se*, and

which is expressly made subject to the Court being satisfied that all parties entitled to interests in the land are before it and are solely entitled to it (*Kumarihamy v. Weeragama* 43 NLR 25).

[92] In *Soma Rasaputra v. Nagakankanamage jayanthi de Silva (*B.L.R. 1994) Vol. V, Part II, p. 10, G.P.S. de Silva C.J. held that the parties are bound by the consent terms entered in the District Court, and disputes in partition proceedings have been regularly settled in our Courts over the years. This practice is to be encouraged, or it is in every way salutary and beneficial to all parties concerned, provided of course a settlement is not 'forced' or 'imposed' upon an unwilling party.

[93] In *Kumarihamy v Weeragama,* Kretser, J. emphassed the need to avoid protracted and expensive litigation in partition actions where the parties are willing to settle case provided there are provisions or circumstances which take away such practices to settle disputes. He stated at page 268:

> *"It seems to me that we have travelled far enough in making partition actions elaborate and costly, and w hile that could not be helped when emphasis was laid on the need for fu ll investigation of the title of the parties to the land, it is unnecessary to make partition proceedings needlessly burdensome and to force contention unless w e have some clear provision which takes away the right of parties to settle their disputes inter se".*

[94] Accordingly, when an agreement is entered into, the Court has to be satisfied only as to whether the agreement is between all the parties having interests in the land sought to be partitioned (*Rosalin v. Maryhamy* 1994 (3) Sri LR 262). In the event of such agreement, the respective shares or interests to be given to each party is based upon the compromise that is reached and not on an examination of title (supra).

[95] In the present case, the District Court issued notices on all the Defendants, including the 11-28 Defendants and upon being satisfied that all

the parties had notice or represented by their attorneys, fixed the matter for trial. The 7th Defendant-Petitioner does not dispute the corpus of the action and thus, it is common ground that the land sought to be partitioned is depicted in the Preliminary Plan No. 10437 made by M. D. J. D. Perera, Licensed Surveyor marked 'X'.

[96] According to the Plaintiffs' pedigree, the original owner of the land was Polduwage Johanis Appu who by Deed No. 9770 gifted 1/3 of his share to his daughter Selantina and upon his demise, his balance 2/3 share devolved on his children, the said Selantina and Karlinahamy. The Plaintiffs claimed that their rights devolved on the parties according to the pedigree pleaded by them in the Plaint.

[97] The 1-10 Defendants, including the 7th Defendant-Petitioner in their joint statement of claim also pleaded that the original owner of the land sought to be partitioned was Polwattege Johanis who by Deed No. 9770 gifted the entire land to Selastina and her husband, Polwattege Julis Gomis and their rights devolved on the 1-10 Defendants according to the pedigree pleaded by them in their statement of claim in the following manner:

The 1st Defendant	-	undivided 63/216
The 2nd Defendant	-	undivided 81/216
The 3rd Defendant	-	undivided 9/216
The 4th Defendant	-	undivided 9/216
The 5th Defendant	-	undivided 9/216
The 6th Defendant	-	undivided 9/216
The 7th Defendant	**-**	**undivided** 9/216
The 8th Defendant	-	undivided 9/216
The 9th Defendant	-	undivided 9/216
The 10th Defendant	-	undivided 9/216

[98] At the trial, the learned District Judge has specifically recorded that all parties were present and that they represented by their Attorneys-at-Law (පාර්ශවකරුවන් සිටී. නිතිඥ වී.එස්. ගුණාවර්ධන මහතා පැමිණිල්ල වෙනුවෙන් පෙනී සිටී. නිතිඥ රංජන් සුවඳරත්න මහතා විත්තිය වෙනුවෙන් පෙනී සිටී. පැමිණිල්ලෙන් සාක්ෂි නොකැඳවන අතර, විත්තිය වෙනුවෙන් සාක්ෂි කැඳවයි.). Although the Plaintiffs were represented by Mr. V.S. Gunawardene, they did not lead evidence in support of their pedigree and therefore, the 8th Defendant testified in support of the pedigree pleaded by the 1-10 Defendants in their statement of claim, produced the Preliminary Plan marked 'X', the Report marked 'X1', the Title Deeds of the Defendants No. 9770 (1V1), 1478 (1V2), 1479 (1V3) and 22896 (1V4).

[99] The 8th Defendant while denying the pedigree of the Plaintiffs, however, stated that all the Defendants agreed to give 30 perches to the Plaintiffs as the Plaintiffs had been in long and continuous possession of the land in suit and moved that their shares be given according to their pedigree from the remaining portion of the land..

[100] Accordingly, the learned District Judge by judgment dated 28.10.1996 held that he was satisfied with the evidence adduced by the 8th Defendant, including the agreement of all the Defendants to concede 30 perches to the Plaintiffs. Accordingly, the learned District Judge decreed that the following parties are entitled to undivided rights in the following manner:

The 1st to 8th Plaintiffs	-	30 perches
The 1st Defendant	-	undivided 7/24
The 2nd Defendant	-	undivided 9/24
The 3rd Defendant	-	undivided 1/24
The 4th Defendant	-	undivided 1/24
The 5th Defendant	-	undivided 1/24
The 6th Defendant	-	undivided 1/24

The 7th Defendant	**-**	**undivided 1/24**
The 8th Defendant	-	undivided 1/24
The 9th Defendant	-	undivided 1/24
The 10th Defendant	-	undivided 1/24

[101] A perusal of the judgment entered in the case reveals that all the Defendants including the 7th Defendant-Petitioner had been allotted the same share claimed by them in their statement of claim and thus, the 7th Defendant-Petitioner had been allotted an undivided 1/24 share which is equal to 9/216 share pleaded in the statement of claim filed by the 1-10 Defendants.

[102] No allegation had been made by the other Defendants, including the 3rd and the 4th Defendants that (i) they were not present at the trial or they never agreed to give 30 perches to the Plaintiffs or the 8th Defendant was not authorized by them to adduce evidence on their behalf according to the settlement spoken to by the 8th Defendant in his evidence. The 7th Defendant-Petitioner cannot now be allowed to file a self-serving affidavit and contradict the record by asserting that she was absent and unrepresented or that she was not a party to the said agreement. Illustration (d) to Section 114 of the Evidence Ordinance states as follows:

> "The Court shall presume-
>
> (c) that judicial and official acts have been regularly performed".

[103] In *Andradie v. Jayasekera Perera* [1985] 2 Sri LR 204 at 208, Siva Selliah J. held:

> *"It has been held in the cases Orathinahamy v. Romanis (1900) 1 Browne's Rep. 188, 189 and Gunawardene v Kelaart (1947) 48 NLR 522, 524 that the record maintained by the judge cannot be impeached by allegations or affidavits and that "the prospect is an appalling one if in every appeal it is open to the appellant to contest*

the correctness of the record". Gunawardena v. Kelaart (supra). Thus, in the face of what appears on the record it is not possible for this court to controvert the record of the District Court unless in the first instance material has been provided before the District Court itself. "

[104] In *Chaminda v. Republic of Sri Lanka* [2009] 1 Sri LR 144 at 148, Sisira de Abrew J. held:

> *"In my view, a litigant can't make a convenient statement in court and contradict a judicial record. In this regard, I am guided by the following judicial decisions. O.I.C Ampara police Station vs. Bamunusinghe Arachchige Jayasinghe CA 37/98 HC (PHC) APN 38/98 CAM 8.9.98 Jayasuriya J remarked: "A litigant is not entitled to impugn a judicial record by making a convenient statement before the Court of Appeal." In Gunawardane v. Kelart 48 NLR 52 Supreme Court held: "The Supreme Court will not admit affidavits which seek to contradict the record kept by the Magistrate".*

[105] In *Vanikkar and 6 others v. Uthumalebbe* 1996 (2) Sri LR 73, Jayasuriya, J. held:

> *"No party ought to be permitted to file a belated self serving and convenient affidavit to contradict the record, to vary the record or to purge a default where they have not taken proper steps to file such affidavits before the Judge/Tribunal. If a party had taken such steps, then an inquiry would be held by the Tribunal and the self-serving statements and averments could be evaluated after cross-examination of the affirmant when he gives evidence at the inquiry".*

[106] In the present case, the record clearly indicates that the 8th Defendant adduced evidence in support of the pedigree pleaded in their statement of claim filed by the 1-10 Defendants and agreed to give 30 perches to the Plaintiffs and the Court having been satisfied with the evidence and the said agreement, entered judgment accordingly. In my view, there is nothing to prevent the Partition Court from allowing this settlement to be

done, and once it is allowed, the parties are bound by the agreement. Under such circumstances, there is no duty cast on the Judge to raise issues and answer them and thus, the decisions in *Bank of Ceylon v. Chelliahpillai and Hanafi v. Nallamma* relied on by Mr. Perera are not relevant to this case.

[107] I have no hesitation in rejecting the submissions made on behalf of the 7th Defendant-Petitioner and the 3rd and the 4th Defendants that the learned District judge failed to investigate the title of the parties and blindly entered judgment without any agreement with regard to the allocation of 30 perches to the Plaintiffs when the record clearly indicates that the parties were present and the judgment was entered in acccordnace with the pedigree pleaded by the 1-10 Defendants and the agreement of the Defendans and the Plaintiffs represented by their respective attorneys, to give 30 perches to the Plaintiffs.

Has the 7th Defendant-Petitioner satisfied as to how her rights are affected by the interlocutory or final decree?

[108] By the said judgment of the District Court, the 7th Defendant-Petitioner was allotted an undivided 1/24 share as pleaded by the 1-10 Defendants in their statement of claim. She has not pleaded in her Petition filed in this Court as to how her right, title or interest in the land in dispute has been extinguished or otherwise prejudicially affected by the judgment or interlocutory decree entered. No material has been placed before Court to demonstrate that she has more than 1/24 share either by deed or inheritance or that she has a claim to any specific portion of the land by prescription. It is interesting to note that at the Preliminary Survey, the 7th Defendant-Petitioner had claimed only the house marked ‘7’ and the foundation marked ‘8’ shown in the Preliminary Plan.

[109] By the proposed final scheme of partition (Plan No. 2525 made by G.P. Abeynayake, the 7th Defendant-Petitioner was allotted lot 5 in extent of 5.16 perches, which is equal to her 1/24 share (p. 201). As noted, by letter dated 28.12.1997 (p. 208), she initially accepted the said scheme of partition. When the final scheme of partition (Plan No. 2525) was submitted to Court, the Plaintiffs objected to the schedule of distribution and the matter was fixed for inquiry. Later on, the Surveyor submitted an amended schedule of distribution and the matter was fixed for the consideration of the final scheme of partition.

[110] On 07.06.1999, the 7th Defendant-Petitioner revoked her proxy and appointed a new Attorney and thereafter, the husband of the 7th Defendant-Petitioner filed an Affidavit dated 21.06.1999 objecting to the final scheme of partition (Plan No. 2525) and thus, the matter was fixed for inquiry. In the meantime, the 7th Defendant-Petitioner sought permission to file an alternative scheme of partition and submitted the alternative Plan No. 3109 dated 22.01.1999 made by G. O. R. Silva, Licensed Surveyor. By the said alternative Plan, the 7th Defendant-Petitioner had also been allotted lot 5 in extent of 5.16 perches, which is equal to 1/24 share. On 24.01.2000, the Court directed the Commissioner to prepare the amended final partition Plan and forwarded the 7th Defendant-Petitioner' alternative Plan No. 3109 to the Commissioner.

[111] On 23.10.2000, the District Court inspected the land with the consent of the parties and decided to call both Surveyors to ascertain whether any adjustments could be made to the proposed Final Plan No. 2525 (Vide-proceedings dated 20.12.1000). In the meantime, the Commissioner Abeynayake submitted the amended Final Plan No. 3051 dated 12.03.2001 and when this matter was called for inquiry on 15.03.2001, all parties agreed to accept the amended Final Partition Plan No. 3051 dated

14.03.2001 made by G.P. Abeynayake and thus, the said Plan, Report and the amended schedule of distribution were confirmed by the learned District Judge (J.E. No.49).

[112] It is significant to note that by the amended Final Partition Plan No. 3051 dated 14.03.2001, the 7th Defendant-Petitioner has been allotted lot 3 in extent of 10 perches and not 5.16 perches as depicted in Plan No. 2525 (See-also the Final Partition Decree at page 179 of the record). In this context, the 7th Defendant-Petitioner has failed to set out in the Petition filed in this Court as to how her right, title, interests in the land has been extinguished by the interlocutory or final decree entered or that she has been prejudicially affected by the said decrees.

Final Partition Plan (Plan No. 3501)

[113] On the other hand, after the original final partition plan No. 2525 was filed/ The learned District Judge had clearly recorded that all parties were present when the evidence of the 8th Defendant was led and represented by their respective attorneys and thus, the Petitioner who had agreed to the settlement spoken of by the 8th Defendant on 14.06.1996 and acccpted the initial scheme of partition (see- letter dated 28.12.1997, at p. 208) cannot contradict the record and resile from the settlement by filing a self-serving Affidavit filed long after the interlocutory and final decree are entered.

Non registration of lis pendens

[114] Mr. Laksman Perera and Mr. Manohara de Silva have further submitted that when the record was reconstructed, there was a legal duty cast on the Plaintiffs to have the lis pendens registered under section 6 of the Partition Law. He submitted that the Extracts of the Folio's in the Land Registry in respect of the corpus marked P3-P5 reveal that the action had not been registered as a lis Pendens and accordingly, the decrees entered in

the action are nullities. He submitted that the failure to register the lis pendens is a mandatory requirement in terms of section 6 of the Partition Law and thus, this action should be dismissed for the failure to comply with the mandatory provisions of the Partition Law.

[115] Mr. de Silva has complained for the first time that the Plaintiffs failed to produce the Land Registry Extracts in the reconstructed case record and satisfy that the lis pendens had been registered in terms of section 6 of the Partition Law and thus, the action is liable to be dismissed.

[116] Mr. Sahabandu has however, submitted that no party including the 7th Defendant-Petitioner raised any issue with regard to the non-registration of lis pendens in the District Court and that in the present application, none of the parties except the 7th Defendant-Petitioner, being a party to the action complained of non-registration of the lis pendens and thus, it is too late to raise this issue for the first time in the Court of Appeal.

[117] Section 6 of the Partition Law requires the Plaintiff in a partition action to file or cause to be filed in court with the Plaint an application for the registration of the action as a lis pendens in the Land Registry. Section 6 reads as follows:

> *(1) The plaintiff in a partition action shall file or cause to be filed in court with the plaint-*
>
> *(a) where the land to which the action relates is situated in one registration district, an application for registration of the action as a lis pendens addressed to the Registrar of Lands of that district, or*
>
> *(b) where the land is situated in two or more registration districts, separate application for registration of the action as a lis pendens addressed to the Registrar of Lands of each of those districts.*

(2) The application or each of the applications referred to in subsection (1) of this section shall be in triplicate and marked original, duplicate and triplicate respectively substantially in the form prescribed by the Registration of Documents Ordinance and shall contain a blank space for the insertion of the number to be assigned to the action by the court.

(3) Notwithstanding anything to the contrary in the Registration of Documents Ordinance or in any regulation made thereunder, no fee shall be a charged for the registration of a partition action as a lis pendens under that Ordinance.

[118] Section 13 of the Partition Law provides that where the court is satisfied that a partition action has been registered as a lis pendens under the Registration of Documents Ordinance, the estimated costs of the preliminary survey of the land to which the action relates have been deposited in Court and that the Plaintiff in the ation has complied with the provisions of section 12, the Court shall order that such summons ……. to be sent by registered post to the Defendant…

[119] On an examination of the case record, I find, however, that no party, including the 3-4 Defendants and the 7th Defendant-Petitioner had made any allegation in the District Court that the lis pendens had not been registered in terms of the provisions of section 6 of the Partition Law. On the other hand, the Extracts from the Land Registry marked P3 and P4 are blank documents since the the Registrar of the Land Registry has certified that the entries relating to the registration of the land in dispute had decayed and the only other document marked 'P5' is not a continuation of the folios that contain the oldest deeds relating to the land in question.

[120] The submissions made on behalf of the 7th Defendant-Petitioner and the 3rd and the 4th Defendant-Respondents at a late stage of the proceedings in the Court of Appeal are mere statements made to take advantage of the

destruction of the original case record, which had unfortunately occurred due to no fault of the Plaintiffs or the Defendants.

[121] It is settled law that there is no provisions in the Partition Law or the Registration of Documents Ordinance for the dismissal of an action merely on the ground that the lis pendens has not been duly registered in the correct folio. (*Seneviratne v. Kanakaratne* 39 NLR 272, *Tochina v. Daniel* 39 NL 168, *Don Sadiris v. L. Heenhamy* 68 NLR 17 and *Sumanawathie v. Bandiya* 2003 (3) Sri LR 278).

[122] In *Don Sadiris v. Heenhamyi* (supra), in the course of the trial counsel for some of the contesting defendants raised two points, i.e., whether the lis pendens had been duly registered, and, if not, whether the plaintiff could maintain this action. On appeal, Sirimane, J. at p. 19 stated:

> "*In my view, an action should not be dismissed merely because the lis pendens has been registered in the wrong folio. When it is found in the course of a trial that the lis pendens has been incorrectly registered, the proper procedure is to take the case off the trial roll and offer the plaintiff an opportunity of correcting his mistake; and after a declaration is filed by his Proctor under section 25(1) of the Partition Act, and any new party which it may be necessary to add has been given notice, the Court will proceed on with the action".*

[123] It is to be noted that the decision in that case has no application to the facts in the present case, for in this case, no party made any allegation that the lis pendens had not been duly registered or the lis pendens is defective and thus, the plaintiff could not maintain this action. It is apt to quote what Sirimane, J. stated in that case at p. 18:

> *"The purpose in registering a lis pendens is two-fold: firstly, that all parties who have registered documents may have notice of the action; and secondly, that intending purchasers of undivided shares may be made aware of the partition action that is pending. There is no*

provision in the Partition Act itself for the dismissal of an action merely on the ground that the lis pendens has not been registered in the correct folio. It may be noted here that even in a case where the lis pendens has been incorrectly registered in an action under the old Ordinance, it was decided in the case of Seneviratne v. Kanakaratne- 39 NLR 272 that there is no provision in the Registration of Documents Ordinance for dismissing an action on the ground that lis pendens has not been duly registered".

[124] In *Sumanawathie v. Bandiya* (supra), the question arose whether the registration of the lis pendens is defective and the failure to comply with section 12(1) is fatal. Somawansa J. cited CA No. 287/82 (F) (5) - D. C. Gampaha No.22610/L-CAM 5.12.1988 wherein Palakidnar, J. observed:

"The partition law section 48(5) enacts that the party to the action is bound by the decree and it is final and conclusive in all respects. A third party may attack the judgment and decree on stipulated grounds but a party to the action is precluded from doing so. Under the earlier Partition Act, judgment and decree could be challenged on the ground that there was non registration of lis pendens but in the present law, such a provision has been omitted and a party to the action cannot challenge it on that footing."

[125] Having examined the authorities, Somawansa J. held in *Sumanawathie v. Bandiya* (supra) that (i) no issue has been settled on defective lis pendens registration or failure to comply with section 12(1) and no questions have been put to the plaintiff-respondent on these two issues. (ii) there is no provision in the Partition Law for the dismissal of an action merely on the ground that the lis pendens has not been registered in the correct folio; (iii) the 2nd defendant-appellant is a party to the action and no prejudice has been caused to her by the lis pendens registration being defective or non-compliance with section 12(1).

[126] In the present case, the 7th Defendant-Petitioner is a party to this action and no material has been adduced that any prejudice has been

caused to her by the failure to register the lis pendens in the Land Registry and thus, the 7th Defendant-Petitioner is estopped from raising any such new issue at this late stage and challenge the decrees entered in the partition action.

Failure to file the Section 12 Declaration

[127] Mr. Perera further contended that there is no record to show that the certificate as required by section 12 of the Partition Law has been given by the Attorney-at-law for the Plaintiffs and thus, the entire proceedings are a nullity. He strongly relied on the decision of the Supreme Court in *Somawathie v Madawala* 1983 (2) Sri LR 15 in support of his contention. On the other hand, Mr. Sahabnadu contended that the facts of the decision in *Somawathie v. Madawala* are inapplicable in the present case as that case was based of different facts and Mr. Madawala who was not a party to the said action had a deed in his favour in respect of the said land and his name was found in the Land Registry as the owner but was not a made a party by the Plaintiff. 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.*

[128] Under this section, it is thus, 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.

[129] In *Somawathie v. Madawala* (supra), the Plaintiff did not make Mr. Madawala a party to the action, but he was an owner of an undivided portion of the land in dispute in terms of a title deed and the Surveyor had reported in his Report that lot 4 was in possession of Mr. Madawala but no notice was served on him. When Mr. Madawala found that lot 4 which was possessed by him and which had been excluded at the first survey had been included in the final plan, he sough permission to intervene but his application was refused by the District Court and the final decree was entered.

[130] Under such circumstances, Soza J. held that the section 12 declaration was a mandatory legal requirement as had the Proctor who gave the declaeration had personally inspected the registration entries, he could have found the said Deed executed in favour of Mr. Madawela and under such circumstances, the non-compliance with section 12(1) resulted in a miscarriage of justice. Soza J. held *inter alia*, at page 20 that:

> *"There was no proper compliance with section 12 (1) of the Partition Act No. 16 of 1951 which was operative at the time this case was filed. under this provision, it was imperative that a proctor 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 as a lis pendens, and giving the names and where such is registered, the addresses of every person found upon such inspection to be a necessary party to the action under section 5 of the Act. If in fact the*

Proctor who gave the declaration had personally inspected thew registration entries, he could not have missed Deed No. 2828 of 22.07.1943 in favour of R.B. Madawela executed by Encina Perera. The declaration dated 18.08.1969 filed in this case did not disclose Madawela's name".

[131] Having regard to the facts and circumstances of the present case, I am unable to agree with the subsmissions of Mr. Perera and Mr. de Silva that the failure to comply with the requirement of section 12(1) of the Partition Law is a ground to set aside the judgment in this revision application. I shall now give reasons.

[132] Section 12 (3) of the Partition Law No. 21 of 1977 provides that "if the Plaintiff without sufficient cause fails to comply with the provisions of the foregoing subsections of this section 12, the court may dismiss the action. In the present case, the entire case record was destroyed in 1989 and hence, the Plaintiffs could not produce the original section 12 (1) declaration. When the Court issued notices and reconstructed the case record, no issue was raised, or no allegation was made by any party to the action that there was non-compliance with section 12 (1) of the Partition Law. No allegation was made by any party that the failure to comply with the requirement of section 12 (1) of the Partition Law has resulted in entinguishing any right, title or interest of any party to the action including the 7th Defendant-Petitioner's own right, title of interest in the land in dispute.

[133] The 1-10 Defendants had pleaded in their statement of claim that the 7th Defendant-Petitioner was entitled to undivided 9/216 share and she had been granted the same share in the judgment. The 7th Defendant-Petitioner had been allotted lot 3 in the Final Partition Plan No. 3051 in extent of 10 perches which is larger than lot 5 depicted in Plan No. 2525 and 3109. No deed or pedigree has been produced by the 7th Defendant-Petitioner that

she is entitled to a larger portion of the land than what had been allotted to her in the in the final decree.

[134] No credible evidence has been placed by the 7th Defendant-Petitioner that there are outsiders who also own the land in dispute, but they were not made parties to the action and thus, their right, title or interests in the land had been extinguished by the interlocutory or final decree entered by the District Court similarly to *Somawathie v. Madawela*. Accordingly, I hold that the decision in *Somawathie v. Madawela* has no application to the facts of the present case.

[135] I am of the view that the facts and circumstances of the present case clearly fall in line with section 12 of the Partition Law and thus, the Plaintiffs had shown that they had a sufficient cause for not producing the original section 12 (1) declaration in the reconstructed case record. In any event, the 7th Defendant-Petitioner is a party to the action and she has failed to establish that any prejudice has been caused to her or any other party for non-compliance with the requirement in section 12 (1) of the Partition Law.

[136] Section 48 of the Partition Law invests interlocutory and final decrees entered under the Partition Law with finality, but the revisionary powers of the Court of Appeal are left unaffected (*Somawathie v. Madawela*). The purpose of revisionary jurisdiction is supervisory in nature and that the object is the proper administration of justice (*Attorney-General v. Gunawardena* (1996) 2 Sri LR 149, at p. 156). The Court of Appeal will, however, exercise its revisionary powers where it appears that a miscarriage of justice has occurred or there are special circumstances which warrant the intervention of the Court under Article 138 of the Constitution.

[137] It is to be noted that the trial was conducted on 14.06.1996 and the judgment was entered on 28.10.1996. All Plaintiffs and the Defendants including the 7th Defendant-Petitioner were present at the final survey done on 28/27.11.1997. After the preparation of the proposed final Plan No. 2525 by Surveyor G.P.Abeynayake, nine Defendants incliding the 7th Defendant-Petitioner have accepted the scheme of partition suggested in the final Plan No. 2525 and submitted the letter dated 28.12.1997 to the Surveyor (Vide- letter dated 28.12.1997 at page 208 of the recoed). The proposed final Plan No. 2525 was retured to the District Court on 19.02.1998.

[138] If the rights of the 7th Defendant-Petitioner were prejudicially affected by the judgment entered by the District Court on 28.10.1996 and the scheme of partition suggested by the Surveyor in November/December 1997, she could have sought the intervention of this Court by way of revision at least after the return of the proposed final Plan to the District Court on 19.02.1998. The 7th Defendant-Petitioner has filed this application in December 2001 without providing any reasonable explanation as to why she could not have sought intervention of this Court at any early stage of the District Court proceedings. In the circumstances, I am of the view that the 7th Defendant-Petitioner is guilty of laches.

[139] It is to be noted that the Proviso to Article 138 (1) of the Constitution states that "No judgment or decree of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice". As noted, the 7th Defendant-Petitioner has miserably failed to establish that her her right, title, interest in the land in question has been extinguished or she has been otherwise prejudicially affected by

the interlocutory or final decree entered by the District Court in this partition action.

Conclusion

[140] As noted, the 7th Defendant-Petitioner has not shown any exceptional circumstances that amount to a positive miscarriage of justice calling for the intervention of this Court by way of revision or restitutio in integrum under Article 138(1) of the Constitution. Accordingly, there is no merit to interfere with the interlocutory or final decree entered by the District Court of Mount Lavinia in Case bearing No. 1676/P.

[141] In the circumstances, I dismiss the 7th Defendant-Petitioner's Application for Revision and Restitutio in Integrum with costs.

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratne J.

I agree.

JUDGE OF THE COURT OF APPEAL