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

In the Matter of an application for revision made under Article 138 of the constitution

CASE NO: CA/REV/10/16
DC Colombo Case No .18045/P

1. J.K.A.Bandulasena
2. 2. Hemalatha Abeysiri Munasinghe
   Both at
   No.71/14, Rajagiriya Road Rajagiriya

Plaintiffs

Vs.

1. Mahindrapala Nimmuniarachchi
   No.71/12, Rajagiriya Road,
   Rajagiriya.
2. Indrani Hettiarachchi,
   No.71/15, Rajagiriya Road,
   Rajagiriya.
3. 4P.D.P.Sriyanayake ,
   No.71/11, Rajagiriya Road,
   Rajagiriya
4. G.D.Violet ,
   No.71/16, Rajagiriya Road,
   Rajagiriya..

Defendants

AND

1. J.K.A.Bandulasena
2. Hemalatha Abeysiri Munasinghe
   Both at No.71/14, Rajagiriya Road
   Rajagiriya

   And Presently No.9425 Legler Road,
   Brooklyn, 53521, WI USA.

Appearing by their Power of Attorney Holder.

Jayatissa Wickramasinhe Gunasekara ,
No.11A2 Sri Mahawihara Road,
Pamankada, Dehiwala.

Plaintiff-Petitioners

-VS-

1. Mahindrapala Nimmuniarachchi
   No.71/12, Rajagiriya Road,
   Rajagiriya.
2. Indrani Hettiarachchi (Deceased),

   2.A Gamage Lihan Geethmal Perera
   No.71/15, Rajagiriya Road,
   Rajagiriya
3. P.D.P.Sriyanayake ,
   No.71/11, Rajagiriya Road,
   Rajagiriya
4. G.D.Violet ,
   No.71/16, Rajagiriya Road,
   Rajagiriya.

Defendant-Respondents

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Tisath Wijayagunawardane, PC with Tharindu Weerasena, instructed by Tharaka Jayathilake for the Plaintiff-Portioner for the 1st Defendant-Respondent

H. Vithanaachchi with Shantha Karunadhara for the

1st Defendant-Respondents.

Written Submissions:	By Substituted Plaintiff Respondent on 22.11.2019
	By 9A, 9B, 9D, 9E, 9F,12A, 12B, and 12C Substituted-Defendant-Respondent on 22.11.2019
	Substituted 4A Defendant Appellant on 20.12.2019
Argued on:	23.07.2019 and 22.02.2021
Judgment on:	**29-03-2021**

N. Bandula Karunarathna J.

The Plaintiff-Petitioners (hereinafter referred to as the Petitioners) instituted this action in the District Court of Colombo against 1st to 4th Defendant Respondents (hereinafter referred to as the Respondent) to Partition a land situated within the Municipal Limits of Sri Jayawardanapura Kotte by amended plaint dated 18.02.1998. The Judgment was delivered on 21.09.2000 by the Learned District Judge holding that the 1st and 2nd Petitioners are entitled to an undivided half share and the 1st Respondent entitled to the balance half share of the land.

Thereafter Court issued a Commission to prepare a Final Scheme of Partition and the Surveyor returned the said commission with plan No. DC/C-2/01 dated 15.08.2001 with the report. The 1st Respondent objected to the said Plan by his statement of objections dated 07.02.2002 and tendered an Alternative Scheme of Partition. Court upheld the Objection of the 1st Respondent after an Inquiry and directed the court commissioner to prepare the Final Scheme of Partition in terms of the said Alternative Scheme of Partition.

Petitioners being aggrieved by the said order, filed a leave to appeal application to this Court against the said order by Petition dated 12.07.2002 and the Judgment was delivered on 29.07.2009 dismissing the said Appeal. The District Court thereafter reissued a commission to prepare a Final Scheme of Partition. The Court commissioner prepared Plan no. 1079 dated 22.07.2014 and its report in terms of the said order and the Petitioners objected to the said plan being accepted as the Final Scheme of Partition by their Statement of Objections dated 25.09.2014.

The Court after an inquiry overruled the objections of the Petitioners' and accepted the said plan No. 1079 as the Final Scheme of Partition and directed to enter the final decree accordingly. Being aggrieved by the said orders, Petitioners have applied in Revision to this Court against the said order of the District Court and requested for a Judgment, to set aside the said orders.

The Plaintiff-Petitioners preferred this Revision Application dated 04-07-2016 seeking the following relief;

(i) to set aside the Judgment dated 29.07.2009 in Court of Appeal C.A.L.A. No. 273/2002 (P11).

(ii) to set aside the Order dated 27.06.2002 (P9), Order dated 25.06.2013 (P14) and Order dated 22.04.2016 (P17) made by the District Court of Colombo.

The Plaintiff Petitioners instituted the case No. 18045/P in the District Court of Colombo against the 1st to 4th Defendant Respondent to partition the land shown as Lot A in Plan 2152 situated within the Municipal Limits of Sri Jayawardenapura Kotte, Municipal Council. On a Commission issued to, G. Chandrasena, Licensed Surveyor prepared the Preliminary Plan No.504/98 and the case was taken up for trial on 17.07.2000. The Case was concluded without contest, by allocating half share of the corpus each to the Petitioners and the 1st Respondent. The parties further agreed that the existing access road from Rajagiriya Road should be maintained to provide access to the houses of the 1st Respondent and the Petitioners.

After the entry of the Interlocutory Decree (P5(II)), a commission was issued to Patrick W. Fernando, Licensed Surveyor to prepare a final plan. Then Plan No. DC/C2/01 [P6(i)] was prepared. The 1st Respondent tendered objections (P7) to the said Plan No. DC/C2/01 and sought an order from the Court to direct the Commissioner to adopt Alternative Plan No. 784 of D. Bellana, Licensed Surveyor.

After inquiry Learned Additional District Judge by order dated 27.06.2002 (P9) held inter alia that the access road on the South of the corpus provided a road as had been in use by Alternative Plan No.748 which in turn allowed the existing water and electricity connections to all houses on the corpus. The Petitioners sought leave to Appeal from the Appeal Court in C.A.L.A. 273/2002 in which the Order of the District Court dated 27.06.2002 was affirmed. {Vide: Judgment dated 29.07.2009 (P11)

Thereafter Plan No.1061 (P12) was prepared by Surveyor, Krishnapillai to which both parties tendered objections. The District Court by Order dated 25.06.2013 (P14) while holding that the Surveyor, Krishnapillai had not indicated as to why Plan No.748 of Surveyor, Bellana could not be adopted and directed the preparation of a final plan as suggested by Plan No.748. Accordingly Plan No.1079 (P15 (1)) was prepared by Surveyor, Krishnapillai to which objections (P16) were tendered by the Petitioners. The parties moved to conclude the inquiry on Written Submissions and District Court delivered the Order on 22.04.2016 (P17) upholding the Plan No,1079.

The Petitioners had already canvassed the said Order 'P9' dated 27.06.2002, before this Court (Leave to Appeal) Application No. CA 273/2002 and the Judgment 'P 11' debars the Petitioners from re-agitating the same question again.

The impugned Order 'P14' dated 25.06.2013 related to the direction given by the District Court to prepare a final plan on the lines suggested by Plan No.748 of Surveyor, Bellana.

In this Order 'P14', the District Court was confronted with the position taken up for the first time that the Plan No.748 had been prepared in violation of the Planning Regulations of the Urban Development Authority. The Court insisted that following the final scheme of partition shown in Plan No.748. Although the Petitioners could avail themselves of the right of appeal with prior leave from the Court of Appeal, against the said Order marked 'P14', they have thought not to do so.

The Last Order in question dated 22.04.2016 (P17) affirming the Final Plan No.1079, had resulted in with the entry of the Final Decree and provisions of Section 36A of the Partition Law as amended by Act No.17 of 1997 and such Order gives rise to an appeal with the leave of the Court of Appeal first had and obtained. The Petitioners having failed to make such Leave to Appeal application to the Civil Appellate High Court in terms of Section 36A, had invoked the extraordinary and discretionary jurisdiction of this Court in Revision, canvassing Order made as far back as 27.06.2002.

The explanation provided by the Petitioners regarding their failure to make use of the right of appeal, is that the Judgment of Court of Appeal 'P11' was binding on the District Court and further they take up the position that the said Judgment 'P11' dated 29.07.2009, is '*per incuriam*'.

When the Plaintiff caused the preparation of Plan No. DC/C2/01 by Surveyor Patrick Fernando on 15.08.2001, the access road from the Rajagiriya Road, did not extend up to Lot No.4 allotted to the 1st Respondent and Surveyor, Bellana's Plan No.748, had indicated the said access road up to Lot No.5 allotted to the 1st Respondent. The only question that came up for adjudication before this Court was whether the provision of access from Rajagiriya Road to the piece of land on West, allotted to the 1st Respondent was correct? The complaint of the Petitioners was that since a public road namely, Raja Hewavitharana Road was bordering the portion of the land of 1st Respondent on the West, access could be given from the same.

The electricity, water and telephone lines to the 1st Respondent's house had been supplied along the access road from Rajagiriya Road and at the trial, the Plaintiffs never suggested that 1st Respondent should be provided access from the Raja Hewawitharana Mawatha, decided not to interfere with the Order of the District Court dated 27.06.2002 (P9). The agreement at the trial, reached between the parties to maintain the access to the houses of the Petitioners and the 1st Respondent, from Rajagiriya Road should be treated as an admission from which the Petitioners could not resile.

Thus, it is apparent that the ratio of the said Judgment (P11) confined to the issues raised in C.A.L.A.273/2002 and could not have trammelled the powers of the District Court to confirm with or without modification the scheme of partition proposed by the Surveyor in terms of Section 36 (1) (a) of the Partition Law as amended. Since the Petitioners in their objections had taken up the position that the Plan No.748 of Surveyor, Bellana was violative of the Regulations of UDA, they could have sought relief by way of Leave to Appeal from the Order of the District Court dated 25.06.2013 (P14) and the Order dated 22.04.2016.

In the circumstances the Judgment (P11) of this Court, was not '*per incuriam*' and dealt with only the matters urged in that case. The Petitioners being the '*litis dominus*' in the case should have been aware of the provisions of the law in Sections 26, 31, 32 and 36 of the Partition Law as amended by Act No.17 of 1997 and the Petitioners seemingly oblivious of the said provisions for their advantage, had been urging such grounds since 2013 without making use of right of appeal available to them. The Petitioners are not entitled as of right to seek relief by way of revision when they had failed and neglected to exercise the right of appeal provided by law in the absence of a plausible and acceptable explanation.

The Petitioners have preferred this application to revise the order of the District Court marked "P9", "P14", "P17" and the Judgment of this Court marked "P11". By the said orders of the District Court and the Judgment of this Court, the Commissioner has been directed to prepare the Final Scheme of Partition in terms of the Alternative Scheme of Partition tendered by the 1st Respondent marked "P8".

The Petitioners' position was that, the said Alternative Scheme of Partition is contrary to the written law regulating the sub-division of land for development purposes. Hence, it was argued by the petitioner that the Final Scheme of Partition is prepared in terms of the said Alternative Scheme of Partition, such Final Scheme of Partition will never be approved under the written law applicable for such approval and the parties would be deprived of getting approval for the said Final Scheme of Partition and the parties would never be able to carry out any development work forever.

In the alternative Scheme of Partition marked "P8" the Court observed that, the access road to the Lots 2, 3, 4 and 5 is shown as Lot 1. The extent of Lot 1 is 218.51 Sq. Meters and as the maximum width is 12 Feet, the length of the road access shown as Lot 1 is more than 50 Meters. However, the petitioner argued that as it is between 10-12 feet, the length of the road should be more than 59.21 Meters.

There is no turning circle at the end of the road way. The petitioner says that the extent of the Lots 2 and 3 are 68.28 Sq. Meters (2.7 Perches) and 50.58 Sq. Meters (2 Perches) respectfully. The preliminary plan marked "P3 (i)", which clearly describes that the land is situated within the municipal limits of Kotte Municipal Council. It is a common fact in this case. Under the Gazette dated 30.09.1978 marked "P18 (i)", the Kotte Urban Council (as it then was) has been declared as an Urban Development Area under Section 3 of Urban Development Authority Act as amended.

The Gazette dated 10.03.1986 marked "P18(ii)" which consists of the Regulations made under Section 21 read with Section 8 of the Urban Development Authority Act as amended. The said Regulations are applicable to all the areas those have been declared under the said Act as "Urban Development Areas" in terms of Regulation 2 of the said Regulations. The said Regulation 2 is read as follows;

> "අමාත්‍යවරයා විසින් ගැසට් පත්‍රයේ පළ කරනු ලබන නිවේදනයක් මගින් නාගරික සංවර්ධන ප්‍රදේශයක් බවට තත් කාලයේ ප්‍රකාශයට පත් කරනු ලබන සෑම ප්‍රදේශයක් සඳහාම මේ නියෝග වල විධිවිධාන අදාළ වන්නේය."

The said Regulations are applicable to Sri Jayawardanapura Kotte Municipal Council Area where the subject matter of the present Partition Action is situated. These Regulations are applicable for obtaining for sub-division of the land sought to be partitioned or to obtain Development Permits and carry out Development Work in the said land. These Regulations are the written law relating to the sub-division of the land sought to be partitioned for Development Purposes.

Section 32 (1) (f) of the Partition Law is as follows;

(1) "The surveyor shall make his return to the commission, verified by affidavit, substantially in the form set out in the Second Schedule to this Law, on or before the returnable date or the extended returnable date (as the case as be) fixed under Section 27 and together with such return he shall transmit to the Court-

(a) ……
(b) ……
(c) ……
(d) ……
(e) ……
(f) a certificate to the effect that the plan of partition is in conformity with written law relating to the subdivision of land development purpose."

In terms of Section 32 (f) of the Partition Law, the Surveyor who prepares the Final Scheme of Partition should give a certificate with his report that the Final Scheme of Partition is in conformity with written law relating to subdivision of land for Development Purposes. In order words, the Final Scheme of Partition cannot violate the said written law (Regulations in the Gazette marked P18 (i)) relating to the subdivision of land for Development Purpose and it is mandatory that the Final Scheme of Partition is in conformity with the written law relating to subdivision of land for Development Purposes.

Section 31(2) and 36 (1)(b) of the Partition Act as amended by Act No. 17 of 1997 are as follows;

31 (2) "Where any divided partition of portions that are to be allotted to any person under an interlocutory decree are less than the minimum extent required by written law regulating the subdivision of land for development purposes, the surveyor shall, so far as is practicable, divide the land in such a manner as would enable the allotment or sale of such portions as one lot."

36(1)(b) "order the sale of any lot, in accordance with the provisions of this Law, at the appraised value of such lot given by the Surveyor under Section 32, where the Commissioner has reported to Court under Section 32 that the extent of such lot is less than the minimum extent required by written law relating to the subdivision of land for development purposes and shall enter final decree of partition subject to such alternations as may be rendered necessary by reasons of such order of sale."

in terms of Regulations 20(1)(ඇ) and the said Section 31(2) and 36(1)(b) of the Partition Act, the Court is obliged to consider the said written law regulating the sub-division of the land for development purposes in approving a Final Scheme of Partition and the Final Scheme of Partition cannot contravene the said written law regulating the sub-division of land for development purposes.

Regulation 16(4) reads as follows;

"මීටර් නවයකට (9) වඩා අඩු පළලකින් සහ මීටර් තිහකට (30) වඩා වැඩි දිගකින් යුත් සෑම වීදියක්ම අවසන් වන කෙළවරේ විෂ්කම්භය මීටර් නවයකට (9) නොඅඩු හැරවුම් වෘත්තයක් සකස් කොට තිබිය යුතුය."

the length of the said road access shown as Lot 1 in the said Alternative Scheme of Partition marked "P8" is more the 50 Meters and it was argued that there is no turning circle shown in the said land.

Plan No. 1079 marked "P15(i)" which is the Final Scheme of Partition prepared in terms of the said Alternative Scheme of Partition marked as "P8" and finally approved by the District Court by the said impugned order marked as "P17". There is no turning circle shown in the said plan marked "P15 (i)" prepared in terms of the said Final Scheme of Partition and accepted by Court as the Final Scheme of Partition. The report of the plan marked "P15 (i)", which is marked as "P15 (ii), stated that "due to the placement of existing building; I am unable to provide a turning circle."

The said Alternative Scheme of Partition and the Final Scheme of Partition accepted by the District Court violates the said Regulation 16(4).

Regulation 20(3), 17(1) and Form (ඇ) of the 3rd Schedule to the said Regulations marked "P18 (ii)" is as follows;

20(3) "ඉඩම් කොටස්වල අවම විශාලත්වය සහ පළල 17 වන නියෝගයේ විධිවිධාන වලට අනුකූල විය යුතුය."

17(1) "බිම් කොටස් සම්බන්ධයෙන් මේ නියෝග වල III වන උපලේඛනයේ ''ඇ'' ආකෘතියේ පිරිවිතර වලට වඩා වැඩි හෝ අඩු අවම විශාලත්වයක් සහ හෝ වැඩි හෝ අඩු පළලක් යම් ප්‍රදේශයක් සඳහා එවකටත් අනුමත කොට ඇති හෝ යම් ප්‍රදේශයක් සඳහා යෝජනා කොට ඇති සංවර්ධන සැලැස්මක් මගින් අධිකාරිය විසින් නියම කරනු ලැබ ඇත්තේ නම් මිස එවැනි ප්‍රදේශයක අධි උස ගොඩනැගිලි නොවන විවිධ මාර්ගයේ ගොඩනැගිලි සඳහා වූ බිම් කොටස්වල අවම විශාලත්වය සහ අවම පළල iii වන උපලේඛනයේ ''ඇ'' ආකෘතියේ දක්වා ඇති පිරිවිතර වලට අනුකූල විය යුතුය.''

Form (ඇ) of the 3rd Schedule

ගොඩනැගිල්ලේ ස්වභාවය	භූමි භාගයේ අවම බිම් ප්‍රමාණය (වර්ග මීටර් වලින්)	භූමි භාගයේ පළල (මීටර් වලින්)

පහත දැක්වෙන ගොඩනැගිලි හැර අන් සියලුම ගොඩනැගිලි...	150	6
මහජනයා රැස්වන ගොඩනැගිලි සහ පොදු ගොඩනැගිලි	300	12

In terms of the said Regulations, the minimum extent in a sub-divided Lot should be 150 Sq. Meters.

The extent of the said Lot 2 & 3 of the said Alternative Scheme of Partition are only 68.28 Sq. Meters and 50.58 Sq. Meters respectively. The petitioner says that even though these Lots 2 & 3 can be sold under Section 36(1) (b) of the Partition Act as amended, it would be impractical to do so as the aggregate extent of both Lots is less than 150 Sq. Meters and any purchaser cannot obtain approval for such a Lot and carry out development work. In terms of the said regulations, there are only 2 Lots that can be considered as Residential in the said Alternative Scheme of Partition marked "P8" and the said Final Scheme of Partition marked "P15 (i)" prepared in terms of the said Alternative Scheme of Partition.

Regulation 16(2) (අ) and Form (අ) in Schedule 3 of the Regulations marked "P18 (iii)" is as follows;

> 16(2) (අ) "පදිංචිය සඳහා වූ ඒකක වලට යාම ඒම පිණිස අදහස් කැරෙන සෑම වීථියක්ම මෙහි III වන උපලේඛනයේ "අ" ආකෘතියෙහි දක්වා ඇති පිරිවිතර වලට අනුකූල විය යුතුය."

Form (අ) of the 3rd Schedule

සේවා සලසන පදිංචිය සඳහා වූ ඒකක සංඛ්‍යාව	අවම පළල (මීටර් වලින්)	උපරිම දිග (මීටර් වලින්)
පදිංචිය සඳහා වූ ඒකක 4 කට අඩු වන විට....	3.0	50

In terms of the said Regulations, maximum length of the road access for Four (4) or less than Four Residential Units should not exceed 50 Meters. The length of the said road way marked Lot 1 is more than 50 Meters and hence it violates the said Regulations. The said Alternative Scheme of Partition and the Final Scheme of Partition marked "P15 (i)" prepared in terms of

the said Alternative Scheme of Partition violates the written law regulating the sub-division of the land for development purposes. Therefore, the Petitioner argued that the said Final Scheme of Partition prepared in terms of the said Alternative Scheme of Partition marked "P8" is illegal and no party will be able to obtain a development permit and carry out any development work in any of the said Lots.

Final Scheme of Partition cannot be prepared in terms of the written law regulating the sub-division of lands for development purposes according to the said Alternative Scheme of Partition marked "P8" proposed by the 1st Respondent. No certificate can be issued in respect of a Final Scheme of Partition prepared according to the Alternative Scheme of Partition marked "P8" as required by Section 32 (1) (f) of the Partition Law, which is a mandatory requirement.

It is a common ground in this case that the surveyor who prepared of Final Scheme of Partition marked "P15 (i) which was prepared in terms of the Alternative Scheme of Partition marked "P8", has not transmitted a certificate to the effect that the said Final Scheme of Partition is in conformity with the written law relating to the sub-division of land for Development purposes as required by Section 32 (1) (f) of the Partition Law. Thus, the petitioner says that the said Final Scheme of Partition marked "P15 (i)" could not have been accepted and confirmed by Court and any Final Scheme of Partition prepared in terms of the said Alternative Scheme of Partition marked "P8" cannot be accepted and confirmed by Court as it violates the said written law and no certificate can be issued as required by Section 32 (1) (f) of the Partition Law in respect of such a Final Scheme of Partition.

The 1st Defendant Respondent says that, the objections of the Petitioners to the Scheme suggested by Surveyor Bellana are founded on a misapprehension that the final Scheme prepared in partition case has to be presented to the local authority for approval as required by the UDA Act. According to Paragraph 7 of the Statement of Objections dated 21.01.2013 and the Paragraphs 6 and 13 of the Statement of Objections dated 25.09.2014, the grievance of the Petitioners, was that approval had been refused and no approval would be granted to the Plan No. 1061 (P12) and Plan No. 1079 (P15 (i)). Neither the provisions of the Partition Law nor the Urban Development Authority Act, require that a Final Scheme of a partition case should be presented to the local authority for approval. However, the Amending Act No. 17 of 1997, has replaced the provisions of Section 26 (3) by a subsection, to deal with small allotments in which the extent is less than the minimum extent required by the Regulations for subdivision of land and such provisions would apply at the time of entering of the preliminary decree. The Amendments to Section 31 and Section 32 cast new duties on the surveyor who prepares a Final Scheme with regard to the smaller extents of the corpus and Section 32 (1) (f) mandates that a certificate by the Surveyor to the effect that the Plan of partition is in conformity with written law relating to the subdivision of land for development purposes.

In terms of Section 36 (1), the District Court is empowered to confirm with or without modification the scheme proposed by the surveyor after a summary inquiry and to enter final decree.

The Regulations Nos. 20, 21 and 22 deal with the subdivision of a land by a private individual without the intervention of Court and an application to that effect conforming to Regulation No. 6, has to be made to the UDA or to the local authority as the case may be. The contention of the Petitioners that every subdivision of land including a Final Scheme of partition, has to be approved in terms of the UDA Regulations is a misconception of the law. What is contemplated by the Amending Act No. 17 of 1997, is the avoidance of partitioning a land so as to create small parcels of land extent of which would be less than the minimum extent required by any written law regulating subdivision of land for development purposes.

The Amended Section 26, 31 and 32 of the Partition Law are concerned with the compliance with the requirements in the phraseology emphasized above. The contention of the Petitioners that the final plan should provide a turning circle and an appropriate width for the access road within the corpus, is a matter not within the scope of the above phraseology. It is my view that the said requirements are meant to be applicable when a large bare land is subdivided into several allotments as usually done by property developers or by a housing scheme.

If all the Regulations in the said Gazette P18 (ii) are to be applied in the case of a Final Scheme of Partition, practically most of the lands would not be partitioned. The only shortcoming of the Approved Plan No. 1079 (P15 (i)) appears to be the allocation of Lots 2 and 3 which do not confirm to the minimum extent required by the law. This is a defect which could be remedied by having recourse to the provisions of the Section 26 and Section 32 of the Partition Law. The 1st Defendant Respondent argued that the Petitioners' endeavour had been to delay the finalization of the partition on various unreasonable and unconscionable demands.

The petitioner says that in making the said orders marked "P9", "P14" & "P17" by the District Court and delivering the Judgment marked "P11" by the Court of Appeal, this point has slipped the mind of the respective Courts which has caused grave and irremediable prejudice and justice to not only to the Plaintiff-Petitioner but also to the 1st Defendant- Respondent though he objects to this application. if the said orders of the District Court and the Judgment of this Court are not set aside, the Plaintiff-Petitioners would be left with a Partition Decree and a Final Scheme of Partition which violates the written law making it illegal and would never get the approval of the relevant authority and no party will be permitted to carry out any development work. Then whole purpose of the Partition Action would be rendered nugatory.

It was argued by the Petitioner that there is certainly a miscarriage of justice and a violation of Petitioners' rights which would entitle the Petitioners to invoke the Revisionary Jurisdiction of this Court which is necessary for due Administration of Justice in this case.

The Plaintiff-Petitioners main argument was that since the 1st Defendant Respondent's already has a roadway to the main road, namely the Rajahewawitharana Road, is a proper roadway. However, having considered the instant circumstances the Hon. Justices of the Court of Appeal was of the opinion that the electricity, water and telephone lines to the 1st Defendant Respondent's house had been supplied along the access road aforesaid and that

the Plaintiffs never suggested that the 1st Defendant Respondent's should be provided access from the Rajahewawitharana Road. The Hon. Justices had further decided that the agreement reached at the trail, between the parties to maintain the access to the houses of the petitioners and the 1st Respondednt from Rajagiriya Road should be treated as an admission from which the Petitioners could not resile.

Further the attendant circumstances direct to the fact that in a revisionary application, certain guidelines need to be fulfilled in order to ensure that the same can be successfully claimed. The guidelines taken from celebrated judgements are mentioned hereinbelow.

In the judgment of Sansoni J, who delivered the majority decision of the Divisional Bench in the case of Madina Beebee V Seyed Mohamed {1995) 68 NLR 36, it was held that;

> "The power of Revision is an extraordinary power which is quite independent of and distinct from the Appellate jurisdiction of the Court. Its object is the due administration of justice."

In the Supreme Court case Somawathie V Madawela and others, 1983 (2) SLR 15, Justice Soza stated as follows;

> "The powers of Revision and restitutio integrum have survived all the legislation that has been enacted up to date. These are extraordinary powers and will be exercised only in a fit case to avert miscarriage of justice"

Moreover, the Supreme Court has observed in Rustom V Hapangama and Co. 1995 (2) SLR 195, the trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked, the practice has been that these powers will only be exercised if the existence of special circumstances are urged necessitating the indulgence of this Court.

The power of revision by the Court of appeal is contained in Section 753 of the Civil Procedure Code (as amended). The power given to the Court by way of Revision are wide enough to give it the right to revise any order made by original Court whether an appeal has been taken against it or not. However, in such a case the Court will exercise its jurisdiction only in exceptional circumstances.

The fact that a Judge's order is merely wrong is not a sufficient ground for exercising that power. In this case the petitioners had averred that they seek revisionary powers of this Court as the order concerned is bad in law and as there is illegality and impropriety. As the powers of revision are exercised only in exceptional circumstances, such circumstances depend on the facts of each case.

It was held in the case of Wijesinghe V. Thamaratnam - Sri Kantha Law Reports Vol 5/47 that the revision is a discretionary remedy and will not be available unless the application discloses circumstances which shock the conscience of the Court.

In the objections filed by the 1st Defendant-Respondent says that the petitioner is guilty of lashes for undue delay which has not been explained by the petitioner. A bear statement that the judgment is bad in law or improper and illegal is not sufficient under the section to invoke the revisionary power of this Court. The failure to set out any averment to indicate the

existence of the exceptional circumstances to invoke extra ordinary jurisdiction of this Court, is fatal to the application of revision.

In Hotel Galaxy v Mercantile Hotel Management 1987 1 SLR 5, the Revision application is refused, on those circumstances.

Therefore, considering the attendant circumstances of this case, I am of the view that the Learned Judge had considered all the relevant matters and not erred in his order.

I am of the view that the judgment shall be awarded in favour of the 1st Defendant-Respondent and this Revision Application is hereby dismissed with costs.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal