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

1. Mahindra Ratwatte, Basnayake Nilame of Sri Vishnu Maha Dewalaya, Kandy and Sri Dedimunda Dewalaya, Aluthnuwara

C. A. RII 27 2018
D.C. Kegalle Case No.
27604/P

PETITIONER

1. Ranhoti Pendige Hemantha Wijesinghe of Arandara, Atala and others

PLAINTIFF-RESPONDENTS

1. Ethugal Pendige Indika Thushara of Arandara, Atala and others

Defendant Respondents

Before: Hon. D. N. Samarakoon J.,

Hon. Sasi Mahendran J.

Counsel: Dr. Sunil Abeyratne for the Petitioner

D. Jayasinghe for plaintiff respondents

Chanaka Kulathunga for Substituted 5(a) and 6(a) defendant respondents

Written Submissions on: 5 (a) and 6(a) defendant respondents on 27.05.2020

Petitioner on 21.05.2020 and 01.06.2022

Plaintiff Respondent on 25.06.2020

Argued on: 01.04.2022

Date: 28.10.2022

D.N. Samarakoon J.

The relevant provision in repealed Partition Act No. 16 of 1951 read,

"16 of 1951

Finality of interlocutory decree and final decree of partition.

48. (1) Save as provided in subsection (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

In this subsection " encumbrance " means any mortgage, lease, usufruct, servitude, fideicommissum, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month, and the rights of a proprietor of a nindagama.

(2) The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.

(3) The interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by subsection (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Documents Ordinance as a lis pendens affecting such land".

There was no reference to powers of revision or restitutio in integrum.

The plaintiff respondent has cited the cases, **Fernando vs. Marshall Appu 23 NLR 370, Ibrahim vs. Beebee, Muthumenike vs. Appuhami 50 NLR 162, Appuhamy vs. Samaranayake 19 NLR 403, Petisingho vs. Rathnaweera 62 NLR 572, Rasia vs. Thambipillai 69 CLW 57** and **Nonahamy vs. Odiris Appu 68 NLR 385.** They were decided either under Act No. 16 of 1951 or under Ordinances that were in force prior to that.

He has also cited **Ranasinghe and others vs. Gunasekara and another 2006 (2) SLR 393** and **Perera and others vs. Adlin and others 2000 (3) SLR (CA 491/96)**.

What is currently applicable is Partition Law No. 21 of 1977. Its section 48 says,

"This Law may be cited as the Partition Law, No. 21 of 1977,

Finality of Interlocutory and final decrees of partition.	*48.*

(1) Save as provided in subsection (5) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever rights title or interest they have, or claim to have to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.
In this subsection "omission or defect of procedure " shall include an omission or failure-
(a) to serve summons on any party; or
(b) to substitute the heirs or legal representatives of a party who dies pending the action or to appoint a person to represent the estate of the deceased party for the purposes of the action; or
(c) to appoint a guardian ad litem of a party who is a minor or a person of unsound mind.
In this subsection and in the next subsection "encumbrance " means any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month.
(2) Where in pursuance of the interlocutory decree a land or any lot thereof is sold, the certificate of sale entered in favour of the purchaser shall be conclusive evidence of the purchaser's title to the land or lot as at the date of the confirmation of sale, free from all encumbrances whatsoever except any servitude which is expressly specified in such interlocutory decree and a lease at will or for a period not exceeding one month.
(3) The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance, and accordingly such provisions shall not apply to such decrees.
The powers of the Supreme Court by way of revision and restitutio in integrum shall not be affected by the provisions of this subsection.

(4)
(a) Whenever a party to a partition action-
(i) has not been served with summons, or
(ii) being a minor or a person of unsound mind, has not been duly represented by a guardian ad litem, or
(iii) dies before judgment Is entered and no substitution of his heirs or legal representatives has been made or no person, has been appointed to represent the estate of the deceased party for the purpose of the action, or
(iv) being a party who has duly filed his statement of clime and registered has address, fails to appeal at the trial,
and in consequence thereof the right, title or interest of such party to or in the land, which forms the subject matter of the interlocutory decree entered in such action has been extinguished or such party has been otherwise prejudiced by the interlocutory decree, such party or where such party is a minor or a person. of unsound mind, a person appointed as guardian ad litem of such party, or the heirs or the executor or administrator of such deceased party or any person duly appointed to represent the estate of the deceased party, may at any time, not later than thirty days after the date on which the return of the surveyor under section 82 or the return of the person responsible for the sale under section 42, as the case may be, is received by the court, apply to the court for special leave to establish the right, title or interest of such party to or in the said land notwithstanding the interlocutory decree already entered.
(b) The aforesaid application shall be by petition, supported by an affidavit verifying the facts, which shall conform to the provisions of paragraph (a) of subsection (1) of section 19 and shall specify to what extent and in what manner the applicant seeks to have the interlocutory decree amended, modified or set aside and the parties affected thereby.
(c) If upon inquiry into such application, after prior notice to the parties to the action deriving any interest under the interlocutory decree, the court is satisfied-
(i) that the party affected had no notice whatsoever of the said partition action prior to the date of the interlocutory decree or having duly filed his statement of claim and registered his address, failed to appear at the trial owing to accident, misfortune or other un-avoidable cause, and
(ii) that such party had a prima facie right, title or interest to or in the said land, and
(iii) that such right, title or interest has been extinguished or such party has been otherwise prejudicially affected, by the said inter-locutory decree,
the court shall upon such terms and conditions as the court in its discretion may impose, which may include an order for payment of costs as well as an order for security for costs, grant special leave to the applicant.
(d) Where the court grants special leave as herein before provided the

(5) The interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by subsection (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree, if, but only if, he proves that the decree has been entered by a court without competent jurisdiction.
(6) Where by an interlocutory or final decree a right, share or interest has been a warded to a party but such party was dead at the time, such decree shall be deemed to be a decree in favour of the representatives in interest of such deceased person at the date of such decree.
(7) The provisions of this section shall apply to all interlocutory and fin decrees entered in partition actions instituted under the provisions of the Partition Act, No, 16 of 1951, and under the provisions relating to partition actions contained in the Administration of Justice Law, No. 44 of 1973, repealed by the Civil Courts Procedure (Special Provisions) Law, 1977".

Its section 48(3) in its Proviso specifically refers to revision and restitutio in integrum.

In 1977 when Partition Law was enacted, these powers were exercised by the Supreme Court. A New Constitution was enacted in 1978. Presently under Article 138 of the Constitution, the said jurisdiction is exclusively vested in the Court of Appeal.

RANASINGHE AND ANOTHER VS. GUNASEKERA AND ANOTHER, 2006 is a decision of the Court of Appeal.

While analyzing the provisions it said,

> "The only question that remains to be decided is the issue raised by the learned counsel for the petitioners, that the lis pendens of the partition action is not registered in the correct folio. Improper registration or non registration of a lis pendens and its effect on the finality of the partition decree are found in the repealed section 48(3) of the Partition Act No. 16 of 1951. It reads as follows : "(3) The interlocutory decree or the final decree of partition entered in a partition action shall not have the final

and conclusive effect given to it by section (1) of this section as against a person who, not having been a party to the partition action , claims any such right, title or interest to or in the land any portion of the land to which the decree relates as is not directly or remotely derived from the decree if , but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action had not been duly registered under the Registration of Documents Ordinance as a lis pendens affecting such land." The new section 48(3) of the Partition Law No. 21 of 1977 reads thus "The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by sub section (1) of this section notwithstanding the provisions of section 44 of the Evidence Ordinance , and accordingly such provisions shall not apply to such decree." Even under section 48(3) of the Partition Act of 1951 despite the fact that the lis pendens has not been duly registered, a person who was not a party to the partition action cannot intervene after the interlocutory decree had been entered. In the case of Noris Vs. Charles it was held that where a partition action had not been duly registered as a lis pendens, a person who was not a party to the proceeding could not intervene after the interlocutory decree was entered, but that such person, notwithstanding the interlocutory decree, was entitled to establish his rights in a vindicatory action or in a subsequent partition action. The effect of registration or improper registration of a lis pendens on the finality of the interlocutory decree and the final decree under the provisions of section 48 (3) of the Partition Act No.16 of 1951 is no more in the Partition Law No. 21 of 1977. The provisions in section 48(3) of the Partition Act that the non registration or improper registration of a lis pendens is a ground of assailing the final and conclusive character of a partition decree has been removed and is not available in the Partition Law No. 21 of 1977.

The resulting effect of the change in the law is that non registration or improper registration of the lis pendens is no more a ground of challenge to the conclusive effect of the partition decree".

Whatever may be the correctness of that decision, the question in that case was the non registration of the lis pendence. It is not the ground on which the petitioner seeks to set aside the decrees in the present case.

In **PERERA AND OTHERS v. ADLINE AND OTHERS, 2000** the Court of Appeal decided,

"According to Section 48(5) of the Partition Act the interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by Section 48(1) as against a person who, "not having been a party" to the partition action, claims any such right, title or interest to or any land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree has been entered by a Court without competent jurisdiction. According to the Provisions of the Partition Act, a partition decree could not be challenged even on the grounds of fraud or collusion".

The court did not interpret as to what is "**a Court without competent jurisdiction**".

The "jurisdiction" in a partition action is given in section 25.

It says,

"*25.*

(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".

If the District Court has failed to examine title, can it be said that the decree was entered by a "Competent Court"? The answer is "No".

In the present case, the 01st plaintiff, 01st defendant and the 07th defendant have given evidence. It was said that the "Subject Matter" was admitted and the original owner is P. W. Kira. His rights were said to have been inherited by his daughter, P. W. Pini. No birth certificate or death certificate were adduced in evidence. The oldest deed was in 1998. It was on that evidence the District Court entered judgment to partition the land.

Can it be said that the District Court has examined the title? It is apt to appreciate what was said in cases reproduced below,

• **Peiris Vs. Perera (1) NLR 362** "The Court should not regard a partition suit as one of to be decided merely on issues raised by and between the parties and it ought not to make a decree unless it is perfectly satisfied that the persons in whose favour the decree is asked for are entitled to the property sought to be partitioned."

• **Silva Vs. Paulu 4 NLR 177** "In partition suits the Court ought not to proceed on admissions but must require evidence in support of the title of all the parties and allot to no one a share except on good proof."

• **Golagoda Vs. Mohideen 40 NLR 92** "The Court should not enter a decree in a partition action unless it is perfectly satisfied that the persons in whose

favour it makes the decree are entitled to the property."

• **Juliana Hamine Vs. Don Thomas 55 NLR at 546** "We are of the opinion that a partition decree cannot be subject of a private arrangement between parties of matters of title which the courts is bound by law to examine. While it is indeed essential for parties to a partition action to state to the Court the points of contest and to obtain a determination on them, the obligation of the Court are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do. The interlocutory decree which the Court has to enter in accordance with its findings in terms of section 26 of the Act is final in character since no interventions are possible or permitted after such a decree. There is therefore, the greater need for the exercise of judicial caution before a decree entered. **The Court of trial should be mindful of the special provisions relating to decrees as laid down in section 48 of the Act**. According to its terms, the interlocutory and final decrees shall be good and sufficient evidence of the title of any person so as to the interests awarded therein and shall be final and conclusive for all purposes against all persons whomsoever, notwithstanding any omission or defect of procedure or in the proof of title adduced before the Court, and notwithstanding the provisions of section 44 of the Evidence Ordinance, and subject only to the two exceptions specified in sub-section 3 of section 48 of the Act."

• **Cooray Vs. Wijesuriya 62 NLR 158** "Section 25 of the Partition Act imposes on the Court the obligation to examine the title of each party to the action and section 26(f) gives legal action to a practice that existed in actions tried under the old Partition Ordinance of leaving a share unallotted. It is unnecessary to add that the Court before entering a decree should hold a careful investigation and act only on clear proof of the title of all the parties. It will not do for a plaintiff merely to prove his title by the product of a few deeds relying on the

shares which the deeds purport to convey. It is a common occurrence for a deed to purport to convey either much more or much less than what a person is entitled to. Before Court can accept as correct a share which is stated in a deed to belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share. How then is the proof to be established in a Court of Law? It only too frequently happens, especially in uncontested cases, that the Court is far from strict in ensuring that the provisions of the Evidence Ordinance are observed; and when this happens where there is a contest in regard to the pedigree as in the present case, the inference is that the Court has failed totally to discharge the functions imposed upon it by section 25 of the Act. It cannot be impressed too strongly that the obligation to examine carefully the title of the parties becomes all the more imperative in view of the far reaching effects of section 48 of the new Act which seems to have been specially enacted to overcome the effect of the decisions of our Courts which tended to alleviate and mitigate the rigorous of the conclusive effect of section 9 of the repealed Partition Ordinance of No.10 of 1863."

• **Cynthia De Alwis Vs. Marjorie D'Alwis and Two others 1997 (3) SLR 113** "A District Judge trying a partition action is under a sacred duty to investigate into title on all material that is forthcoming at the commencement of the trial. In the exercise of this sacred duty to investigate title a trial Judge cannot be found fault with for being too careful in his investigation. He has every right even to call for evidence after the parties have closed their cases."

• **Piyaseeli Vs. Mendis and Others 2003 (3) SLR 273** "(i) Main-function of the trial Judge in a partition action is to investigate title, it is a necessary pre-requisite to every partition action. (ii) Partition decrees cannot be the subject of a private agreement between parties on matters of title which the Court is bound by law to examine. There is a greater need for the exercise of judicial

caution before a decree is entered."

• **Faleel Vs. Argeen and others 2004 (1) SLR 48** "It is possible for the parties to a partition action to compromise their disputes provided that the Court has investigated the title of each party and satisfied itself as to their respective rights."

• **Somasiri Vs. Faleela and others 2005 (2) SLR 121** "(i) The error had arisen owing to the failure of the trial Judge to investigate title. (ii) The trial Judge must satisfy himself by personal Inquiry that the plaintiff made out a title to the land sought to be partitioned and that the parties before Court are solely entitled to the land. (iii) While it is indeed essential for parties to a partition action to state to court the points of contest inter-se and to obtain a determination on them the obligation of the courts are not discharged unless the provisions of Section 25 of the Partition Law are complied with quite independently of what parties may or may not do."

• **Karunarathna Banda Vs. Dassanayake 2006 (2) SLR 87 1.** ..... 2. A partition suit is not a mere proceeding inter-parties to be settled of consent or by the opinion of the Court upon such points as they choose to submit to it in the shape of issues. 3. **The Court has to safeguard the interests of others who are not parties to the suit who will be bound by the decree.** 4. The Court should safeguard that the plaintiff has made out his title to the share claimed by him.

• **Sopinona Vs. Cornelis and others 2010 BLR 109** (a) It is necessary to conduct a thorough investigation in a partition action as it is instituted to determine the questions of title and investigation devolves on the Court. (b) In a partition suit which is considered to be proceeding taken for prevention or redress of a wrong it would be the prime duty of the judge to carefully examine

and investigate the actual rights and to the land sought to be partitioned.

The petitioner is the Basnayake Nilame of the Maha Vishnu Dewale in Kandy and Dedimunda Dewalaya in Aluthnuwara. His complaint is that the plaintiffs and defendants have partitioned a land belonging to Maha Vishnu Dewale.

The plaintiff has argued that in "Arandara" village, in which the "Subject Matter" is situated, there is no land belonging to either of the Dewale. This is a question to be decided on oral and documentary evidence subjected to cross examination.

In the case of **SOMAWATHIE V. MADAWELA AND OTHERS, 1983,** Justice Joseph Francis Anton Soza said,

> "The saving of powers of revision and restitutio in integrum was probably put into subsection 3 of section 48 of the Partition Law No. 21 of 1977 out of abundance of caution because of the decision of the Privy Council in the case of Mohamedaly Adamjee v. Hadad Sadeen 20. In this case the Privy Council following the decisions of Burnside C. J. in Nono Hami v. De Silva 21 and Sir Alexander Wood Renton in Jayawardene v. Weerasekera 22. held that a partition decree is conclusive against all persons whomsoever, and that a person owning an interest in the land partitioned whose title, even by fraudulent collusion between the parties, had been concealed from the Court in the partition proceedings, is not entitled on that ground to have the decree set aside, his only remedy being an action for damages. Lord Cohen who delivered the judgment of the Board went on to say that although the law abhors fraud and equity has an undoubted jurisdiction to relieve against every species of fraud, still to say that fraud vitiates everything obtained by it is too broad a proposition. When adequate relief can be had at law and when in fact there is a

full, perfect and complete remedy otherwise, it is not the course to interfere.

Whatever the reason for the saving of the powers of revision and restitutio in integrum in section 48(3) of the Partition Law No. 21 of 1977 to say that these powers will not be available outside the area of fraud and collusion would be to leave victims of miscarriages of justice where there is no fraud and collusion without remedy. The expressio unius rule should not be applied where to do so would produce a wholly irrational situation and gross injustice. Further there is nothing to support an inference of legislative intent on the basis of the maxim expressio unius exclusio alterius. The omission to reserve specially the powers of revision and restitutio in integrum of the Supreme Court in section 48(1) of the Partition Law No. 21 of 1977 does not support the conclusion that these powers that were already there have been impliedly taken away. Nothing less than an express removal of these powers would be required to achieve such a result.

The pronouncement of Sansoni C.J. in regard to the revisionary powers of the Court in **Mariam Beebee v. Seyed Mohamed** (supra) therefore remains applicable even after the enactment of the Administration of Justice (Amendment) Law No. 25 of 1975 and the Partition Law No. 21 of 1977. The powers of revision and restitutio in 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 a miscarriage of justice. The immunity given to partition decrees from being assailed on the grounds of omissions and defects of procedure as now broadly defined, and of

the failure to make "persons concerned" parties to the action should not be interpreted as a licence to flout the provisions of the Partition Law. The Court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred".

Hence, the petitioner is entitled to the remedy he seeks.

Before concluding a word should be said with regard to the 5A and 6A defendant respondents. They were tenant cultivators whose rights have been vitiated by the decrees and who preferred an unsuccessful appeal to the Civil Appellate High Court. They too argue that there was no proper investigation of title and ask for remedies prayed for in their Statement of Objections.

Hence the judgment, interlocutory decree and all steps taken thereafter in the District Court, Kegalle case No. 27064/P are set aside. The trial proceedings are also set aside. The petitioner is entitled to file his statement of claim and the learned District Judge is directed to hold a fresh trial in which he has to examine the title of parties including the petitioner. If the Lis Pendence is not registered in the correct folio or folios the plaintiff or any other interested party may correct the same.

Hence the application is allowed. The petitioner is entitled to the costs of this application.

Judge of the Court of Appeal

Hon. Sasi Mahendran J.

I agree.

Judge of the Court of Appeal