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

In the matter of an application for a Revision and Restitutio-in-Integrum under Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/RII/35/2023
D.C. Mount Lavinia Case No: P/1144

Vidana Gamage Prema Padmini Renuka
58/3, 3rd Lane, Udahamulla,
Nugegoda.

Petitioner

Vs.

KadawathaKankanamalage Wijesena (Deceased)
No.416, Dewala Road, Depanama,
Pannipitiya.

Plaintiff- Respondent

KadawathaKankanamalage Tilak Dewapriya
No.416, Dewala Road, Depanama,
Pannipitiya

Substituted -Plaintiff-Respondent

-Vs-

1. (a) A.A. Deyawathi Perera
413, Depanama,
Pannipitiya.

(Deceased) 15A. BaragamaAriyabodhi Himi
DharmavijayaViharaya,
Weera Mawatha,
Depanama, Pannipitiya

15B. Wattala Ariyarathana Thero
No.415, Dharmavijaya
Viharaya,
Weera Mawatha,
Depanama, Pannipitiya.

(Deceased) 16A. BaragamaAriyabodhi Himi
Dharmavijaya Viharaya,
Weera Mawatha,
Depanama, Pannipitiya.

16B. Wattala Ariyarathana Thero
No.415, Dharmavijaya
Viharaya,
Weera Mawatha,
Depanama, Pannipitiya.

And 83 Others.

Defendant-Respondents

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

Counsel: Varuna Nanayakkara instructed by Suneetha M. Edirisinghe Nanayakkara for the Petitioner.

W.R. Jayawardena Herath for the 15(B) and 16(B) Defendant-Respondents.

P.B. Rajakarunaratne for the 62(B) and 82(B) Defendant-Respondents.

The other parties although noticed did not take part.

Argued on: On 30.04.2024 learned counsel moved court to dispose this matter on written submissions.

Written submission tendered on: by the Petitioner on 06.05.2024
by 15B & 16B Defendant-Respondents on 06.05.2024

Decided on: 10.05.2024

D. N. Samarakoon J.,

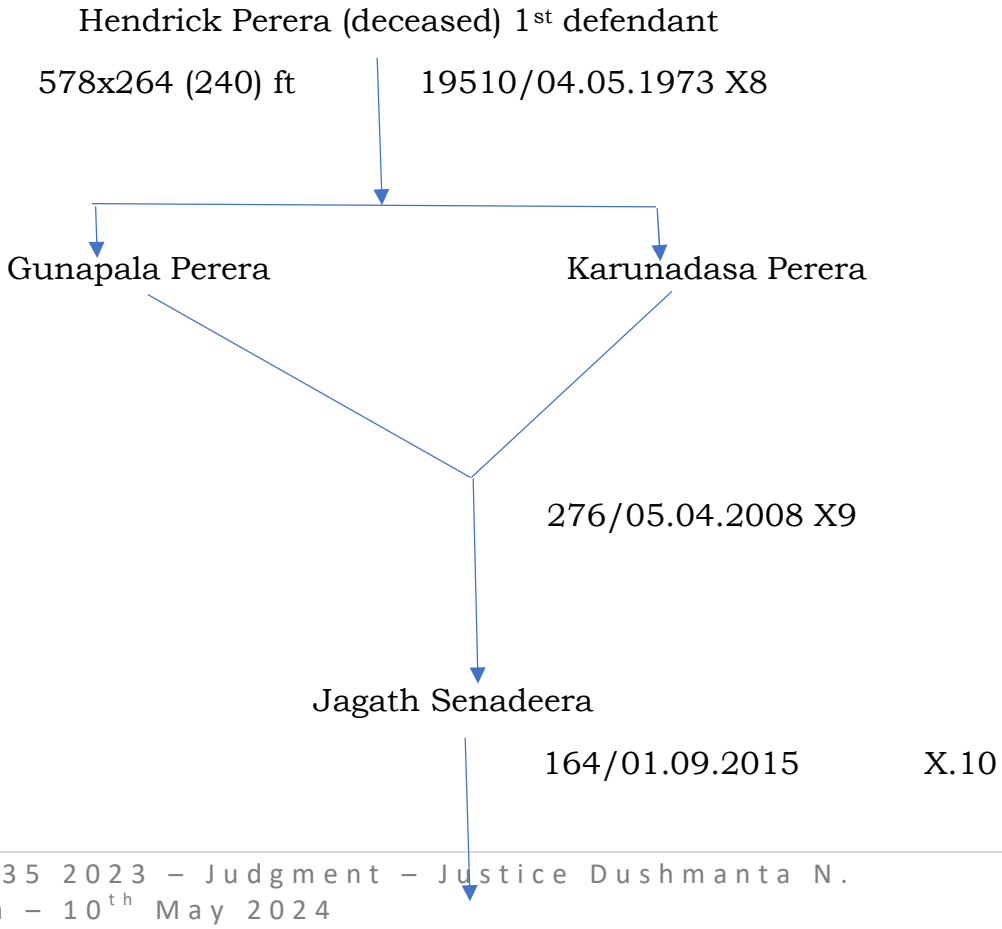
The case instituted on 10.09.1979 is nearly 45 years old.

Trial was held nearly 20 years later on 22.06.1999.

The District Court decided that,

(i) Corpus 11A.03R.36.85P. Plan X5 dated 15.07.1980/Bernard Joseph L.S.
(ii) Judgment 14.12.2006 X6
(iii) Interlocutory Decree 05.07.2017 X7

The petitioner claims rights through the 1st defendant.



Randil Waruna

1028/09.11.2015 X.11

Petitioner

The petitioner argues, that, her deed is not pending partition as the "original" deed in the above pedigree is dated 1973, prior to the institution.

The above is not correct.

Section 66 of Partition Law No. 21 of 1977 says, that,

"

Sale, lease or mortgage pendente lite is void.

66.

(1) After a partition action is duly registered as a lis pendens under the Registration of Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the enter of a decree of partition under section 36 or by the entry of a certificate of sale.

(2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (1) of this section shall be void:

Provided that any such voluntary alienation, lease or hypothecation shall, in the event of the partition action being dismissed, be deemed to be valid.

(3) Any assignment, after the institution of a partition action, of a lease or hypothecation effected prior to the registration of such partition action as a lis pendens shall not be affected by the provisions of subsections (1) and (2) of this section.

Hence deeds executed after the registration of the lispendence are invalid, unless the partition action is dismissed.

But the lispendence must be registered in the correct folio.

The petitioner says that the lispendence was not registered in the correct folio.

Then again, she says, the folio M 1234/147 was damaged. X.13

He deeds were registered in M 1042/43, M 3133/140 and B 268/92.

Her applications made to the District Court, Provincial High Court exercising civil appellate powers and to the Supreme Court were of no avail.

The written submissions of the 15B and 16B defendant respondents state, among other things, that, the decision in Somawathie vs. Madawala 1983 will not apply as Mr. [R. B.] Madawala was a co owner.

A co owner is a person who has some right on the land. The petitioner too says she has a right. The application of the prohibition in section 66 of Partition Law to her deeds after the registration of lispendence, is a question to be determined considering the evidence pertaining to the destruction of the folio in which the lispendence was registered.

For the provisions of section 66 to come into effect, there must be a duly and physically registered lispendence. If the folio was not in extant after the purported registration how can a buyer come to know about the pendency of the partition action?

This is a matter to be decided by the court without summarily dismissing the petitioner's application based on a single section of Partition Law, section 48 and its parts.

This Court noticed all the parties to the partition action. Their presence was personally recorded by this Court on 08.11.2023. The proceedings/journal entry of that day records each and every one who is present.

The court directed, in addition, to publish notices on each of the Gramasewaka divisions in which the land is situated, as it is a fairly large land; and also in the Divisional Secretariat and in the District Courts of Mt. Lavinia and Nugegoda. It was from the cases in the District Court of Mt. Lavinia, the

District Court of Nugegoda was created towards the end of the first decade in the present millennium.

Only the 15B and 16 B defendant respondents and 62(b) and 82(b) respondents have objected.

The petitioner going to the Civil Appellate High Court and the Supreme Court and those courts refusing her application is no bar for the exercise by this Court of its powers of restitutio in integrum and revision.

As it has been shown by this Court in several orders where preliminary objections of similar nature were raised, neither the Civil Appellate High Court, nor the Supreme Court, with respect, have the power to restore. The Civil Appellate High Court does have the power of revision, which, it had not exercised in the petitioner's application due to a misconception.

Mrs. Vivionne Gunawardena vs. Hector Perera, Officer in Charge, Police Station, Kollupitiya and others S.C. Application 20/1983 was an application filed in respect of an alleged violation of a fundamental right, where Mrs. Vivionne Gunawardena alleged, among other things, that she was unlawfully arrested by the OIC of Kollupiya Police Station. The IGP, the 02nd respondent filed an affidavit from one Vinayagam Ganeshananthem, Sub Inspector, to the effect that he and not the 01st respondent who arrested Mrs. Vivionne Gunawardena because she had no "permit" to go in a procession. Although Mrs. Vivionne Gunawardane countered this position, the Supreme Court consisting of a three Judge bench did not believe her, but believed the affidavit of Vinayagam Ganeshananthem and decided that the petitioner's fundamental rights have been violated as Vinayagam Ganeshananthem is "guilty" of unlawfully arresting her.

Vinayagam Ganeshananthem then petitioned to the Supreme Court requesting to set aside the said decision of the Supreme Court itself, as he was only a witness (on affidavit) and he was not informed before finding him "guilty" and

therefore the rule audi alteram partem is violated. This second case was decided by a Seven Judge bench of the Supreme Court, including the incumbent learned Chief Justice. The decision was divided 05 to 02 and the majority decided against Vinayagam Ganeshananthem.

The learned Chief Justice, N. D. M. Samarakoon, who wrote the leading judgment of the majority said,

> "He submits that this caption read with prayer (a) to the petition invokes a jurisdiction in revision which this Court does not have. One has to look at the legislation which created this Court to find an answer to this dispute. That legislation is to be found in the second Republican Constitution of 1978. **The Supreme Court which existed up to the time of the first Republican Constitution of 1972 and which continued to exist under that Constitution ceased to exist when the 1978 Constitution became operative.** (Vide Article 105 (2) of the Constitution). **Its place was taken by the Court of Appeal** (Vide Article 169 (2) of the 1978 Constitution). A new Supreme Court has been constituted which is the highest and final Superior Court of Record. (Article 118 of the Constitution)."

The relevant portion of Article 169(2) says,

> **"Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal."**

Ranasinghe J., despite being in the minority of the 07 Judge bench judgment referred to a case decided by Dias S.P.J. in 1950 which was on restitutio in integrum and said,

> "**The real basis upon which relief is given and the precise nature of the relief so given by the Supreme Court upon an application made to it for relief against an earlier Order made by the Supreme Court**

itself was very lucidly and very effectively expressed by Dias S.P.J. way back in the year 1951 in the case of Menchinahamy v. Muniweera, (40). In that case, about six weeks after an appeal to the Supreme Court from an interlocutory decree in the District Court was dismissed by the Supreme Court, an application was made to the Supreme Court, on 23.3.1949, " for revision or in the alternative for restitutio-in-integrum" by the heirs of a party defendant, who had died before the interlocutory decree was entered but whose heirs had not been substituted in his place before the interlocutory decree was so entered. It was contended on behalf of the respondents: that there was no merit in the application: **that if the relief sought is granted then the Supreme Court would in effect be sitting in judgment on a two-Judge decision of the Supreme Court which had passed the Seal of the Court that the Supreme Court cannot interfere with the orders of the Supreme Court itself.** In rejecting these objections, Dias S.P.J., placed this matter in its proper setting quite convincingly in the following words:

> "In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. **We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice** which makes it incumbent on this Court, despite technical objections to the contrary, to do justice."

So a seven judge Bench of the present Supreme Court, that came after 1978 had decided, that,

(i) It does not have the power of restitutio in integrum
(ii) Its power of revision is very rarely exercised
(iii) All references to the Supreme Court prior to 07th September 1978 are to the present Court of Appeal (Article 169(2)).
(iv) In Menchinahamy vs. Muniweera, 1951, Dias S. P.J., (one of the finest judges this country produced) exercised the power of restitutio in integrum to set aside the judgment of the Supreme Court itself

The jurisdiction under Article 138(1) of the Constitution:

The Constitution is the Grundnorm. In applying the law on the directions set by the Preamble to the Constitution, which not only refers to JUSTICE but also to the ingredients of Rule of Law, convenience must yield to justice. The words……..in the Preamble makes it impossible for a Court to do the vice versa, that is, to give in to convenience at the expense of justice. There are no fetters imposed on restitutio in integrum by Article 138(1) of the Constitution. That Article envisages,

(i) Subject to the provisions of the Constitution,

(ii) Subject to the provisions of any law

(iii) an appellate jurisdiction for the correction of all errors in fact or in law **and**

(iv) sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things

There is no question, with respect, of the interpretation of this provision here. There is no doubt whether it means A or B. There is no impediment in law in its direct application. This Article describes the jurisdiction of the Court of Appeal. Despite the "side note" in the very next Article, Article 139(1) saying "powers in appeal", the body of the article refers to the exercise of the jurisdiction of the Court of Appeal. Hence the exercise of the power of restitutio in integrum must also be done "according to law." As it was seen above the term "law" is defined in Article 170. There is no statute on restitutio in integrum. There is a direct affinity between "subject to…any law" in Article 138(1) and "according to law" in Article 139(1).Hence, restitutio in integrum must be applied under the Constitution in its purest form. That is the power of Royal Prerogative delegated by the Emperor to the Preator. Its nature and characteristics will be examined under the next section of this judgment.

The extension of restitutio in integrum to cover an illegality (i.e., ultra vires):

It is said, as follows in regard to the position in United States in respect of what is called restitutio **ad** integrum,

> "The Latin term "restitutio in integrum" translates to "restoration to original condition." It serves as one of the primary guiding principles in common law negligence claims. When a plaintiff successfully proves negligence, the principle implies that the amount of compensation awarded should restore the injured party to the position they would have been in if the tortious action had not occurred. This includes compensating for direct expenses (such as medical bills and property repairs), loss of future earnings due to the injury, and even the decrease in expected standard of living and pain and suffering" - Graham v. Egan, which is cited as 15 La. Ann. 97, 98 (1860).

This is the Louisiana State Law Institute Reports.

It is also said, that,

> "**In ancient Roman law, restitutio in integrum was a specific method of praetor intervention in an otherwise-valid legal action that was deemed especially unjust or harmful**. Interestingly, this concept also extends to European patent law, where it provides a means of redress for applicants or patentees who have missed a time limit despite exercising all due care. If the request for restitutio in integrum is accepted, the applicant or patentee is re-established in their rights as if the time limit had been duly met."

In regard to its scope, it has been said, that,

> "In classical Roman law, "restitutio in integrum" could be granted on various grounds, including "metus" (fear), where the praetor and iudex (judge) worked together to order restitution. **It was a powerful tool in**

the hands of the praetors to ensure fairness and justice in the legal system of ancient Rome[1]."

Kupisch's work in 1974, especially on pages 105–107, challenged existing views on this remedy. His insights shed light on how the praetor and iudex functioned when ordering restitutio[2].

In summary, Berthold Kupisch's scholarship significantly enriched our understanding of in integrum restitutio within the framework of Classical Roman Law. His contributions continue to shape legal discourse in this field.

In the article "**Two unusual appellate remedies: revision and restitutio in integrum in the law of Sri Lanka**" **Jerold Taitz[3]** Senior Lecturer Faculty of Law University of Cape Town and Attorney of the Supreme Court of South Africa says that

"**Restitutio in Integrum originated in Roman law <u>through the imperium</u>** (supreme judicial powers) <u>delegated to the praetors after the expulsion of the kings</u>. **It has been described as the judicial termination of the inequitable situation**<u>(created by the law per se)</u> and the restoration of the status quo…"

"**Restitutio in Integrum was used as a form of appeal against a valid judgment or magisterial order made in terms of the law and which caused inequitable loss or injury to a party**. <u>Cicero refers to the rescission of a number of judgments originally granted by Verres as governor of Sicily</u>. **The judgments were rescinded by his successor Metullus on account of their having been founded initially on incorrect premises of law**. A further ground was that no proper trial had taken place as the court had

[1]Hommage à Berthold Kupisch, In Integrum Restitutio under Classical Roman Law, Particularly on the Ground of Metus, and Berthold Kupisch, Jeroen Chorus * Université de Leiden, https://www.academia.edu/42303353/In_integrum_restitutio_under_classical_Roman_law_particularly_on_the_ground_of_metus_and_Berthold_Kupisch

[2]https://www.academia.edu/42303353/In_integrum_restitutio_under_classical_Roman_law_particularly_on_the_ground_of_metus_and_Berthold_Kupisch

[3]https://journals.co.za/doi/pdf/10.10520/AJA00104051_856

not been properly constituted. The following example of restitutio in integrum being used as an appellate remedy is given by Engelsman. **The praetor set aside a decision on account of an error in the formula. It would appear that although the formula was framed correctly in terms of the contentions of the parties it contained an error which could have led only to a wrong decision**. [*This is a question of jurisdiction or a jurisdictional question, a wrong answer for which affects the jurisdiction of the Tribunal*] An aggrieved party had locus standi and could apply directly to the praetor for relief. The intercession of an official was unnecessary in regard to restitutio in integrum. The remedy was wide and could be invoked in a number of situations. For example it could be granted to creditors who suffered loss resulting from the debtor undergoing capitis diminutio minima. This form of legal disability extinguished all the contractual debts of the affected party. By virtue of the remedy the praetor restored the rights of action to creditors. **The power to grant restitutio in integrum was also held by the emperor**. **He used the remedy inter alia to set aside administrative decisions**[*This is administrative justice*]**eg. To pardon Roman citizens who had been deported (deportio in insulam)**. As a result of the pardon the citizen was restored to his **patria potestas** and was said to be **restitutus in integrum.**" [The parts within [ ] Square brackets added in this judgment]

Therefore at the commencement too it was never a remedy available only in regard to civil disputes. It is a basic remedy that covers the public as well as the private law including criminal law. It is "**the judicial termination of the inequitable situation (created by the law per se)**." **Inequitable situations created by law are not limited to civil law.**

In Perumpuli Arachchige Sajith DilhanAlutwatte vs. Perumpuli Arachchige BandutissaHenegamagedara C. A. 40/2009 dated 27.03.2009 His Lordship Justice Chithrasiri opined that the whole of restitutio in integrum could be

included in revision. In C. A. RI 15 2018 02.11.2018 Justice M. A. Samayawardhena said,

> "I must state that there is no magic in the word restitution, as the relief, in my view, can also be sought in a revision application. Although, in law, revision and restitutio in integrum are two different applications, in practice, they go hand in hand, and, almost all the time, are sought in combination[4]."

Hence the statement that all restitutio in integrum is included in revision could be, with respect, a mostly correct statement as far as empirical[5] observation is concerned. But the "magic" in those words, so to speak, with respect, lies in the jurisprudential origin of this remedy for it is "**the judicial termination of the inequitable situation created by the law per se."**

Hence the preliminary objections cannot be sustained. They are overruled.

The objecting respondents refer to Odiris Appuhamy vs. Caroline Nona 66 NLR 241.

This case is as interesting as **Mrs. Vivionne Gunawardena's case.**

Basnayake, C.J., with Abeyesundere, J., held, that,

"**Held** (SRI SKANDA RAJAH, J., dissenting): Once interlocutory decree has been. passed in a partition action instituted under the Partition Act, a new party is not entitled, by invoking the provisions of section 48 (3) of the Act, to intervene and have the interlocutory decree set aside by the Court of first instance on the ground that the lis pendens has not been duly registered".

Sri Skanda Rajah J., dissented and said,

> "SRI SKANDA RAJAH, J**.-** **[Beginning of the Quotation]**
>
> **If I begin by remarking that this appeal was argued by this Court, with occasional assistance from the learned Counsel who appeared for the parties[6], I will only be following, with**

[4] In this application the petitioner John Peter Gamini Codippili has sought only restitutio in integrum.
[5] based on, concerned with, or verifiable by observation or experience rather than theory or pure logic
[6] This phrase was often used by one of my esteemed colleagues at law college, which was reminded to me due to certain instances I had to observe relating to absence of judicial temperament which is not a reflection of an open

respectful agreement, two learned and experiencedJudges, eminent in their countries, though their observations are " not binding " on this Court.

In Elliot v. Duchess Mill [(1927) 1 K. B. 182], which came up before the Court of Appeal consisting of Lord Hanworth, M.R., Scrutton, L.J., and Romer, J., at 201, Scrutton, L.J., commenced his judgment, " The Court, with occasional assistance from counsel, took more than a day in discussing this case . . . . ."

In The Federal Commissioner of Taxation v. Hoffnung & Co., Ltd., (1928) 4 C. L. R. 39, which came up before the Full Court consisting of Isaacs, Higgins and Starke, JJ., at 62, Starke, J., commenced his judgment, " This is an appeal from the Chief Justice, which was argued by this Court over nine days, with some occasional assistance from the learned and experienced Counsel who appeared for the parties. The evidence was taken and the matter argued before the Chief Justice in two days. This case involved two questions, of no transcendent importance, which are capable of brief statement, and could have been exhaustively argued by learned counsel in a few hours[7]. "

This is a partition action filed on 21.5.1958, i.e., after the new Partition Act 16 of 1951 came into operation. Interlocutory decree was entered on 25.3.1960. On 15.3.1961 one Caroline Nona (Respondent to this appeal), who was not a party to this action, filed petition and affidavit alleging, inter alia, that this action, had not been duly registered as a lis pendens, in that it was not registered in the correct folio, and prayed that the interlocutory decree be set aside. After inquiry the learned Additional District Judge made

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mind at least partly could be cultivated in a man with proper judicial training. I am glad, that, I have finally come across with that phrase itself.

[7] It appears, that, Justice Sri Skandha Rajah says this avoiding the commission of a breach of discipline.

order on 17.4.1963 setting aside the interlocutory decree on the ground stated above. This appeal is from that order.

It seems appropriate to reproduce certain provisions of the Partition Act:

Section 3 (1)-Every partition action shall be instituted by presenting a written plaint to the court, . . .

Section 6 (1)-The plaintiff in a partition action shall file or cause to be filed in court with the plaint-

(a) .... an application (in duplicate vide sub-section(2)) for the registration of the action as a lis pendens addressed to the Registrar of Lands . . .

Section 7-Where the plaintiff in a partition action fails to comply with the requirements of .... section 6, the court may-

(a) return the plaint so that the plaintiff may, ... comply with those requirements, or

(b) reject the plaint . . .

Section 8-Where the plaint in a partition action is accepted, the court shall forthwith-

(a) cause to be inserted in each copy of the application for the registration of the action as a lis pendens a reference to the number assigned by the Court to the action, and transmit the application in duplicate to the Registrar of Lands of each land registry in which the action is to be registered as a lispendens ;

Section 11-A Registrar of Lands to whom an application for the registration of a partition action as a lis pendens has been transmitted

by a court under section 8 shall, upon registration of the action as a lis pendens, return to the court the duplicate of the application duly endorsed in the manner prescribed by the Registration of Documents Ordinance. . . .

Section 12 (1)-After a partition action is registered as a lis pendens . . . (proctor to file declaration).

Section 13 (1)-**Where the court is satisfied that a partition action has been registered as a lis pendens** . . . the court shall order that . . . summonses .... shall be issued ....

Section 26-(deals with the entering of interlocutory decree).

Section 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, or 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.

(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.

Section 70 (1)-The court may at any time before interlocutory decree is entered in a partition action add as a party to the action, on such terms as to payment or prepayment of costs as the court may order-

(a) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or

(b) any person who, claiming an interest in the land applies to be added as a party to the action.

(2) Where a person is a party to a partition action and his right, title and interest to or in the land to which the partition action relates are sold, during the pendency of the partition action, in execution of, or under, any decree, order or process of any court, the purchaser of such right, title and interest at the sale shall be entitled to be substituted for that person as a party to the partition action, and such purchaser, when so substituted, shall be bound by the proceedings in the partition action up to the time of the substitution.

From the provisions reproduced above the following emerge :-

(1) Where a plaint in a partition action is filed it may be either accepted or rejected by the Court.

(2) If the Court accepts the plaint a number should be assigned to it. From that moment it would be pending.

(3) Thereafter steps should be taken to register the action as a lis pendens.

(4) Summons can issue only after the lis pendens is registered. To put it another way, registration of lis pendens is a condition precedent to the issue of summons.

(5) Before interlocutory decree the court may add parties.

(6) In section 48 (3) want of due registration of the lis pendens is equated with such a fundamental matter as want of jurisdiction of the court in the sense of the power to act at all.

It is elementary that every act of a court which lacks jurisdiction in the sense that it has no power to act at all is void and not merely voidable.

Anyone who has even a passing acquaintance with the procedure in the original courts would know that if, after the issue of summons, it is discovered that the lis pendens has not been duly registered, i.e., not registered in the correct folio, then the court orders that the lis pendens be duly registered, i.e., in the correct folio. After that order is carried out fresh summons is issued. This is done in the exercise of the Court's inherent powers, though there is no special provision in the Partition Act requiring this procedure to be adopted. In Wijeyesinghe v. Uluwita1[1 (1933) 34 N. L. R. 362 at 364.] Macdonell, C.J., said, " . . . .1 cannot help thinking that a District Court has the power to recall process which it has issued improvidently, that is to say, on information which is or which is alleged to be insufficient and misleading. It seems clear from section 839 that a District Courthas inherent powers, and the various authorities cited to us in argument support this view. It would indeed be extraordinary if such court has not the power of vacating an order which

had been obtained from it on insufficient or inaccurate information and there is abundant authority that it has that power."

The reason for doing so is that want of due registration of lis pendens has the same effect as failure to register the lis pendens at all and renders the issue of summons and all further proceedings null and void. Even an interlocutory decree entered under such circumstances would be null and void.

If all the proceedings from and after the registration of lis pendens are null and void, the resulting position would be that the action is still pending, and any person who has not been made a party will have the right to intervene and to be added as party.

In an unreported case, S.C. 74-B.C. (Inty.) Colombo 8115 P : S. C. Minutes of 3.2.1961, Sansoni, J., with whom Tambiah, J., agreed, said, " The learned District Judge has found that lis pendens was not duly registered. In view of that finding, it appears to us that summons should not have been ordered to issue on the defendants, since the correct registration of the lis pendens was a necessary step to have been taken by the plaintiff before such an order was made. We therefore set aside the interlocutory decree entered in this case and all proceedings taken at the trial. The case will go back in order that the plaintiff might register the lis pendens correctly. Thereafter, summons may be issued on the defendants, and the intervenient will also have an opportunity of putting forward his claim. A fresh commission to survey the land must also be issued. As all proceedings that have taken place since the filing of the plaint are bad, proceedings must commence de now."

In Noris v. Charles1 [1 (1961) 63 N. L. R. 501.] Sinnetamby, J., with whom H. N. G. Fernando, J., agreed, held that it is not open to a new party to intervene to have a decree set aside on the ground that lis pendens was not registered in the correct folio. The learned Judge took

the view that to permit this would be to unduly prolong partition actions and thereby defeat the purpose of the new Partition Act.

Section 48 (3) restricts the grounds depriving an interlocutory decree of its "final and conclusive" character to : (1) want of jurisdiction in the court; and (2) want of due registration of lis pendens. The determination of one or the other or both these will not take an unduly long time. There was no such restriction under the old Partition Ordinance. Therefore, it was that repeated interventions were possible and partition actions took many years. But, once these matters are decided, there can be no further interventions.

It behoves the court which enters a " final and conclusive " decree, to satisfy itself that it had jurisdiction and/or the lis pendens wasduly registered when such a matter is brought to its notice, regardless of the source of information being an outsider and the stage at which it is made aware. This power is inherent.

In considering the effect of section 48 (3), Sinnetamby, J., said at 503, " In the case of persons who are not parties to the action, however, sub-section 3 provides, inter alia, that the fact that the lis pendens had not been properly registered would deprive the decree of its final and conclusive effect." With respect I would agree. But with respect I am unable to agree with the learned judge's further statement, " This does not mean that he is entitled to intervene and have the interlocutory decree set aside." Why should a person wait till action is taken on the decree which in reality is no decree at all ? Why cannot he go to the court and intimate to it one or both these grounds ?In order to do so and to prove his allegation he will have to be permitted to intervene.

Section 48 (3) is concerned with a person who was not a party to the partition action. It only places the burden on a person who was not a party to the partition action to prove want of jurisdiction in the court or

want of due registration of the lispendens, as the case may be. It does not lay down the procedure he should adopt for doing so. It does not say that he should wait till " steps are taken against him under the partition decree " ; nor does it say that he should wait till " his proprietory rights are in any way challenged in other proceedings ", as stated by Sinnetamby, J., at 504 in Noris v. Charles (supra).

The observation of the learned judge that the question whether the lis pendens was duly registered will arise only if steps are taken against him under the partition decree carries with it the implication that, if steps are taken under the partition decree, e.g., to be placed in possession, he will be entitled to show in the partition action itself, that there was want of due registration. If he can do so at that stage, why should he not be permitted to do so without waiting till then ?

Section 70 is a permissive or enabling provision regarding addition of parties before interlocutory decree is entered. It is not exhaustive. It should not be construed as prohibiting the addition of parties altogether after interlocutory decree regardless of its validity. In the absence of express provision prohibiting the addition of parties after interlocutory decree the Court will have to act on the principle that the non-observance of an essential step such as due registration of lis pendens renders the proceedings void and puts back the partition action to the stage of the acceptance of the plaint by the court.

Due registration of lis pendens, like due service of summons on a party, is an essential step. Failure to comply with either would not come within the term "omission or defect of procedure" in section 48 (1).These words should be confined to omissions or defects of much more venial character as pointed out by Sansoni, J., in Siriwardene v. Jaya Sumana 1.[1 (1958) 59 N. L. R. 400]

This view derives support from the judgment of T. S. Fernando, J., with whom Abeyesundere, J., agreed in Victor Perera v. Don Jinadasa1,[1 (1962) 65 N. L. R. 451.] which I discovered after judgment was reserved and to which I have drawn the attention of My Lord the Chief Justice and brother Abeyesundere. The caption reads thus :-

In partition suit No. 7059 R, who was added as a party, did not take any action herself in respect of the suit and did not participate at the trial. After interlocutory decree was entered she attempted to intervene in the suit in order to obtain either a dismissal of the suit or an exclusion of lots 1 and 2 in the corpus. Her attempt proved unsuccessful. Thereafter she transferred her rights in lots 1 and 2 to V.P. Belying upon this deed of transfer, V.P. instituted the present action No. 8576 claiming a declaration of title to lots 1 and 2, citing as defendants all the persons who had been allotted shares in the interlocutory decree which dealt with lots 1, 2 and 3 as one corpus. He claimed that, inasmuch as the partition action had not been duly registered as a lis pendens, his right to a declaration of his title was unaffected by the interlocutory decree.

Held, that under section 48 (3) of the Partition Act the trial judge was obliged to address his mind to the question of due registration of the partition action as a lis pendens.

R. was already a party to the partition action 7059 when interlocutory decree was entered. Therefore, if that was a valid decree or the court had jurisdiction to enter it, not only R. but also her successor in title V.P. would be bound by it and by the final decree. I have examined the record in 8576, the issues, the learned District Judge's answers to them and the petition of appeal and find that, inter alia, the following points were before this Court for decision in appeal:

If lis pendens was not duly registered :-

(a) V.P., the appellant who derived title from R., would not be bound by the interlocutory decree in 7059 in spite of section 48.

(b) The interlocutory decree could not operate as res judicata because the court had no jurisdiction to enter it.

The question of due registration of lis pendens, to which this Court directed the District Judge to address his mind, would arise only if R. and, therefore, her successor in title V.P. were not bound by the interlocutory decree. This judgment can be explained only on the footing that if the lis pendens is not duly registered both the interlocutory and final decrees do not have the " final and conclusive " effect sought to be conferred on them by section 48 (1) and (2) even as regards parties to the partition action. That would seem to be because due registration i& an essential step and not an " omission or defect of procedure ".

The learned Additional District Judge was right in permitting the respondent to intervene. All proceedings since the acceptance of the plaint are bad. Therefore, proceedings should commence de novo. I would dismiss the appeal with costs."**[End of Quotation[8]]**

It is true that by majority decision, the appeal was allowed in that case.

In a literal, realistic and dramatic sense of "what goes around comes around," the 15B and 16B defendant respondents cite Nonnohamy vs. Odiris Appu 68 NLR 385. Here Sri Skandha Raja J., disagrees with yet another illustrious Chief

[8] From page 13 to 23 I have quoted the entire dissenting judgment of Sri Skandha Rajah J. For those who decry that it is too long what I have to say is (i) that since every passage of it was necessary to convey the logic and reason contained and if summarized or paraphrased it would not convey the same meaning and (ii) that judgment escaped attention of generations thereafter due to the label "dissenting". The majority, with respect, is not always right and it is for the posterity to assess the truth of the opinion of the minority. In C. A. RII 46 2023 dated 15.02.2024 I have argued that both stare decisis and cursus curiae are matters of practice (conclusion of the reasoning at page 64 of that judgment). The importance of dissenting opinion in shaping up the legal landscape of a country and in that case in respect of one of the richest and most influential, United States of America, is depicted in Melvin I. Urofsky's "Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue," Pantheon books 2015, which is also available at the book shop in the Supreme Court in Washington D. C.

Justice, Sansoni. Melanie Claude Sansoni had been the District Judge of Tangalla; and incidentally, this partition action, that his lordship decided, was also from the District Court of Tangalla.

Chief Justice Sansoni said,

> "After final decree was entered in this partition action, the appellant petitioned the District Court to set it aside on the grounds (1) that the lispendens had not been duly registered, and (2) that the plaintiff's proctor had not included the appellant's name in the declaration filed under section 12 (1) of the Partition Act.
>
> The District Judge dismissed the application for reasons the soundness of which it is not necessary to examine.
>
> We are of the view that the application to set aside the decree and to be allowed to intervene could not possibly succeed, because no intervention can be allowed after interlocutory decree has been entered.
>
> Mr. Wijeyaratne argued that (1) the failure to register the action correctly as a lis pendens and (2) the breach of section 12 (1) by the plaintiff's proctor rendered the decree invalid, and entitled the appellant to have it set aside.
>
> For the reasons we have given in S. C. No. 414/62 (F)-D. C. Point Pedro 6611/P [[(1965) 68 N. L. R. 145.]] decided today, we are unable to accept these submissions".

Justices T. S. Fernando and Abeyesundere agreed.

Sri Skandha Raja J., said,

> "After careful consideration of the arguments submitted to us from the Bar and the judgment of My Lord the Chief Justice I am confirmed in theview to which I ventured to give expression in the dissenting judgment

in the Divisional Bench case of Odiris Appuhamy v. Caroline Nona [1 (1964) 66 N. L. R. 241 at 244.]. The appeal should be allowed with costs."

G. P. A. Silva J., said, **[Beginning of the Quotation]**

"I agree that the appeal should be dismissed. In the case S. C. 414/1962 (F)-D. C. Point Pedro-6611/P [2 (1965) 68 N.L.R. 145,] I have disagreed with the decision of my Lord The Chief Justice and my brother Judges who have concurred on the question whether a person can intervene after the interlocutory decree has been entered and would have expressed my disagreement in this appeal as well, if the only ground of appeal was based on the question of law whether a person can intervene after the interlocutory and the final decree.

In the instant case, however, the learned District Judge has, after inquiry, held that the folio in which the lis pendens has been registered was a continuation from another folio which too was a continuation from another folio, according to the extracts of encumbrances produced in the case. He accordingly concluded that there was no material to show any irregularity in the registration of the lis pendens. In view of this conclusion he held, correctly, in my view, that the appellant was not a party to whom section 48 (3) would apply. In the circumstances, I do not see sufficient reason to interfere with the decision of the learned District Judge."**[End of Quotation]**

The Partition Act applicable in these cases was Act No. 16 of 1951. Its section 48(3) read as,

"The interlocutory decree or the final decree of partition enteredin a partition action shall not have the final and conclusive effectgiven to it by subsection (1) of this section as against a personwho, not having been a party to the partition action, claims anysuch right, title or interest to or in the land or any portion of theland to which the decree relates as is not

directly or remotelyderived 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**".

The corresponding provision of the present Partition Law No. 21 of 1977 is section 48(5). It does not mention of the registration of the lispendence. In fact present section 48 nowhere refers to a lispendence.

It is pertinent, at this stage, to refer to the other case, the learned Chief Justice and Justice G. P. A. de Silva referred to, [[(1965) 68 N. L. R. 145.]] It has also been decided on the same day as Nonnohamy vs. Odiris Appu, 07th December 1965.

That case is, **R. RASAH and others, Appellants, and M. THAMBIPILLAI, Respondent**, decided by the same five Judge bench who decided Nonnohamy's case.

Sansoni C. J., said, **[Beginning of the Quotation]**

"The question arising on this appeal is the effect, on an interlocutory decree entered in a partition action, of the failure to register the action duly as a lis pendens under the Registration of Documents Ordinance. The appellants petitioned the District Court to quash all the proceedings on this ground, but the District Judge held that once interlocutory decree had been entered no such relief would be given to them and dismissed their application.

In two cases decided recently it was held that even if the lis pendens had not been duly registered, the interlocutory decree entered under section 26 and the final decree entered under section 36 cannot be set aside. The cases are-Noris v. Charles [1 (1961) G3 N. L. R. 501.] and Odiris Appuhamyv. Caroline Nona [2 (7964) 66 N. L. R. 241.]. According to

these decisions there can be no intervention by a stranger to the action who pleads such a defect in the registration. The former decision does not refer to section 70 of the Partition Act, Cap. 69, but the latter does.

Section 70 (1) provides that the Court may at any time before interlocutory decree is entered add as a party to the action-

(a) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or

(b) any person who, claiming an interest in the land, applies to be added as a party to the action.

The effect of this provision is that no intervention can be permitted at any stage after interlocutory decree has been entered." **[End of the Quotation]**

His lordship the Chief Justice, then referred to the argument of C. Ranganathan, Q.C., who appeared for the appellant. **[Beginning of the Quotation]**

"**The argument for the appellants is that the interlocutory decree does not exist so far as they are concerned, and therefore section 70 does not apply**. The reasoning on which this argument is based is that where the action has not been duly registered as a lis pendens, the appellants are entitled under section 48 (3) to say that there is no valid interlocutory decree.

To consider this argument one must have regard to the whole of section 48. Section 48 (1) reads :-

" Save as provided in sub-section (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, or 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."

I omit the definition of " encumbrance " which follows, as it has no bearing on the matter under consideration.

Sub-section (3) provides that neither the interlocutory decree nor the final decree shall have the final and conclusive effect given to it by sub-section (1) "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 ".

Sub-section (2) is not relevant to the question at issue and I need not consider it.

The terms of the relevant sub-sections show that whether a decree has been entered in a court of competent jurisdiction or not, and whether the action has been duly registered as a lis pendens or not, the onlyeffect of any omission or defect in these respect is to deprive the decree of its final and conclusive effect as against a stranger to the action claiming an

interest independently of the decree. He is not bound by it and is free to attack it as being incorrect where it defines the rights of the parties.

There is nothing in section 48 or any other section of the Act to support the argument that a decree which has either of the two flaws mentioned in section 48 (3) is invalid. On the contrary, the provision in section 48 (1) that " the decree shall be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him ", is deliberately left unaffected. The decree is still to be treated as being in force, and effective, though it is not final and conclusive against the particular persons just mentioned". **[End of Quotation]**

The judgment of the learned Chief Justice then comes to the question of the non registration of the lispendence. **[Beginning of the Quotation]**

"Mr. Ranganathan then sought to equate the wrong registration of a Lis pendens with the non-service of summons on a party to the action, by arguing that each constitutes a failure to take an essential step in procedure. Even if it be conceded that the correct registration of a lis pendens is an essential step in procedure which the Proctor for the plaintiff, and perhaps also the Proctors for the defendants, should seek to ensure, a wrong registration is still nothing more than an omission or defect of procedure such as section 48 (3) specially provides for. It is in no way to be compared with the non-service of summons on a party, for that has always been recognised as offending the first principle of justice, which requires that a party is entitled to be summoned and to be heard.

It is impossible to overlook, in this connection, the repeal of section 12 of the Registration of Documents Ordinance, Cap. 101, by the Partition Act. Section 12 had laid down that " a precept or order for the service of summons in a partition action shall not be issued unless and until the action has been duly registered as a lis pendens, "

We have now the much less stringent provision in section 13 (1) of the Partition Act that " where the court is satisfied that a partition action has been registered as a Rs pendens under the Registration of Documents Ordinance " it shall order that summonses, etc., shall be issued to the Fiscal. The Legislature cannot have overlooked the wording of the earlier provision, or inadvertently failed to provide for due registration if that was intended. Furthermore, the Partition Act itself shows that when due registration is necessary it says so in express terms. For sections 51 and 67 speak of due registration, and the omission of that requirement in section 13 (1) is significant.

Finally, Mr. Ranganathan who laid stress on the word " under" argued that an interlocutory decree entered under section 26 and final decree entered under section 36 can only mean decrees which ate regular in the sense that they have been entered after all the requirements of the Act have been obeyed, and that they are valid not merely in form but in substance. This argument cannot be sustained in view of the very terms of section 48 (1) which contemplate decrees entered despiteomissions or defects of procedure, or inadequate proof of title, or non joinder of parties who had an interest in the land. For the same reason I would hold that registration of an action as a lis pendens under the Registration of Documents Ordinance (as required by section 13 (1)) does not mean registration in accordance with all the provisions of that Ordinance, since due registration is not required by section 13 (1).

Before I conclude I ought to say that my judgment dated 3rd February 1961 in S. C. 74-D. C. (Inty.) Colombo 8116/P, which was not followed in the two later judgments which I have cited, must be treated as wrong and is now overruled.

I would dismiss this appeal with costs."**[End of Quotation]**

T. S. FERNANDO, J. and ABEYESUNDERE, J.agreed.

Sri Skandha Raja J., said,

> "After careful consideration of the arguments submitted to us from the Bar and the judgment of My Lord the Chief Justice I am confirmed in the view to which I ventured to give expression in the dissenting judgment in the Divisional Bench case of Odiris Appuhamy v. Caroline Nona [1 (1964) GS N. L. R. 241 at 244.]
>
> The appeal should be allowed with costs[9]."

G. P. A. Silva J., dissenting, said, among other things, that,

> "The entire question at issue revolves round sections 48 and 70 of the Partition Act. Sub-section (1) of section 48 sets out in strong terminology the finality attaching to an interlocutory and final decree in a partition case filed under this Act, subject to the exception contained in sub-section (3). Sub-section (2) seeks to fortify this finality by expressly removing the exceptional circumstances in section 44 of the Evidence Ordinance which would ordinarily affect the finality of any other judgment. Sub-section (3), which is in the following terms sets out the exceptional case referred to in sub-section (1) :-...."

Here his lordship reproduced section 48(3) of Act No. 16 of 1951.

Thereafter, his lordship analysed that section as follows,

> "On an analysis of this sub-section the conditions which would prevent an interlocutory decree from having that final and conclusive effect are :-
>
> (i) the person to be affected should not have been a party to the partition action,

[9] This is the passage ipsisimaverba Justice Sri Skandha Rajah incorporated in the judgment of Nonnohamy vs. Odiris Appu at page 385 of 68 NLR which incidentally was given on the same day. This episode that took place on 07th December 1965, 58 years ago is interesting. Unfortunately, "The Law Net" does not have both these judgments. But Law Lanka have them.

(ii) he should claim 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, and

(iii) **he should prove 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**."

G. P. A. Silva J., further said, **[Beginning of the Quotation]**

"There being no dispute as to the existence of any of these conditions in the instant case, I shall proceed to examine the question on the basis that the appellant in this case fulfilled these conditions and was, therefore, qualified to be a person to whom the final and conclusive effect of the interlocutory decree did not attach. If one pauses to consider what the resulting position will be, one will see that the law intended that such a person should not be adversely affected. The only reasonable way hi which his right, title or interest to or in the land can be preserved will, in my view, be by permitting him to intervene. If any other view is taken such as that the party aggrieved should be entitled to assert his rights as against a holder of a decree in any steps which are sought to be taken, under it, it can lead to results which are far from reasonable. In Noris v. Charles[1 (1961) 63 N. L. R. 501 at 503.], Sinnetamby, J. stated in the course of his judgment at page 503 as follows :-

> " A person who was not a party to the partition action is not bound by the interlocutory decree if the lis pendens had not been properly registered. This does not mean that he is entitled to intervene and to have the interlocutory decree set aside. His position would be much the same as a person who is not a party to a vindicatory action. He is unaffected by the decree and is entitled to assert his rights as against the holder of the decree in any steps which are

sought to be taken under it. He is in exactly the same position as a claimant to an interest in the land which had been partitioned under the repealed Ordinance, where the final decree had not been entered ' as hereinbefore provided'. "

Earlier in this judgment, Sinnetamby, J. expressed the view that the Partition Act of 1951 sought to put an end to the considerable delay occasioned by such interventions. While this was a very correct observation, if I may say so with respect, it seems to me that the main decision he took in the appeal was to some extent influenced by this consideration. One has to be careful not to overstress the importance of expedition in the disposal of a partition case to the extent of overlooking the paramount consideration underlying such a case, namely, to put an end to the various problems arising from common possession and to give an unimpeachable title to the co-owners. It is because of the strictly binding nature of a partition decree once it has been entered that the law has taken great care to impose certain safeguards by way of obligations on the parties, on the proctor, and even on the court before the stage of the interlocutory decree so that any party who has a claim of title, etc., shall be before court and that his case shall not go by default. A necessary corollary to this consideration is that the sanctity attaching to an interlocutory decree can only prevail when all the necessary parties are before court. The finality given to such a decree in section 48 (1) is also based on the broad assumption that all the parties have been represented, despite the notwithstanding clause which gives finality in spite of certain omissions. The notwithstanding clause does not, in my opinion, give a licence to omit certain essential steps. Whatever that may be, sub-section (3) definitely creates an exception to the notwithstanding clause or, to put it in another way, it expressly provides for two instances in which finality does not attach to an interlocutory or final decree. **The instance with which we are**

concerned in this case is where a person, not having been a party to the action, claims a share in the land through a title not directly or remotely derived from the decree and is able to prove that the lispendens was not properly registered." **[End of Quotation]**

At this stage, it is pertinent to consider the other case in the series which was not examined up to now, Noris v. Charles[1 (1961) 63 N. L. R. 501 at 503.] This is one of the cases Sansoni C. J., purported to follow in the majority judgment.

In S. D. NORIS, Appellant, and P. M. G. CHARLES and others, (1961) 63 NLR 501, which was a decision of two judges of the Supreme Court, where the judgment was written by Sinnetamby J., (with the concurrence of H. N. G. Fernando J., (later Chief Justice)) the court said, **[Beginning of the Quotation]**

"Under the old Partition Ordinance, interventions were generally never allowed after final decree was entered. The final and conclusive effect given by Section 9 of the old Ordinance related to the decree that was entered under Section6 in the case of an order for partition and under Section 4 in the case of an order for sale. Once there was a confirmation of the partition proposed by the Commissioner and final judgment entered under Section 6, interventions were not permitted. A decree duly entered under Section 6 would be final and conclusive against all parties if in terms of Section 9 it was entered " as hereinbefore provided ". If the steps taken prior to the entering of the decree under Section 6 were not " as hereinbefore provided ", it did not give a party affected by the decree, who was not a party to the action, the right to have the decree set aside. It only gave such a party the right to dispute the conclusive effect of that decree and to maintain that it was not binding on him. That was the effect of the cases decided under the provisions of the old Partition Ordinance. It was always open to a party after the interlocutory decree had been entered and before final decree to intervene in proceedings under the old Ordinance and trials had in consequence to be adjourned

from time to time as a result of successive interventions made sometimes at the instance of an unsuccessful party. This followed as a necessary consequence from the decisions of our Courts which refused to give to the interlocutory decree entered under Section 4 the final and conclusive effect contemplated by Section 9. It seems to me that the Partition Act of 1951 sought to put an end to the considerable delay occasioned by such interventions. Section 48 of the new Act expressly provided that the interlocutory decree entered under Section26 which I corresponds with the interlocutory decree under Section 4 of the repealedOrdinance shall have a final and conclusive effect. No intervention thereafter would ordinarily be permitted and Section 48 further provided that both the interlocutory decree entered under Section 26 and the final decree entered under Section 36 shall "be good and sufficient evidence of 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"; and it further went on to provide that this would be so "notwithstanding any omission or defect of procedure or in the proof oftitle adduced before the court or the fact that all persons concerned arenot parties to the partition action ". This conclusive effect was subject 'to the provisions of sub-section 3 to which I shall refer later.

It seems to me that by expressly denying the right of intervention on the ground of "omission or defect of procedure or in the proof of title or the fact that all the persons concerned are not parties to the partition action", the new Act sought to negative the effect of any failure to conform to the earlier essential steps contemplated by the words "as hereinbefore provided" in Section 9 of the Partition Ordinance, as interpreted by judicial decisions. The object of the legislature no doubt was to enable partition actions to be brought to a speedy conclusion. **Under the old Ordinance, it was not uncommon for actions to be pending for lengthy periods of time extending in some cases to as**

much as 25 to 30 years and even more. Once the interlocutory decree was made final and conclusive no intervention should ordinarily be permitted thereafter, and a partition action would consequently be brought to a much speedier conclusion.. The legislature at the same time realised that persons may be adversely affected by the conclusive effect given to both the interlocutory and the final decree and by Section 49 re-enacted the provisions of the proviso to Section 9 of the earlier Ordinance which gave such persons the right to bring an action for damages. In the case of persons who are not parties to the action, however, sub-section 3 provides, inter alia, that the fact that the lis pendens had not been properly registered would deprive the decree of its final and conclusive effect. That is all that sub-Section 3 provides. A person who was not a party to the partition action is not bound by the interlocutory decree if lis pendens had not been properly registered. This does not mean that he is entitled to intervene and have the interlocutory decree set aside. His position would be much the same as a person who is not a party to a vindicatory action. He is unaffected by the decree and is entitled to assert his rights as against the holder of the decree in any steps which are sought to be taken under it. He is in exactly the same position as a claimant to an interest in land which had been partitioned under the repealed Ordinance, where the final decree had not been entered " as hereinbefore provided".

.....

"**After judgment was reserved in the present appeal**[10], our attention was drawn to the unreported case of Don Gardin Arangala v. TuduhenageMethias et al. 2[S. C. 74 D. C, Inty. Colombo No. 8116 (P) S. C. Minutes of 3.2.61.] wherein this court set aside an interlocutory decree at the instance of a petitioner intervenient on the ground that lis

[10] These words are omitted in the pdf available in the Law Net. May be the "editor" thought it inappropriate. But it was said so by Sinnetamby J.

pendens had not been properly registered. In a short judgment, Sansoni, J. in that case, permitted the intervention. The effect of Section 48(3) was not considered and I would, with great respect, disagree with the views therein expressed.

There are, however, several cases where the Supreme Court, acting in revision, has set aside interlocutory and even final decrees. I wish to add that the powers of this court to act in revision are in no way restricted by the provisions of the Partition Act. The present appeal is not a case in which we should, in my opinion, act by way of revision." **[End of Quotation]**

Coming back to **Rasah vs. Thambipillai** and referring to the dissent of G. P. A. Silva J., His Lordship said, that, **[Beginning of the Quotation]**

"There would be no purpose in making an exception in such a case unless it were to give the party who is benefited by such exception an opportunity to intervene and have his title investigated and his shares allotted. **If such a course is not open to him and if he is to follow the course suggested in the judgment cited earlier he would either have to file a rei vindicatio action against all persons who were allotted any shares or, his rights as a co-owner not being extinguished, to bring a fresh partition action. This would, in my judgment, lead to a negation of the very object that the new Partition Act intended to serve, namely, the expeditious disposal of partition cases**. For, instead of being allowed to intervene after the interlocutory decree was entered which would be a comparatively early stage in this situation we will have the curious position of an interlocutory decree having been entered in the teeth of a claim having been brought to the notice of court and the person affected filing another partition action or a vindicatory action all over again.

For these and other reasons which are not relevant to this case, I think that in referring to the interlocutory decree in the Act the legislature had in mind that interlocutory decree to which no exception was attached and which was unqualified in its scope. Therefore, when section 70 (1) went on to provide for the point of time before which a court may add a party, namely, at any time before the interlocutory decree is entered, it must be deemed to refer to an interlocutory decree in the normal case and not an interlocutory decree which was qualified by the exception provided in section 48 (3). For, if it is conceded that a person, who comes within the exceptions provided in section 48 (3), can, by reason of the inconclusive nature of an interlocutory decree or even the final decree so far as he is concerned, file another partition action or a vindicatory action in order to establish his rights which are protected by section 48 (3), **it must surely stand to reason that he should be allowed to intervene in the same action rather than be told that even though his claim of title is sound he cannot intervene as the interlocutory decree has been entered[11].** If he can bring an action long after an interlocutory and a final decree and, if successful, disturb all the shares allocated in the partition decree, a fortiori it must be possible for him to intervene soon after the interlocutory decree. In such an event the interlocutory decree will, by necessary implication, have to be set aside and a fresh interlocutory decree will have to be entered after consideration of the new claim of the intervening party". **[End of Quotation]**

The absolute reason in the two paragraphs above stand testimony to the fact that His Lordship has been underrated.

[11] To say that, with respect however, is lopsided logic, to say the least.

What **GardiyePunchihewageAmaraseela Silva**, who later became the 34th Chief Justice of Ceylon (for a very brief period[12], preceded by Hugh Norman Gregory Fernando and succeeded by Victor Tennekoon) said next makes one think, that, the final judgment I wrote in the draft of this judgment to support my argument, **Mrs. SOMAWATHIE v. Mr. R. B. MADAWELA AND OTHERS** would not be necessary (with great respect to Justice J. F. A. Soza who authored the same) unless for the purpose of giving "numerical" validity to the dissenting views of G. P. A. Silva J., in the form of later acceptance of similar logic in a majority judgment of the Supreme Court. It is as follows,

> "In short, one cannot, in my view, give a meaning to section 48 (3) unless it be construed as enabling a person falling in the category to which that sub-section refers to assert his rights which are kept alive by that sub-section. **The other view, to my mind, will result in a situation which savours of being illogical and unreasonable**. For, if a person in such a case is not allowed to intervene and the parties to the action have been allotted their respective shares of a land by the interlocutory and final decrees, there would be nothing to prevent such person who fell within the exception in sub-section (3) of section 48 and, therefore, was unaffected by these decrees, from filing another partition action on the basis of the original shares owned by him and the others who were parties to the action. **In such a case the object of expeditious disposal will be completely defeated and there will be two partition cases in respect of the same corpus**. **Even though the earlier judgments have referred to the possibility of a vindicatory**

[12] His Lordship joined Attorney General's Department in 1944 as Temporary Additional Crown Counsel. He was promoted Crown Counsel in 1947. In 1953 he joined the Ministry of Justice as assistant secretary and reverted to the Attorney General's Department in 1954 as Senior Crown Counsel. It is stated that in 1960 he was appointed the acting permanent secretary of the Ministry of Justice and then in 1961 as the permanent secretary and in 1962 to the Bribery Commission in addition to his duties. These particulars are from the book "The Supreme Court, first 185 years" of Dr. A. R. B. Amerainghe. However, just as His Lordships full name is not mentioned there the only mention about his judicial career there is that he served a brief period as the Chief Justice in 1973. Unfortunately, judgments like the above, where His Lordship's opinion has represented absolute logic and reason have not come to limelight.

action in such a situation, I can see serious difficulties in the way of such an action which will make it even more chaotic than a second partition action. **The plaintiff in such a case will have to ask for a declaration of title to his share from each of the parties to the original partition action who have by now been allotted divided lots**. **Either alternative, therefore, would lead to a curious, not to call an absurd result**. The only reasonable view, therefore, seems to me to interpret the section in a way that will not lead to such a situation. **This situation will not arise if it is construed that an interlocutory decree which is entered without due registration of the Lis pendens is not the interlocutory decree which is in the contemplation of section 70 (1)**. Such a construction is, to my mind, not based on an argument of convenience but on the special provision contained in section 48 (3). Obvious as it may seem, chronologically too, section 48 precedes section 70 and the latter has, therefore, to be read subject not only to the main provision but also to the exception contained in the former. **To refrain from doing so will be to ignore the exceptional circumstances provided for in section 48 (3) and to leave the person who is protected by this sub-section with only the feeling of satisfaction that the interlocutory decree does not have the conclusive effect so far as he is concerned but without any direction by the legislature as to what step he should or can take to retrieve his position after his lands have been apportioned in divided lots among his original co-owners by a decree of court**. **It has to be borne in mind that the remedies available to him are not those specifically provided by law but only those which have been judicially interpreted as possible remedies**[13]. The judgment referred to earlier and the judgment in the case of Gomis Appuhamy v. Caroline Nona[1 (1964) 66 N. L. R. 241.],

[13] My order in C. A. Writ 41 2024 dated 09.04.2024 commenced saying, "**No court in this country ever, made a correct decision by going beyond the provisions of law laid down by the parliament in its wisdom. It did so, [made a correct decision] by adhering to the letter of that law**." [Also George S Patton Movie]

which have decided that a person coming within the exceptions in section 48 (3) can bring a separate action, do not base such a right on a specific provision of law. A person who comes within the exception to section 48 (3) should, therefore, be allowed to intervene at any stage and the District Judge would have the power to set aside the interlocutory decree entered by him for this purpose because it ceases to be an interlocutory decree".

Not stopping there, His Lordship researched for the intention of the legislature in bringing fourth several provisions of the Partition Act including that dealt with the failure to properly register the lispendence, having gone through the Hansards. **[Beginning of the Quotation]**

"According to the Hansards, the Partition Bill was presented in the Senate on 20th September, 1950, deemed to have been read the first time, and ordered to be printed. On the 4th of October, 1950, the Bill was read a second time and debated. On the 6th of October, 1950, it was decided that the Bill be referred to a Select Committee. At that stage section 48 of the Bill contained only sub-section (1) of the present Act and not sub-sections (2) and (3). The Select Committee which consisted of some eminent lawyers held several meetings at which a large volume of evidence and suggestions was received. On the 20th of March, 1951, the Report of the Select Committee was presented together with the Minutes of the Proceedings, and was ordered to lie upon the Table. The Select Committee reported that clause 48-which is the present section 48 (1)- should be amended by adding a proviso as follows :-

" Provided that it shall not prevent any person who is not a party to the proceedings or privy of such party from impeaching such a decree on the ground that the lis pendens has not been duly registered or on the ground of want of jurisdiction." (Minutes of Proceedings-20th January, 1951).

On the 27th of March, 1951, clauses 34 to 52 as amended by the Select Committee were ordered to stand part of the Bill. It must, therefore, be assumed that sub-sections (2) and (3) were inserted in section 48 to give effect to the decision of the Select Committee. The result was that the Bill laid down definitely that the validity of an interlocutory decree canonly be impeached on the ground that the lis pendens in respect of the action has not been duly registered or on the ground of want of jurisdiction. On the same day the Bill was reported with the amendments, read the third time, and passed. The second and third readings of this Bill were taken up in the House of Representatives on the 6th of April, 1951, and passed without amendment.

The history of the Partition Act, therefore, shows that the intention of the legislature was to give an opportunity to a party who was prejudiced by an absence of due registration of the lis pendens to impeach the decree. It seems fairly clear that it was not the intention of the legislature to give this same opportunity to the other categories such as mortgagees, lessees, fidei commissaries, beneficiaries of trusts, etc. In my view, it is to safeguard these categories whose rights may have been extinguished by an interlocutory decree that specific provision has been made in section 49 empowering such party by a separate action to recover damages from any party to the action by whose act, whether of commission or omission, such damages may have accrued, and where the whole or any part of such damages cannot be recovered from any such party, recover such damages or part thereof from any other person who has benefited by any such act of such party. The fact that there is no such specific provision to protect a person who has been prejudiced by the failure to register duly the lis pendens by empowering him to bring a separate action appears to me to be an additional reason for thinking that the impeachment of the interlocutory decree referred to by the Select Committee was to be achieved by such a party being allowed intervention

after the interlocutory decree. The fact that what was sought to be achieved was the impeachment of the interlocutory decree presupposes that an interlocutory decree did exist in form earlier. Such interlocutory decree would, however, be lacking in one of the essential attributes, namely, the due registration of the lis pendens at the appropriate stage, which decree for that reason will be invalid. The requirement in section 70 that a party should intervene before the interlocutory decree will, therefore, have no application to a case where the lis pendens has not been duly registered.

The question may arise here as to whether the remedy prescribed in section 49 is or is not available to the category of persons referred to in section 48 (3). I can see at least three reasons for answering this question in the negative. In the first place, section 48 (3) refers to a person who 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, while section 49 refers to a party whose rights to the land to which the action relates have been extinguished or who is otherwise prejudiced by the interlocutory decree entered in the action. Secondly, a party under section 48 (3) to whom the final and conclusive effect will not apply can claim the benefit of this sub-section 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 as a lis pendens. There is no such requirement for one to claim a benefit under section 49. Thirdly, if the remedy under section 49 was to apply to the category of persons mentioned in section 48 (3) as well, I should have expected section 49 to have been part of section 48 or at least to have some connecting link with section 48 (3) so as to include among the persons who can recover damages by a separate action, the category referred to in section 48 (3). In all

humility and with the utmost respect to the views of my Lord The Chief Justice and my brother Judges from which I have dissented I would say that the interpretation which I have given above will, without doing any violence to the provisions of the Act, enable the smooth working thereof and where two views are possible it behoves[14] the court to lean towards the view that is conducive to the smooth working of an Act of the Legislature.

As there was considerable argument on the question of registration simpliciter and due registration of the lis pendens, it is apposite to say a word or two on that aspect. When I state in the earlier paragraph that the requirement of section 70 will have no application to a case where the lis pendens has not been duly registered, I must not be understood to mean that under section 13 of the Act it is necessary for a court to be satisfied that a partition action has been duly registered as a lis pendens. I think the omission of the word " duly " in this section and its presence in section 48 (3) is of significance. Whereas under section 13 a court has to be satisfied inter alia, that the step of registering the lis pendens has been taken, under section 48 (3) the categories of persons mentioned therein will be able to impeach the decree if only the lis pendens has not been duly registered. That is to say, that, despite all the steps for the registration of the lis pendens being taken by the plaintiff as required by section 6, if some error has occurred in the actual registration in consequence of which a necessary party would have been prejudiced, such a party would be able to impeach the decree.

For these reasons, I would allow the appeal, set aside the order of the learned District Judge dated 31st August, 1962, as well as the decree of sale dated 30th November, 1960, and make order that proceedings be held de novo from the point of time of the registration of the lis pendens-

[14] It is a duty or responsibility for someone to do something

In view of the circumstances under which the learned District Judge found himself constrained to decide this matter against the appellant, I make no order for costs". **[End of Quotation]**

Section 70(1) of Partition Act No. 16 of 1951 reads as follows,

Addition of parties.

70. (1) **The court may at any time before interlocutory decree is entered in a partition action add as a party to the action, on such terms as to payment or prepayment of costs as the court may order-**

(a) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or

(b) any person who, claiming an interest in the land, applies to be added as a party to the action.

…….

Section 69(1) of Partition Law No. 21 of 1977 reads, as follows,

Addition of Parties.

69. (1) **The court may at any time before judgment is delivered in a partition action add as a party to the action, on such terms as to payment or prepayment of costs as the court may order-**

(a) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or

(b) any person who, claiming an interest in the land, applies to be added as a party to the action.

…….

Hence they are identical.

But there is a distinction between section 48(3) of the Old (1951) Act and its corresponding section 48(3) of the New (1977) Law. They are as follows,

1951

48 (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.

1977

48 (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**.

The part referring to the Lis pendence is omitted.

But it is against all reason to say that it is because the Lis pendence is no longer material.

The Lis pendence is the **sentinel** who guards the sanctity of the decree to be entered in Rem.

It is omitted, because, as all writers of texts on interpretation agree the legislature does not waste words.

The court is no longer competent when the Lis pendence is not duly registerd.

It is covered by the last eleven words highlighted in present section 48(3).

That is what Sri Skandha Rajah J. and G. P. A. Silva J., said.

The dissenting views gets at least an implied assent by a five Judge Bench of the Supreme Court after 19 years where four judges, including a future Chief Justice assented to a well composed judgment written by a judge who started his career as a judge and had the experience of presiding in heavy partition courts of the south of this island such as Galle, Matara and Tangalla, which usually has complicated pedigrees too, Justice Joseph Francis Anton Soza.

The case is, celebrated, for good reason too, Mrs. SOMAWATHIEv. Mr. R. B. MADAWELA AND OTHERS, that came up from another heavy partition area of this country, Kurunegala, with its twin Kuliyapitiya.

Soza J., said,

> "Further it must be observed that after the Divisional Bench of the Supreme Court had held in the case of Mariam Beebee v. Seyed Mohamed (supra) that section 48(1) of the Partition Act No. 16 of 1951 (Cap 69) did not preclude the Supreme Court from exercising its powers of revision in appropriate cases in respect of interlocutory and final decrees entered under the Act, the then National State Assembly enacted section 651 (1) of the Administration of Justice (Amendment) Law No. 25 of 1975 following closely the language of the old section 48(1) and elaborating only on the meaning of "omission or defect of procedure". Section 651(1) was later superseded by section 48(1) of the Partition Law No. 21 of 1977 again retaining almost the identical language. It is well recognised that where cases have been decided in Courts on particular forms of language in a statute and in later statutes on the same subject and passed with the same purpose and the same object, Parliament uses the same forms of language which have earlier received judicial construction, it must be presumed, in the absence of any indication to

the contrary, that Parliament intended the forms of language used by it in the later statutes to be construed in the same manner as before. This is, of course, not a canon of construction of absolute obligation but a presumption that the Legislature intended the language used by it in the later statute should be given the meaning already attributed to it by the courts. As Sir W. M. James L. J. said in the case of Ex parte Campbell, In re Catheart:

> "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statue, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them".

Soertsz S.P.J. cited this passage as authority for a like propo-sition which he stated as follows in the Divisional Bench case of Perera v. Jayewardene:

> "..... it is a well established principle that when a word has received a judicial interpretation and the same word is re--enacted, it must be deemed to have been re-enacted in the meaning given to it".

The principle is an aid to construction and has been applied in a number of cases, e.g. Barlow v. Tea., Greaves v. Tefield, and Webb v. Outrim. See also Maxwell on The Interpretation of Statutes 12th edition (1969) pp. 71, 72: Craies on Statute Law 7th edition (1971) p. 141: Bindra on The Interpretation of Statutes 6th edition (1975) pp. 257,258.

Accordingly the use by the Legislature in successive enactments of a form of words substantially similar to the form of words in section 48(1) of the repealed Partition Act No. 16 of 1951, supports the

assumption that the Legislature intended to leave unaffected the powers of revision and restitutio in integrum vested now in the Court of Appeal in conformity with the construction adopted by Sansoni C.J. in Mariam Beebee v. Seyed Mohamed (supra).

While on the subject of interpretation, I would like to refer to one further matter. A point was made of the fact that in the new Partition Law No. 21 of 1977 a special reservation of the powers of the Supreme Court by way of revision and restitutio in integrum has been included in subsection 3 of section 48 after insulating partition decrees from attack on grounds of fraud and collusion. It was submitted that the maxim expressiouniusestexclusioalterius applies. The maxim is that the expressmention of one thing implies the exclusion of another. But it is not of universal application and great caution must be exercised in applying it. As Lopes, L. J., said in the case of Colquhoun v. Brooks

> "It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."

Where the words expressed are intended to be illustrative only, the rule is inappropriate (Maurice & Co. Ltd. v. Minister of Labour19). Nor should the maxim be applied where what is expressed has been put in by way of abundant caution (Bindra (supra) p. 137).

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 MohamedalyAdamjee v Hadad Sadeen. In this case the Privy Council following the decisions of

Burnside C. J. in Nono Hami v. De Silva and Sir Alexander Wood Renton in Jayawardene v. Weerasekera, 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[15]. The expressiounius 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 expressiouniusexclusioalterius. 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.

[15] This is very important

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.

In the instant case R. B. Madawela the original intervenient was a "person concerned". He was a necessary party. The deed in his favour would have come to the plaintiff's notice when the Land Registry was searched before her purchase from some of Ensina Perera's heirs. She would have come to know of it had she caused a search to be made, as any prudent plaintiff should have done, before she filed the present case. But be that as it may. **The declaration under section 12(1) of the Partition Act No. 16 of 1951 which was the law in operation at the time this case was filed, was a legal imperative. Section 12(1) stipulates that afterthe partition action is registered as a lis pendens the plaintiff must file or cause to be filed in the case a declaration under the hand of a proctor certifying that he personally inspected all the registration entries relating to the land which is the subject--matter of the action and stating the names of all the persons found by him to be necessary parties to the action under section 5 of the Act**..."

[The rest is not that material to this case]

Although Justice Soza's judgment is not 100% similar to the present one, it shows, two matters of significance. They are,

(i) The proposition that, "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statue…." the same interpretation must be given, can apply in **converse**to the omission in section 48(5) (1977 version) the reference to non registration of the Lis pendence referred to in section 48(3) (1951 version) to say that, it is because a decree entered in respect of a land for which the Lis pendence is not duly registered cannot be considered, a decree in law (as the learned Ranganathan Q. C. argued) that, that part is omitted in the present version and

(ii) Even otherwise, as per the argument in the earlier part of this judgment, as a Seven Judge Bench of the present Supreme Court said that Restitutio in Integrum is no longer with that court; and that every reference in that respect in the "old" Supreme Court is a reference to this Court (Court of Appeal); and as Article 138(1) specifically confers that power in the Court of Appeal, in exercising that power, together with that of revision, saved by present section 48(3); and recognized by Five Judges of the present Supreme Court, in Justice Soza's judgment; and also accepting the views of Jerold Taitz, which could be traced to ancient Rome and to Johannes Voet[16], in "the judicial termination of the inequitable situation (created by the law per se)", for the present situation was created by finality the law purports to give to a decree in rem, this Court, deciding that the Lis pendence in this case has not been duly registered to be the sentinel that safeguards the sanctity of a decree in rem; and that the omission of the reference to the Lis

[16] See C. A. RII 46 2023 of 15.02.2024

pendence, that was in section 48(3) of Act No. 16 of 1951, in the corresponding section 48(5) of Law No. 21 of 1977 is due to the fact, that, it does not have to say specifically, because, when the Lis pendence is not duly registered the decrees are not those entered by a competent court; and hence are not endowed with the "finality" the Law purports to confer, sets aside all decrees entered in partition action 1144/P in the District Court of Mt. Lavinia, together with the judgment and allow the petitioner to be added a party and directs the learned District Judge to (having added her a party and allowed her to file statement of claims) to proceed to hold a trial and the action according to law[17].

There is no order on costs.

Judge of the Court of Appeal

[17] In as much as I wrote my first judgment in a case in the Magistrates Court of Gangodawila in 1994, almost 30 years ago; and the District Court of Nugegoda where I functioned as the District Judge, being an off shoot of the District Court of Mount Lavinia; and this judgment being one of my last, I consider it as my privilege, that this case comes from the "old station" to which I have a romantic attachment. [Any resemblance to the quote; "Gentlemen... it has been a privilege playing with you tonight" attributed to Wallace Henry Hartley (2 June 1878 – 15 April 1912), is merely coincidental]Life is full of incidents; and hence coincidence too.