

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

Hemawathie Gnanawickrema (nee
Wickremasinghe)
No. 27/09, Park Lane,
Rajagiriya.

PLAINTIFF

CA. Rev. 771 / 00

DC Matara No. P 12519

-Vs-

1. Nimalawathie Wickremasinghe,
2. Saminona Wickremasinghe,
3. Sujatha Wickremasinghe,
4. Gunaseeli Wickremasinghe,
5. Dhanapali Wickremasinghe,
All of Pehembiya, Dickwella,
6. Sunanda Nanayakkara Gunasena,
of No. 7, 1st Lane, Madiwela, Kotte.
7. Ansie Wickremasinghe
of Dickwella.
8. Somawathie Wickremasinghe
of Dickwella.
9. Ginthota Vidanage Wimalaseelie
of Dickwella.
10. Wickremasinghe Landage
Caronchinahamy,
Getamanna, Karatota.

11. Kapuge Geeganage Alice Nona
of Pehembiya, Dickwella.
12. Senadheerage Don Jagath Anura
Jayawardena
of Balavinna, Balangoda Road,
Pallebadda.
13. Chandra Wickremasinghe
of Pehembiya, Dickwella.
14. Sumana Wickremasinghe
of No. 496, Pannipitiya Road,
Talangama South,
Battaramulla.
15. Wickremasinghe Landage Simon
of Karatota, Getamanna.
- 1a. Prema Matudatta Nanayakka
of No. 32/12, Jayasinghe Road,
Colombo 06.
16. Buddappriya Ihalawela
of Sirilton, Dickwella.
- 7a. Pamuditha Janaka Wickremasinghe
of "Singha", Pehembiya, Dickwella.
18. Wickremasinghe Landage
Leelawathie
19. Wickremasinghe Landage
Sumanaseeli
20. Wickremasinghe Landage
Sumanawathie
All of No. 15, Kondeniyawatte,
Dickwella.

DEFENDANTS

In the matter of an application in Revision
and / or Restitutio in Integrum.

1. Hemawathie Gnanawickrema
No. 27/09, Park Lane,
Rajagiriya.
2. Prema Mathudaththa Nanayakkara
No. 32/12, Jayasinghe Road,
Colombo 12.
3. Sujatha Wickramasinghe
Pagoda Road,
Nugegoda.

PLAINTIFF (17th DEFENDANT),
1(A) AND 3rd DEFENDANTS-
PETITIONERS.

-Vs-

8. Somawathie Wickremasinghe
of Dickwella.
9. Gintota Vidanage Wimalaseeli
of Dickwella.

PLAINTIFFS (Originally 8th and 9th
Defendants) - RESPONDENTS
And

2. Saminona Wickremasinghe,
3. Gunaseeli Wickremasinghe,
5. Dhanapali Wickremasinghe,

- All of Pehembiya, Dickwella.
6. Sunanda Nanayakkara Gunasena
of No. 7, 1st Lane, Madiwela,
Kotte.
- 7a. Samuditha Janaka Wickremasinghe
of Pehembiya, Dickwella.
10. Wickremasinghe Landage
Caronchinahamy;
Getamanna, Karatota.
11. Kapuge Geeganage Alice Nona
of Pehembiya, Dickwella.
12. Senadheerage Don Jagath Anura
Jayawardena
of Balavinna, Balangoda Road,
Pallebadda.
13. Chandra Wickremasinghe
of Pehembiya, Dickwella.
14. Sumana Wickremasinghe
of No. 496, Pannipitiya Road,
Talangama South,
Battaramulla.
15. Wickremasinghe Landage Simon
of Karatota, Getamanna.
16. Buddappriya Ihalawela
of Sirilton, Dickwella.
18. Wickremasinghe Landage
Leelawathie
19. Wickremasinghe Landage
Sumanaseeli and

20. Wickremasinghe Landage
Sumanawathie
All of No. 15, Kondeniyawatte,
Dickwella.

DEFENDANTS-RESPONDENTS

BEFORE : Shiran Gooneratne J. &
Dr. Ruwan Fernando J.

COUNSEL : Dr. Sunil Cooray with Nilanga
Perera for the 17th Defendant
(original Plaintiff), 1 (a) & 3rd
Defendant-Petitioners

Rohan Sahabandu, P.C. with
Chathurika Elvitigala for the 4th
Defendant-Respondent

Manohara de Silva, P.C. with
Hirosha Munasinghe, Harithrika
Kumarage for the 8th and 9th
Plaintiffs-Respondents (originally,
8th and 9th Defendants)

ARGUED ON : 16.06.2020

WRITTEN SUBMISSIONS : 22.01.2003, 03.03.2004,
22.04.2014, 18.02.2019 &
16.07.2020 (by the 17th Defendant)

(original Plaintiff), 1 (a) & 3rd

Defendant-Petitioners

14.06.2004 & 06.06.2003 (by the 8th

and 9th Plaintiffs-Respondents

(originally, 8th and 9th Defendants)

DECIDED ON : 02.09.2020

Dr. Ruwan Fernando, J.

Introduction

[1] This is an application in revision and /or restitutio in integrum to revise and set aside all proceedings that had taken place in the District Court of Matara Case No. P/12519 after the original Plaintiff had moved on 23.03.1999 to withdraw the action and dismiss the said partition action.

[2] The 17th Defendant-original Plaintiff-Petitioner who was later named as the 17th Defendant (hereinafter referred to as the 17th Defendant-Petitioner) instituted this partition action in the District Court of Matara seeking to partition an amalgamated land called “Kattuhena, Sattambigewatrta and Ambarage Bima” in extent of about 8 acres as morefully described in paragraph 2 of Plaintiff dated 12.11.1984. The 1 (A) Defendant-Petitioner in this application was the 1A Defendant and the 3rd Defendant-Petitioner in this application was the 3rd Defendant in the said partition action.

Summary of the Plaintiff’s Pedigree

[3] The 17th Defendant-Petitioner who was the original Plaintiff set out the pedigree in the Plaintiff and stated *inter alia, that* (a) the original owner

of the land described in paragraph 2 of her Plaintiff was Don Janis Wickramasinghe who by Deed No. 8798 dated 09.02.1935 conveyed an undivided 14/75 share to Gunadasa Wickramasinghe; (b) the said Gunadasa Wickremasinghe's 14/75 share devolved on the Plaintiff, 1st, 2nd, 3rd, 4th and 5th Defendants according to the pedigree pleaded in the Plaintiff; (c) the said Janis Wickremasinghe's balance 31/75 share was conveyed to Ladona Kumarapperuma on a Deed which cannot be found; (d) upon the demise of the said Ladona Kumarapperuma, her share devolved on Tidin Priyaprema Wickramasinghe and upon his demise, his undivided share devolved on the Plaintiff.

[4] On the aforesaid chain of title, the 17th Defendant-Petitioner claimed that the parties were entitled to undivided rights in the following manner:

The Plaintiff	-	undivided 221/375
The 1 st Defendant	-	undivided 110/375
The 2 nd to 5 th Defendants	-	undivided 44/375

Preliminary Survey

[5] The Preliminary Survey was carried out by Mr. S.L. Galappathithi, Licensed Surveyor who made the Preliminary Plan No. 2516 dated 10.04.1985, which depicts a land in extent of 4 acres 3 roods and 25 perches (A3). The 1A Defendant-Petitioner and the 3rd Defendant-Petitioner moved for a second Survey and Mr. S. D. Ediriwickrama, Licensed Surveyor made the second Survey Plan No. 784 dated 22.04.1996 (A10) and the said Survey Plan No. 784 depicts a land in extent of 5 acres and 4.1 perches.

Statements of Claims of the Defendants

[6] The 3rd Defendant-Petitioner and 6th Defendant filed their separate statements of claim and claimed undivided rights in the land depicted in

the Preliminary Plan No. 2516 made by Mr. L. Galappathithi, Licensed Surveyor according to the pedigree pleaded in their statements of claim.

[7] The 8th and 9th Plaintiffs-Respondents who were originally the 8th and 9th Defendants filed their joint statement of claim and the amended statement of claim, admitting that the land sought to be partitioned is depicted in the Preliminary Plan No. 2516 made by Mr. L. Galappathithi, Licensed Surveyor. They pleaded that the original owner of the land sought to be partitioned is one Annakkanage Disiliya and claimed their undivided rights according to the pedigree pleaded in their statements of claim. After the demise of their registered attorney, Mr. Shelton Dias, the 8th Defendant filed a separate statement of claim disputing the correctness of the Preliminary Plan and stating that the land sought to be partitioned is depicted in the Survey Plan No. 784 dated 22.04.1996 made by Mr. S.D. Ediriwickrema, Licensed Surveyor. The 8th Plaintiff-Respondent claimed her undivided rights according to the pedigree pleaded in her original statements of claim.

[8] The 10th to 15th Defendants intervened and pleaded in their statement of claim that the original owner of the land sought to be partitioned was Wickremasinghelage Don Simon and upon his demise, his rights devolved on his five children, namely, Abaran, Andariyan, Sisiliyana, Hitchina and Babe Appu *alias* Hitchi Appu. They further pleaded that the undivided rights of the said Abaran, Andariyan, Sisiliyana, Hitchina and Babe Appu *alias* Hitchi Appu devolved on the parties according to the pedigree pleaded in their statement of claim. They sought a dismissal of the Plaintiff's action or in the alternative, a partition of the land in suit according to the pedigree pleaded in their statement of claim.

[9] The Intervenient-Petitioners, in the meantime, filed a statement of claim by way of a motion with notice to the attorneys-at-law for the

original Plaintiff, the 3rd, 6th, 8th, 10th and 15th Defendants. However, the registered attorneys for the Plaintiff, the 3rd and the 8th Defendants objected to the said motion while the registered attorney for the 10th and 15th Defendants only stated that she had no instructions from their clients. (Vide- page 230 of the record).

Application to withdraw the Plaintiff's action

[10] When the case was taken up for trial on 23.03.1999, the Intervenient Petitioners first moved to withdraw their claim but no order was made either allowing or disallowing the application. Thereafter, the original Plaintiff moved to withdraw the partition case but no order was made either allowing or disallowing the application. Later, on the same day, the original 8th and 9th Defendants informed Court that they were prepared to proceed with the action as per the journal entry dated 23.03.1999. The District Court made order naming the 8th and 9th Defendants as substituted Plaintiffs and the original Plaintiff as the 17th Defendant. Thereafter, the matter was re-fixed for trial on 21.10.1999.

Addition of the 18-20 Defendants and Evidence of the 18th Defendant at the Trial

[11] When the case was taken up trial on 21.10.1999, the substituted Plaintiffs (8th and 9th Defendants) were absent and their lawyer informed Court that he had no instructions from them. However, the Counsel for the Intervenient-Petitioners filed the statement of claim of the Intervenient-Petitioners and the District Court made order adding them as 18th, 19th and 20th Defendants. The 18th Defendant who was added as a party defendant that morning itself was called to give evidence by the Counsel for the 18-20 Defendants on the basis of a settlement between the parties and after the uncontested trial, the matter was fixed for judgment.

Judgment

[12] On 13.03.2000, the learned Additional District Judge delivered the judgment in open Court and directed that the land depicted in the Preliminary Plan No. 2516 be partitioned according to the evidence given by the 18th Defendant. The 17th Defendant-Petitioner, 1A Defendant-Petitioner and the 3rd Defendant-Petitioner have filed this application seeking to set aside all proceedings that had taken place after the original Plaintiff had moved on 23.03.1999 to withdraw the action and dismiss the partition action.

Preliminary Objections

[13] The 8th and the 9th Plaintiffs-Respondents filed their objections and while denying all and singular the several averments contained in the Petition raised the following main preliminary objections to the maintainability of this application.

1. The Petitioners have failed to file the originals or certified copies of all the relevant documents in terms of the Court of Appeal (Appellate Procedure) Rules 1990;
2. The Petitioners are guilty of laches;
3. There are no exceptional circumstances for the Court to act in revision or to exercise the powers of revision or restitutio in intergrum; and
4. The Petitioners have suppressed and misrepresented material facts.

[14] All parties agreed to deal with the preliminary objections together with the main matters and accordingly, on 16.06.2020, Mr. Manohara de Silva, P.C. made submissions in support of the preliminary objections raised on behalf of the 8th and 9th Plaintiff-Respondents as well as the main

matters raised by the Petitioners in their Petition. Dr. Sunil Cooray submitted that there was no merit in the preliminary objections and further made submissions with regard to the main matters raised by the Petitioners in their Petition.

Failure to file the originals or certified copies of the relevant documents

[15] The preliminary objection of the 8th and 9th Plaintiffs- Respondents was that the Petitioners have not filed originals or certified copies of the proceedings dated 23.03.1999 and dated 21.10.1999 including the judgment dated 13.03.2000 in violation of the Court of Appeal (Appellate Procedure) Rules 1990.

[16] Rule 3 (1) (a) of the Court of Appeal (Appellate Procedure) Rules 1990 states that:

"Every application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a Petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero motu or at the instance of any party, dismiss such application."

[17] The Petitioners have marked and produced a certified copy of all relevant documents including the Plaintiff, statements of claims, Plans and Reports, proceedings dated 21.10.1999, all available deeds filed of record, (A2-A25) except the proceedings and the judgement dated 13.03.2000. The Petitioners have stated in paragraph 16 of the Petition dated 17.07.2000 that they applied for a certified copy of the judgment

dated 13.03.2000 but found that the judgment was not available in the case record as at the date of the Petition filed in the Court of Appeal on 17.07.2000. The Petitioners have further stated in paragraph 16 of the Petition that their present registered attorney personally perused the record, but found no judgment in the case record till 11.15 a.m. on 13.07.2000. Paragraph 16 of the Petition is as follows:

16-But the Petitioners state with respect that up to date, there is no judgment or interlocutory decree in the record. The Petitioner files herewith an affidavit marked "A26" from their present registered Attorney confirming the said fact. She had personally pursued the case record and also directed a person to formally apply for a certified copy on her behalf."

[18] In support of their contention, the Petitioners have filed an affidavit marked A26 from their present registered attorney confirming the fact that she had personally perused the case record but found that the judgment was not filed of record till 11.15 a.m. on the 13th July 2000. The Petitioners' attorney-at-law has stated in her affidavit (A29) that although she through one Engonona applied for a certified copy, she could not obtain the same and the deeds filed in this application are all documents filed of record in the District Court case record.

[19] The Petitioners have explained the reason for the delay in filing this application and stated in the Petition that the delay in making the application was due to the difficulty in ascertaining the facts, obtaining copies of the relevant documents and and obtaining a copy of the judgment. Paragraph 20 of the Petition is as follows:

20- These Petitioners submit, with respect, that the delay in making this application was due to the difficulty in ascertaining the facts in this case and obtaining copies of the relevant documents and the effort to trace and obtain a copy of the judgment that is said to have

been entered in this case and beg that they be excused as such for the delay if any."

[20] On 13.02.2001, the Petitioners have filed an affidavit in this Court stating *inter alia* that after filing this application and upon a further perusal of the District Court record, they have been able to obtain copies of the proceedings of 13.03.2000 and filed a certified copy of the proceedings and the judgment dated 13.03.2000 marked as A28 and A29.

[21] On an application made by the Petitioners to call for the original case record from the District Court of Matara, this Court on 01.11.2005 made order calling for the original case record. A perusal of the original case record reveals that the judgment dated 13.03.2000 is part and parcel of the proceedings dated 13.03.2000 and hence, the proceedings dated 13.03.2000 include the judgment dated 13.03.2000 as well. A perusal of the original case record further reveals that the learned Additional District judge had delivered the judgment in open court on **13.03.2000** but the unsigned proceedings and the unsigned judgment had been handed over to the Record Room only on 12.07.2000 (Vide- the Rubber Seal of the Record Room dated 12.07.2000). A perusal of the original case record further reveals that the unsigned proceedings and the judgment dated 13.03.2000 had been filed of record only on **14.07.2000** (Vide- the minute of the Record Keeper or the Binder dated **14.07.2000** on the left hand side of the journal entry No. 72 dated 13.03.2000).

[22] The Rubber Seal of the Record Room dated **12.07.2000** and the minute of the Record Keeper or the Binder dated **14.07.2000** clearly confirm without any doubt that although the judgment may have pronounced in open Court on 13.03.2000, the unsigned typed judgment and the unsigned proceedings dated 13.03.2000 had been handed over to

the Record Room only on 12.07.2000 and the same had been filed of record only on 14.07.2000. It is abundantly clear that the unsigned proceedings and the unsigned judgment dated 13.03.2000 were not available in the original case record from 13.03.2000 to 14.07.2000. This confirms the position of the registered attorney of the Petitioners that the judgment was not available in the case record on the 13.07.2000 and thus, the Petitioners cannot be faulted for not filing a certified copy of the proceedings and the judgment which was not available in the case record by the time the Petitioner's registered attorney applied for a certified copy of the same.

[23] I hold that the Petitioners have sufficiently explained the reason for not filing a certified copy of the proceedings and the judgement along with their Petition on 17.07.2000. Subsequently, they had obtained a certified copy of the judgment together with the proceedings dated 13.03.2000 and tendered to the Court by way of affidavits. For those reasons, I am not inclined to agree with the submission of Mr. de Silva that the Petitioner must be held liable for the failure to file a certified copy of the proceedings and the judgment dated 13.03.2000 along with the Petition in violation of the Court of Appeal (Appellate Procedure) Rules 1990.

Other Preliminary Objections

[24] In my view, the other preliminary objections are closely related to the main matters raised by the Petitioners and the 8th and 9th Plaintiff-Respondents and hence, they will be dealt with along with the main matters.

Failure to dismiss the partition action upon the application of the original Plaintiff to withdraw the action

[25] At the hearing, Dr. Sunil Cooray strenuously argued that when the Plaintiff sought to withdraw the action, the learned Additional District Judge should have dismissed the partition action without permitting the 8th and 9th Defendants to prosecute the partition action as the conditions stipulated in the proviso to sub-section (1) of section 70 were not satisfied. Dr. Cooray submitted that the proviso permits a Defendant to prosecute a partition action only where the Plaintiff fails or neglects to prosecute a partition action and in the instant case, the original Plaintiff had not failed or neglected to prosecute the partition. His contention was that since the Plaintiff moved to withdraw the partition action, it was not open to the District Court to permit the 8th and 9th Defendants to prosecute the action under the provisions of the Partition Law.

[26] Dr. Cooray strongly relied on the judgment of the Court of Appeal in *Amarasinghe v. Podimenike and Others* (1997) 1 Sri L.R. 349 in support of the submission that when a Plaintiff deliberately moves to withdraw a partition action, it is not open to the District Court to permit a Defendant to prosecute the partition action. In *Amarasinghe v. Podimenike and Others* (Supra), Edussuriya, J. stated at page 350:

“Under section 70 of the Partition Law, a Court can dismiss a partition action for non-prosecution. However, the proviso to section 70 permits a defendant to prosecute a partition action where the plaintiff fails or neglects to prosecute the partition action. In this instant case, there was no failure or neglect by the plaintiff to prosecute this partition action. On the other hand, there was a deliberate act of withdrawal of the partition action and it is not open to the Court to permit the defendant, who had asked for a dismissal of the action to proceed to prosecute the partition action by filing an amended plaint. The Partition Law does not provide such a procedure”.

[27] On the other hand, Mr. de Silva drew out attention to the statement of claim jointly filed by the 8th and 9th Defendants dated 21.05.1987 and the amended statement of claim jointed filed by the 8th and 9th Defendants on 26.11.1990 wherein they had asked for a partition of the land in suit according to their shares set out in their statement of claim. Mr. de Silva further submitted that where a Defendant had asked for a partition of the land which is the subject of the action, it is open to the District Court to permit a Defendant to prosecute a partition case under sub-section (2) of section 70 and hence, the judgment in *Amarasinghe v. Podimenike and Others* (Supra) has no application to the present case.

[28] In view of the submissions made by Dr. Cooray and Mr. de Silva, I am now called upon to decide the question whether it is open to the District Court to permit the original 8th and 9th Defendants to prosecute the partition action when the original Plaintiff moved to withdraw the action.

[29] The intention of the Parliament in introducing section 70 of the Partition Law can be gathered from the nature, character, purpose and object of the partition action. The concept of judicial proceedings for partition or sale is that of dissolving the bond of common ownership by alienation of the co-owner's shares (*Ceylon Theatres Ltd v. Cinemas Ltd* (70 NLR 337 at 339). It seems that the partition action is instituted for the purpose of putting an end to the common ownership and for that purpose, an obligation is imposed on the Court by endeavouring to compel the parties to bring the action to a termination.

[30] A partition action is defined in section 83 of the Partition Law No. 21 of 1977 as amended as "an action instituted under this Law for the partition or sale of any land or lands belonging in common to two or

more owners and includes any action, proceeding or other matter continued under section 82”.

[31] An action and cause of action are defined in section 5 of the Civil Procedure Code. An action is “proceeding for the prevention or redress of a wrong” and a cause of action is “the wrong for the prevention or redress of which an action may be brought and includes the denial or a right, the refusal to fulfil an obligation the neglect to perform a duty and the infliction of an affirmative injury”. However, a partition action is not an action founded upon a wrong or a cause of action as defined in section 5, but it would be an action under the definition of action under section 6, which is an “application to a court for relief or remedy obtainable through the exercise of the court’s power or authority or otherwise to invite its interference”. A partition action may be fairly said to be a proceeding instituted by one co-owner to secure a divided holding of the common property from joint ownership or to obtain his share in the proceeds of sale of the common land.

[32] For this reason, a partition action has been recognized as a special character as all the parties have the double capacity of Plaintiff and Defendant (*Voet X. I. iii & Bandu Naide v. Appu Naide et al* (1923) 3 C.L. Rec. 192) and thus, he who first brought the action is taken to be the Plaintiff (*Weerakoon et. al v. Waas* 57 NLR 25). In that sense, in a partition action, all the parties are Plaintiffs (*De Silva v. De Silva* 3 C.W.R. 318). When any land belongs in common to two or more owners, any one or more of them, whether or not his or their ownership is subject to any life interest in any other person, may institute a partition action to put an end to ownership in common because of the increased inconvenience of possession of the land in common.

[33] Section 70 of the Partition Law as amended by Partition (Amendment) Act No. 17 of 1997 is intended to promote this legislative intent and ensure that once a partition action is filed, it shall not abate by reason of non-prosecution of the action. To achieve this legislative intent, it imposes an obligation on the Partition Court to use all reasonable endeavours by compelling the parties to bring the action to a termination. Section 70 provides as follows:

"(1). No partition action shall abate by reason of the non-prosecution thereof, but, if a partition action is not prosecuted with reasonable diligence after the court has endeavoured to compel the parties to bring the action to a termination, the court may dismiss the action:

Provided, however, that in a case where a plaintiff fails or neglects to prosecute a partition action, the court may, by order, permit any defendant to prosecute that action, and may, by order, permit any defendant to prosecute that action and may substitute him as a plaintiff for the purpose and may make such order as to costs as the court may deem fit.

(2) Any party in a partition action or any person claiming an interest in the land in respect of which such action has been instituted, may, if no steps have been taken to prosecute the action for a period of two years, apply, by way of motion to court, to have such action dismissed, and the court may dismiss the action if it is satisfied that dismissal is justified in all the circumstances of the case.

(3) Where the court dismisses an action under section, it shall cause a copy of the order of dismissal of the action to be registered at the Land Registry in the folio in which the lis pendens in the action was registered, or the continuation thereof".

[34] The legislative intent of the Partition Law for the promotion of partition is reflected in sub-section (1), which clearly imposes an obligation on the Court to use all reasonable endeavours by compelling the parties to bring the action to a termination. On the other hand, the proviso to sub-

section (1) permits the Court to permit any other Defendant to prosecute the action where the Plaintiff fails or neglects to prosecute the action.

[35] Dr. Cooray strongly relied on the words “where a plaintiff fails or neglects to prosecute a partition action” and argued that where there is no evidence that the Plaintiff had failed or neglected to prosecute the action, a Defendant cannot be permitted to prosecute the action and substitute him as a Plaintiff under the proviso to sub-section (1). Dr. Cooray further submitted that in the instant case, the Plaintiff deliberately sought to withdraw the action and hence, the dismissal of the action is automatic as the Plaintiff had not failed or neglected to prosecute the action. His contention was that the action shall be dismissed irrespective of the fact that the other Defendants who sought a partition moved that they be permitted to prosecute the action.

[36] The legislative intent should not be gathered by reading the proviso alone, but it has to be gathered by reading section 70 in its entirety, the context, the object and purpose of the partition and its operation to achieve the legislative intent. I am not inclined to agree with the submission that where the Plaintiff moves to withdraw the partition action, the policy of the partition law is that the dismissal is automatic, whether the other parties asked for a partition. I shall give my reasons.

[37] It is not in dispute that on 23.03.1999, the Plaintiff moved to withdraw the action on the 4th trial date without prior notice to the other defendants, but the learned Additional District Judge did not dismiss the action but allowed the original 8th and 9th Defendants to prosecute the action. Sub-section (1) of section 70 as amended by the Partition (Amendment) Law No. 17 of 1997 recognises the policy that no abatement of a partition action shall be allowed on the ground on non-prosecution, but the Court may dismiss the partition action for non-

prosecution after it had endeavoured to compel the other parties to bring the action to a termination subject however, to the proviso.

[38] The proviso permits a Defendant to prosecute the partition action where the Plaintiff fails or neglects to prosecute the partition action. It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision and thus, it carves out an exception to the main provision to which it has been enacted as a proviso and to no other (*Ram Narain Sons Ltd v. Asst Commr of Sales -tax* AIR 1955 SC 765). A proviso, however, can only operate to deal with a case, which would have fallen within the ambit of the section to which it is a proviso (Bindra's Interpretation of Statutes, 10th Ed. page 127). A proviso must be considered in relation to the principal matter to which it stands as a proviso and thus, the section must be read along with the proviso as a whole (*State of Punjab v Kailash Nath* AIR 1989 1 SC 558 (1989)).

[39] It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso and thus, it is to be construed harmoniously with the main enactment as a proviso is subservient to the main provision (Bindra's Interpretation of Statutes, 10th Ed. p. 137 & *South Asia Industries Pvt Ltd v. Sarup Singh* AIR 1966 SC 349). The territory of the proviso, therefore, is to carve out in an exception to the main enactment and exclude something which otherwise would have been within the section and thus, it has to operate in the same field (Bindra's Interpretation of Statutes, Supra).

[40] It seems that before a proviso to sub-section (1) can have any application, the sub-section (1) which contains the legislative intent of section 70 itself must be considered first and the proviso must be

considered in relation to the principal section to which it stands as a proviso. The idea is that in any event, a proviso to sub-section (1) cannot be used to defeat the basis intent expressed in the substantive provision in sub-section (1) of section 70 of the Partition Law.

[41] In *Peiris and Others v. Chandrasena and others*, (1999) 3 Sri LR. 153, Gunawardena, J. emphasized the legislative intent in introducing section 70 of the Partition Law and obligation imposed by the Court by endeavouring to compel the parties to bring the action to an end at page 156 as follows:

"It is to be observed that section 70 quoted above, states on an emphatic note, that no partition action shall abate by reason of non-prosecution of the same and it imposes a duty on the Court to "compel the parties" to bring the action to an end which duty the Court in this case has signally failed to fulfil".

[42] Gunawardena, J. further emphasized the need to follow the mandatory requirements of section 70 before a partition action is dismissed and stated at page 157:

"One must not forget the fact, as the Court had forgotten) that section 70 makes it imperative or mandatory, before the action is dismissed, that (to quote the very words of the section): the "Court had endeavoured to compel the parties to bring the action to a termination".

[43] In *K. S. Victor v. W. I. Tissera* (C.A 374/2000) decided on 12.10.2015), Nawaz, J. has also observed the policy of section 70 of the Partition Law at page 14 as follows:

"The pith and substance of promoting the spirit behind the Partition Law lie in the District Judge's role in his/her endeavour to bring the parties to trial and terminate the proceedings as the final decree is dispositive of parties' right against the whole world.... "

[44] The plain words of sub-section (1) of section 70 make it very clear that it is the duty of the Court to use all endeavours to compel the parties to bring the action to a termination and a partition action can only be dismissed for non-prosecution after the Court has endeavoured to compel the parties to bring the action to a termination. This means that the Judge is obliged to make every endeavour and compel the parties who sought a partition to bring the action to an end before he could resort to the harsh sanction of dismissal of the partition action.

[45] In the present case, the Plaintiff moved to withdraw the action on 23.03.1999 without specifying any reason whatsoever and without notice to the other parties. If the withdrawal is permitted under such circumstances, the effect would be that in the eye of the law, the partition action is dismissed and the action is terminated as no partition action is filed.

[46] In *Amarasinghe v Podimenike and Others* (supra), the Court of Appeal held that when there is a deliberate act of withdrawal of the partition action, it is not open to the Defendant who had asked for a dismissal of the action to proceed to prosecute the action. Here, it is different. In the present case, there are several parties who had asked for a partition of the land in suit and thus, before the action is dismissed, a duty was cast on the District Judge under sub-section (1) of section 70 to provide every reasonable opportunity to the parties who had asked for a partition and use every endeavours to compel them to bring the action to a termination.

[47] It is open to the Court to dismiss a partition action only in the event of the parties who had asked for a partition expressing an intention not to prosecute the action after the Court had given all reasonable opportunities and endeavoured to compel them to bring the action to a termination.

When one of the Defendant who had sought a partition of the action indicates his willingness to prosecute the action, any dismissal of the partition action is inconsistent with the legislative intent expressed in sub-section (1) of section 70 of the Partition Law which stipulates that a dismissal may be allowed only after the Court had endeavoured to compel the parties to bring the action to a termination.

[48] I hold that the power of the District Court to dismiss a partition action upon the withdrawal shall be exercised only after every reasonable opportunity had been given to all the parties who asked for a partition and after using every reasonable endeavours to compel the parties to bring the action to a termination. However, where all the Defendants had asked for a dismissal of the action, the Court has no option but to dismiss the action without permitting a Defendant to proceed to prosecute the action as observed by Eddusuriya J. in *Amarasinghe v. Podimenike and Others* (Supra).

[49] Section 70 of the Partition Law requires that in the case where a plaintiff neglects or fails to prosecute a partition action, the Court may, by order permit any Defendant to prosecute that action. In order to achieve this, the District Judge may substitute the Defendant who is desirous of continuing with the action as substituted Plaintiff. The same principle applies where a Plaintiff moved to withdraw the action and a Defendant who asked for a partition indicates his willingness to prosecute the action.

[50] If the District Court is obliged to dismiss the partition action for a mere application of a Plaintiff to withdraw the action, disregarding any intention of a Defendant who had asked for a partition of carrying on with the action, it is obviously inconsistent with the spirit, object and purpose of section 70 (1) of the Partition Law. Such a course of action, in my view, was not contemplated by the legislature in introducing section 70 of the

Partition Law. To take a contrary view, would certainly defeat the legislative intent expressed in sub-section (1) of section 70 of the Partition Law and take away the obligation imposed on the District Judge by endeavouring to compel the parties to bring the action to a termination.

[51] At the hearing, Dr. Cooray and Mr. Sahabandu submitted that the 9th Defendant who had been permitted to prosecute the case along with the 8th Defendant was neither present nor represented after Mr. Shelton Perera passed away and hence, the District Court should not have permitted the 9th Defendant to prosecute the case along with the 8th Defendant.

[52] It seems that after the demise of Mr. Shelton Perera (Vide- J.E 67 dated 13.05.1996), the 9th Defendant had not been represented and thereafter, the District Court issued notice on the 9th Defendant to be present in Court on 04.05.1998. The Journal Entry No. 67 clearly indicates that though the notice was served on the 9th Defendant, she was absent and unrepresented on the notice returnable date on 04.05.1998 or thereafter.

[53] When the case was taken up for trial on 23.03.1999, the Plaintiff moved to withdraw the action, the learned District Judge had recorded that the 8th and 9th Defendants informed him that they wished to prosecute the action. The relevant journal entry No. 68 dated 23.03.1999 reads as follows:

අතුරු පෙන්සමිකරුවන්ගේ ඉල්ලීම ඉල්ලා අස්කර ගෙනි.
පැමිණිලිකරු නඩුව ඉල්ලා අස් කර ගැනීමට අවසර පනයි.

පසුව :

8, 9 වින්තිකරුවන් නඩුව තමාම දිනියට ගෙන යන බව දන්වයි. ඔවුන් පැමිණිලිකරුවන් ලෙස ශීර්ෂයට ඇතුළත් කර සංගේධනය කරන්න.
පැමිණිලිකරු අවසාන වින්තිකරු ලෙස ඇතුළත් කරන්න.

[54] A perusal of the record reveals that the 8th Defendant had been represented by Mr. Barty Jayaweera on 23.03.1999 but the 9th Defendant was neither present nor represented on 23.03.1999. She had not taken any steps to retain a registered attorney even after she was noticed by the District Court to be present in Court. The 8th and 9th Plaintiffs-Respondents in their objections had never denied the position of the Petitioners in paragraph 7 of the Petition which states that after the notice was served on the 9th Defendant, she did not come to Court thereafter or retain a registered attorney to represent her on 23.03.1999.

[55] The 8th and 9th Plaintiffs-Respondents in their objections had admitted the bare matters of record in paragraph 7 of the Petition and denied the rest of the averments. They had never taken up the position in their objections that the 9th Defendant was present in Court on 23.03.1999 and indicated her willingness to prosecute the case along with the 8th Defendant. It seems to me that the 9th Defendant was neither present nor represented in Court on 23.03.1999 and thus, she never indicated her willingness to prosecute the action along with the 8th Defendant when the Plaintiff moved to withdraw the partition action. On the other hand, the registered attorney for the 8th Defendant had no authority to make any application on her behalf when she had not given a proxy to appear for her on 23.10.1999 in Court.

[56] For those reasons, I am inclined to agree with the submission of Dr. Cooray and Mr. Sahabandu that the learned District Judge should not have permitted the 9th Defendant to prosecute the action along with the 8th Defendant.

[57] However, the application made by the original 8th Defendant to prosecute the case is different. Both Dr. Cooray and Mr. Sahabandu conceded that the original 8th Defendant had retained Mr. Berty Jayaweera after the demise of Mr. Shelton Dias, filed an amended statement of claim and prayed for a partition of the land in suit. It is not in dispute that the original 8th Defendant indicated her willingness to prosecute the partition action as borne out by the record in the presence of her attorney who represented her on 23.10.1999.

[58] As noted, the policy of the partition law is to grant relief against increased inconvenience of common property by means of bringing the action to a termination and the dismissal of the partition action either for non-prosecution or mere application to withdraw the action is not the legislative intent when other parties are willing to prosecute the action. It is for that purpose, section 70 (1) imposes an obligation on the Judge to provide every reasonable opportunity to the parties who asked for a partition and use every endeavour to compel the parties to bring the action to a termination.

[59] This partition action was filed in 1984 and after the Preliminary Plan was prepared, the substituted 1A (the present 1A Defendant-Petitioner) and the original 2nd Defendant also took out a commission and prepared the Plan No. 784 dated 22.04.1996. Several parties intervened and filed their statements of claim, including the original 3rd, 6th, 8th and 9th Defendants and sought a partition while the 11th to 14th Defendants also sought a partition as an alternative relief. The case was first fixed for trial on 23.07.1991 and postponed on several occasions. The application for the withdrawal of the action was made by the Plaintiff on 23.03.1999 when the parties had litigated for 15 years.

[60] The Petitioners now seek to cause further inconvenience to the other parties who litigated for more than 15 years and deprive them of having to put the common ownership to an end because of the increased inconvenience of common possession. If they are told to file a fresh action to end their inconvenience, surely, they have to begin the never-ending proceeding from the very beginning by spending an enormous amount of money, time and effort, all to the detriment to the parties and their heirs.

[61] For those reasons, I hold that the learned District Judge has correctly given effect to the legislative intent expressed in sub-section (1) of section 70 of the Partition Law and properly exercised his discretion by permitting the original 8th Defendant who asked for a partition, to prosecute the action and substituting the 8th Defendant as a Plaintiff in the action.

Legality of the Settlement upon which the Judgment was entered

[62] At the hearing Dr. Cooray strenuously argued that the trial was conducted on 21.10.1999 in gross violation of the procedure laid down in the Partition Law and the Civil Procedure Code causing a miscarriage of justice to the parties for the following reasons:

1. The 18-20the Defendants filed a statement of claim without serving copies on the other parties and were added just on the morning of the trial date on 21.10.1999 and thus, the case was not ready for trial as the other parties did not have adequate notice of the nature of their case. There was a total failure on the part of the District Court in not re-fixing the case for trial for another day under section 24 (2) of the Partition Law in order to enable the parties to get ready for trial in view of the addition of the new parties that morning itself;
2. The 18th defendant who was added as a defendant in the case just that morning commenced giving evidence stating that all disputes in

the case had been settled when there was no agreement between the parties and most of the parties including the substituted Plaintiffs were absent and their registered attorneys informing that they had no instructions from their clients;

3. The 18th Defendant failed to satisfy that the corpus of the action is properly depicted in the Preliminary Plan No. 2516 made by the Court Commissioner and the 18th Defendant failed to produce the Preliminary Plan and what was produced at the trial was only the Second Plan No. 784 prepared by Surveyor Mr. Ediriwickrema;
4. The land sought to be partitioned is in extent of 8 acres whereas the land depicted in the Preliminary Plan is in extent of 4 acres 3 roods and 25 perches. The learned District Judge has failed to identify the corpus of the action in the light of a discrepancy between the land sought to be partitioned and the land depicted in the preliminary Plan;
5. There was no investigation of the title of the parties by the learned District Judge who had failed to determine the shares of the parties and give reasons for the findings in total disregard of the provisions of the Partition Law; and
6. Although several deeds were marked at the trial by the 18th Defendant, only few Deeds were produced and the judgment had been delivered without considering all the Deeds marked by the 18th Defendant at the trial.

Testimony of the 18th Defendant on the basis of a Settlement

[63] A perusal of the record reveals that when the case was taken up for trial on 21.10.1999, the original 8th and 9th Defendants who were substituted as Plaintiffs on 23.03.1999 were absent and their lawyer informed the Court that he had no instructions from them. Thereafter, the Intervenient

Petitioners (18-20 Defendants) who withdrew their application on 23.03.1999 (Vide- J.E. No. 68 dated 23.03.1999) were allowed to file their statement of claim and they were added as 18th to 20th Defendants by the learned Additional District Judge.

[64] Strangely, the 18th Defendant who was just added as a party defendant that morning itself commenced giving evidence in a most unsatisfactory, irresponsible and shocking manner, stating that **all disputes in the case had been settled** (මෙම නඩුවේ තිබූ සියලුම ආරච්ඡල් සමරියට පත්වී ඇත. ඒ අනුව සාක්ෂි මෙහෙයවන බව කියා සිටිනවා) in gross violation of section 91 and 408 of the Civil Procedure Code. It seems without doubt, that the evidence of the 18th Defendant was led on the basis of a purported settlement or agreement between the parties when the substituted Plaintiffs and several other Defendants including the 1A defendant, the 4th, 5th, 6th, 10th and 11th Defendants were absent and their registered attorneys informing the District Judge that they had no instructions from their clients.

[65] It is to be observed that the learned Additional District Judge had permitted the 18th Defendant to lead evidence immediately after the 18th to 20th Defendants were allowed to file the statement of claim and added as new parties that morning itself without providing an adequate time to examine the nature of the pedigree pleaded by the 18th to 20th Defendants in their statement of claim and obtain instructions from the parties. It was obvious that the case was not ready for trial on 21.10.1999 in view of the addition of the new parties whose statement of claim was accepted only on that morning and the substituted Plaintiffs were absent and their lawyer had no instructions.

[66] Section 24 (2) of the Partition law reads as follows:

“On the day appointed under subsection (1), of this section or where it appears to the court that the case is not ready for trial, on nay later date to which the matter shall on that date have been postponed, the court shall fix the date of trial of every partition action in open court.”

[67] Under such special circumstances, the learned District Judge in my view, should have exercised his discretion under section 24 (2) of the Partition Law and re-fixed the matter for another date to enable the parties to examine the new statement of claim and the pedigree filed by the new parties that morning itself. On the other hand, the learned Additional District Judge should not have permitted the 18th Defendant to give evidence on the basis of a purported settlement without the presence of the parties or their representatives and without ascertaining the nature of the settlement which was said to have been reached by the parties.

[68] The substituted 4th Defendant-Respondent has stated in his objections that the original 4th Defendant who is his mother passed away on 04.04.1995 (Vide- the Death Certificate No. 3683 which is filed of record and marked as “B”) but no steps were taken to substitute her heirs in place of the deceased 4th Defendant. The substituted 4A Defendant-Respondent has further stated that the purported settlement had been reached without any notice to the heirs of the original 4th Defendant and the trial conducted without taking steps for substituting the heirs of the 4th Defendant. He has stated that under such circumstances, a fraud had been committed by the 18th Defendant in entering into a purported settlement without notice to the heirs of the 4th Defendant and in the result, the rights of the deceased 4th Defendant had been adversely affected.

[69] A perusal of the original Plaintiff reveals that the Plaintiff had given an undivided 44/375 share to the 4th Defendant on the basis of the Deed No.

8798. The 18th defendant had not produced the said Deed but only stated that the rights of Sisiliyana Wickremasinghe who derived rights from deed No. 76 were devolved on the Plaintiff and the 2nd to 5th Defendant and moved to keep such rights unallotted as the Deed No 76 was not produced. It seems to me that the purported settlement had been reached without the knowledge of the heirs of the 4th Defendant.

Judgment entered upon the Settlement

[70] A perusal of the unsigned judgment dated 13.03.2000 reveals that the learned Additional District Judge has merely stated in the judgment that (i) he was satisfied that the land sought to be partitioned is depicted in Plan No. 2516 dated 10.04.1985 made by Mr. Gallapathithi; (ii) according to the evidence adduced and the documents produced at the trial, the land sought to be partitioned is a common property; and (iii) the parties are entitled to partition the land depicted in Plan No. 2516 according to the evidence adduced by the 18th Defendant at the trial. The unsigned judgment dated 13.03.2000 reveals that the judgment only contains bare statements with no investigation of the title of the parties or consideration of the deeds of the parties or determination of the respective rights and the shares of the parties.

[71] While conceding that the learned District Judge had failed to calculate shares to be allotted to the parties, Mr. de Silva argued, however, that the maximum that can be done at this stage is to direct the District Judge to calculate the shares, according to the evidence already led at the trial and pronounce the judgment accordingly. Mr. de Silva strongly objected to any fresh trial being ordered and submitted that the Petitioners cannot now challenge the entire proceedings of the case when the case proceeded to trial in the presence of the original Plaintiff and without a contest and no

objection to any procedural errors in the proceedings was taken by the original Plaintiff in the District Court.

[72] Dr. Cooray however, submitted that the evidence given by the 18th Defendant at the trial was based on a purported settlement between all the parties, which is tainted with fraud and invited us to set aside the judgment dated 13.03.2000 and order a fresh trial in the interests of justice.

[73] It is settled law that an agreement, which is entered into a partition action, affecting only the rights of the parties *inter se*, and which is expressly made subject to the Court being satisfied that all parties are entitled to interests in the land are before it and solely entitled to it, is binding on the parties and is not obnoxious to the Partition Ordinance (*Kumarihamy v. Weeragama* 43 NLR 265). Thus, there must be a binding agreement between the parties and the Court must be satisfied that as to whether the agreement is between all the parties having interests in the land and the respective shares or interests to be given to each party is based upon the compromise that is so reached (*Rosalin v. Maryhamy* 1994 (3) Sri LR 262). In *Gunawardena v. Ran Menike* (2000) (3) Sri LR 243, Weerasuriya J. stated that where there has been a settlement or compromise, it must be in strict compliance with the provisions of section 91 and section 408 of the Civil Procedure Code. Sections 91 and 408 of the Civil Procedure Code are as follows:

91- Every application made to the court in the course of an action, incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his counsel or registered attorney, and a memorandum in writing of such motion shall be at the same time delivered to the court

408. If an action be adjusted wholly or part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the action, such agreement,

compromise, or satisfaction shall be notified to the court by motion made in presence of, or on notice to, all the parties concerned, and the court shall pass a decree in accordance therewith, so far as it relates to the action, and such decree shall be final, so far as relates to so much of the subject-matter of the action as is dealt with by the agreement, compromise, or satisfaction.

[74] When a settlement is reached in a partition action, it must be clearly indicated to the District Judge and the District Judge must also be satisfied that all parties entitled to interests in the land are before Court or represented and that they are solely entitled to shares and that the settlement is not a forced or imposed upon the unwilling parties.

[75] In the present case, soon after the 18-20 Defendants were added as new parties in the morning, the 18th defendant got into the witness box and her evidence was led by her Counsel on the basis that “all disputes are settled” without indicating to Court, the nature and terms of the settlement and the parties who will be entitled to shares agreed upon and as to whether the parties whose interests in the land are affected by the settlement. A pursual of the record clearly reveals that no agreement or terms of the settlement with regard to the corpus of the action, original ownership, the parties who will be entitled to undivided shares or the parties whose interests will be affected by the settlement had been disclosed to the District Court either before or during the course of the trial.

[76] The 18-20 Defendants had in her statement of claim relied on the pedigree set up by the 11th - 14th Defendants who had, however, not given shares to the 18th to 20th Defendants in their pedigree. There is no indication whatsoever, whether the evidence of the 18th defendant was led on the basis of the pedigree set up by the 11th - 14th Defendants or any other composite pedigree.

[77] In the present case, the learned Additional District Judge has completely acted in violation of the provisions of the partition law and merely accepted the evidence of the 18th Defendant by way of a purported settlement which lacks in precision, mutuality and compliance with the provisions of section 91 and 408 of the Civil Procedure Code.

[78] It seems to me that the Court had played the role of a blind umpire, watched helplessly and allowed fundamental vice practiced in the partition proceeding by way of a purported settlement which lacks precision, consensus and mutuality causing a miscarriage of justice to the parties. Hence, the purported settlement and the judgment entered upon such purported settlement cannot be permitted to stand in the eyes of the law.

Investigation of Title of the Parties

[79] Even if it is possible for parties to a partition action to compromise their disputes, the Court has to investigate the title of each party and satisfied itself as to the respective rights and allotment of shares upon the compromise reached by the parties (*Gunawardena v Ram Menike* (Supra)). Section 25 of the Partition Law imposes on the Court the obligation to examine carefully the title of each party to the action. Section 25 of the Partition Law imposes on the Court the obligation to examine carefully the title of each party to the action. Section 25 (1) of the Partition Law provides that: -

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

[80] It is settled law that there is a paramount duty cast on the Court by the Partition Law itself to investigate the title of the land sought to be partitioned and the parties before the Court are those solely entitled to such land. The necessity for a full investigation and strict proof of title has been emphasized in a number of judgments. In *Galagoda v. Mohideen* 40 N.L.R. 92, it was held that the Court should not enter a decree in a partition action unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property.

[81] In *Juliana Hamine v. Don Thomas* 59 N.L.R. 549, it was held that a partition action cannot be the subject of a private arrangement between the parties on matters of title which the Court is bound by law to examine. As noted, there is a total lack of investigation of title and no reference is made to the original ownership of the land sought to be partitioned or the determination of shares of the parties.

[82] The land sought to be partitioned is an amalgamated land called "Kattuhena, Sattambigewattra and Ambarage Bima" in extent of 8 acres, whereas the land depicted in the Preliminary Plan is in extent of 4 acres 3 roods and 25 perches. No investigation has been made by the learned Additional District Judge to be satisfied that the amalgamated land sought to be partitioned is properly depicted in the Preliminary Plan No. 2516. A perusal of the evidence given by the 18th Defendant further reveals that the 18 Defendants had produced the documents marked P1 to P6, 1 V1 to 1V4, 4V3 and 4V4. The record shows, however, that the parties had produced the documents marked P2 to P7, 11V2 and 11V4 and the Deeds marked 4V3 and 4V4, 1V1 and 1V4 had not been tendered to Court by the parties. The judgment had been entered on 21.10.1999 soon after the Plaintiff's P1 to P7 were tended in open Court in the absence of the documents marked 1V1 to 1V4, 4V3, 4V4, 11V3 and 11V4. Thus, the

documents marked 1V1 to 1V4, 4V3, 1V3 and 11V4 had not been considered at all by the Court.

[83] For those reasons, I am not inclined to agree with the submission of Mr. de Silva that the irregularities in the judgment can be rectified by merely calculating the shares on the evidence of the 18th Defendant when the irregularities of fundamental vice had taken place with regard to the purported settlement, total lack of investigation of title and the failure to determine the respective shares of the parties.

Existence of Exceptional Circumstances

[84] The irregularities of fundamental vice with regard to the purported settlement, the total lack of investigation of title of each party, the failure to consider the respective shares of the parties and the absence of a valid judgement supported by reasons are strong exceptional circumstances that warrant the intervention of this Court by way of revision. Hence, the preliminary objection with regard to the non-existence of exceptional circumstances is rejected.

Delay in filing the action after the order dated 23.03.1999 was pronounced

[85] The 8th and 9th Plaintiffs-Respondents have further raised a preliminary objection that the Petitioners who were seeking to set aside the order dated 23.03.1999 and all proceedings that had taken place thereafter had sufficient time to file this application without waiting for a period of 1 year and 4 months and hence, the Petitioners are guilty of laches.

[86] The question whether the delay is fatal to an application in revision depends on the facts and circumstances of the case. In this context, it is appropriate to quote from His Lordship former Chief Justice G.P.S. De Silva, in the case of *Gnanapandithan v. Balanayagam* (1998) 1 Sri LR 391, where he held:

"The question whether the delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to the very special and exceptional circumstances of the case, the appellants were entitled to the exercise of the revisionary parties of the Court of Appeal".

[87] The Petitioners have sought to set aside all proceedings that had taken place after the Plaintiff had moved to withdraw the action, which also include the proceedings and the judgment dated 13.03.2000. As noted, the proceedings dated 21.03.1999 are tainted with illegality and the judgment dated 13.03.2000 is unsupported by reasons and lack of investigation of title and non-consideration of shares.

[88] Article 138 of the Constitution has conferred revisionary jurisdiction on the Court of Appeal to make necessary orders as may be necessary for the ends of justice where a miscarriage of justice has occurred. It is settled law that if the impugned order or part thereof is manifestly erroneous and is likely to cause grave injustice, the Court should not reject the application on the ground of delay alone (*Caroline Nona and Others v. Fedrick Singho and Others* (2005) 3 Sri LR 176). In *Biso Menike v. Cyril de Alwis* 1982 1 Sri LR 368, Sharvananda, J. (as he then was) at 379 observed:

"When the Court has examined the record and is satisfied the order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approved the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically."

[89] Once the proceedings dated 21.10.1999 and the judgment dated 13.03.2000 are manifestly erroneous and liable to be set aside and this

application had been made 4 months from the date of the judgment dated 13.03.2000, I am not inclined to reject the revision application for the mere delay when such fundamental vice had resulted in a grave miscarriage of justice to the parties.

Suppression and Misrepresentation of Material Facts

[90] The 8th and 9th Plaintiffs-Respondents have raised a preliminary objection that there had been a suppression and misrepresentation of material facts by the Petitioners when they filed this application without filing a copy of the judgment which was already filed of record by the time this application was filed. As noted, the Petitioners cannot be found guilty of willful suppression or misrepresentation of material facts when no judgment was available in the record for a period of over 4 months as borne out by the record.

[91] As noted, in paragraphs 18-23, the Petitioners have made a full and fair disclosure of all material facts and the circumstances under which they could not file a certified copy of the judgment with the Petition, which was clearly not available till 14.07.2000 as borne out by the record.

[92] Even if a copy of the judgment is filed with the Petition, it will not have any effect on the outcome of this case as the judgment dated 13.03.2000 is a judgment unsupported by reasons, lacks investigation of title of the parties and the determination of the respective shares of the parties. For those reasons, I reject the preliminary objection that the Petitioners have suppressed and misrepresentation of material facts.

[93] For those reasons, I reject all the preliminary objections raised by the 8th and the 9th Plaintiffs-Respondents and hold that the revisionary powers of the Court of Appeal are wide enough to embrace a case of this nature to remedy a miscarriage of justice.

Conclusion

[94] I hold that the order of the learned Additional District Judge dated 23.03.1999 permitting the original 8th Defendant to prosecute the partition action and substituting the 8th Defendant as a Plaintiff is justified while his decision to permit the original 9th Defendant to prosecute the partition action has no legal basis.

[95] In the interests of justice, I set aside the proceedings, including the purported settlement of the District Court of Matara dated 21.10.1999 and the judgment of the learned Additional District Judge dated 13.03.2000. I direct the learned District Judge of Matara to proceed to trial *de novo* disregarding the proceedings and the purported settlement dated 21.10.1999 and conclude the case as expeditiously as possible.

[96] Subject to this variation, the application in revision in part, is allowed. The parties shall bear their own costs.

JUDGE OF THE COURT OF APPEAL

Shiran Gooneratne J.

I agree.

JUDGE OF THE COURT OF APPEAL