1958 *Present :* **Sansoni, J., and T. S. Fernando, J.**

A. K. W. PERERA, Petitioner, *and* G. DON SIMON, Respondent

S. C. 268—Application for Restitutio in integrum or revision in D. C. Colombo, 6400

Restitutio in integrum—*Instances when relief will not be granted—Partition actions—Negligence—Delay.*

An application for *restitutio in integrum* cannot be made in a partition action

Nor would *restitutio* be granted where there has been negligence or delay on the part of the petitioner.

APPLICATION for *restitutio in integrum* or revision.

Sir Lalita Rajapakse, Q.C., with *W. P. N. de Silva*, for the Plaintiff-Petitioner.

T. B. Dissanayake, for the Defendant-Respondent.

Cur. adv. vult.

October 21, 1958. SANSONI, J.—

This is an application by the plaintiff in a partition action for relief by way of restitutio in integrum or revision.

The plaintiff instituted the action in 1951 in respect of a land which was described in the schedule to the plaint as the divided portion marked lot A presently bearing assessment Nos. 116, 116/1 and 122 situated at Layards Broadway, within specified boundaries and containing in extent 2 roods 24 79/100 perches. Upon a commission issued by the Court preliminary plan No. 19 of 20th September 1952 was made by Surveyor K. L. de Silva who reported that the land was surveyed on 14th March 1952 as pointed out by the plaintiff. The Surveyor's report also contained a detailed valuation of the 4 lots which were said to form the subject matter of the action, and were shown in the plan bearing Nos. 1, 2, 3 and 4.

The trial took place on 12th October 1953, when the plaintiff and the defendant were represented by Counsel. Both parties accepted the correctness of the plan, and the plaintiff in giving evidence stated that he sought to partition lots 1, 2, 3 and 4 depicted in the plan.

By his judgment delivered on 2nd November 1953, the trial judge declared the plaintiff entitled to 1/3 and the defendant to 2/3 share of lots 1, 2, 3 and 4. A decree for sale was entered in those terms on 1st June 1955, after an appeal by the defendant to this Court had been dismissed.

The 4 lots, which had in the meantime been sub-divided into 9 lots for the purpose of the sale, were accordingly sold on 19th March 1958. The plaintiff purchased six of those lots and paid a deposit of 1/10 of the purchase price. When he sought to raise a loan from the Savings Bank by hypothecating premises No. 120 Layards Broadway which belonged entirely to him, the Bank's lawyers apparently discovered that a part of premises No. 120, to the extent of 4·48 perches, had been included in lot No. 2 of the preliminary plan.

The plaintiff now seeks to exclude this extent of 4·48 perches from the corpus in respect of which the sale was held under the decree for sale. The defendant has objected on the following grounds : (1) the land was surveyed for the preliminary plan as pointed out by the plaintiff ; (2) over 6 years have elapsed since that plan was made ; (3) the plaintiff should have become aware of the mistake, if there was one, soon after the plan was made, and he has therefore been negligent in not having taken steps earlier to rectify the error ; (4) the sale has already been held and there is no guarantee that the land would fetch the same price if a re-sale were to take place.

It is fair to presume that the inclusion of a portion of premises No. 120 in the corpus was the result of the plaintiff pointing out that portion to the surveyor. But even if he did not point out that portion, and the surveyor wrongly included it as part of the subject matter of the action, it was the fault of the plaintiff and his lawyers that the mistake was

not detected before the decree was entered. They failed to exercise due care when examining the plan, and thus omitted to discover what the Bank's lawyers discovered after the lapse of some years.

Restitutio in integrum can be claimed on the ground of *justus error*, which I understand to connote reasonable or excusable error. I am unable to see that such a ground exists in this case. It is, on the contrary, an example of damage arising from carelessness or negligence. I would refer in this connection to *Mapalathan v. Elayavan* [1] and *Dember v. Abdul Hafeel* [2]. In those cases it was held that restitutio would not be granted where there has been negligence on the part of the applicant for relief. The case is all the worse if the error is due to the act of the plaintiff himself, as would appear to be the case here.

The delay in seeking relief has raised another bar in the plaintiff's way. An application for restitutio has been held to be governed by Section 11 of the Prescription Ordinance No. 22 of 1871 (now section 10 of Cap. 55) : see *Silindu v. Akura* [3]. Over three years had elapsed between the entering of the decree and the filing of the present application, and it was therefore filed too late.

It has also been held that an application for restitutio cannot be made in a partition action. This is another reason why the plaintiff's application must fail : see *Babun Appu v. Simon Appu* [4] and *Ibrahim v. Beebee* [5].

The application for revision is misconceived since no question arises regarding the legality or propriety of the decree or the regularity of the proceedings. The need for the plaintiff's application is nothing more or less than the failure to present his case at the trial with due care. On the evidence placed before the trial judge the judgment given was inevitable.

I would therefore dismiss the application with costs.

T. S. FERNANDO, J.—I agree.

Application dismissed.

[1] *(1939) 41 N. L. R. 115.*
[2] *(1947) 49 N. L. R. 62.*
[3] *(1907) 10 N. L. R. 193.*
[4] *(1907) 11 N. L. R. 44.*
[5] *(1916) 19 N. L. R. 289.*