W. G. ROSLIN

v.

H. B. MARYHAMY

COURT OF APPEAL.
S. N. SILVA, J. AND
GUNASEKERA, J.
C.A. APPLICATION NO. 915/89.
D.C. MATARA
NO. 11409/P
JUNE 29 AND JULY 22, 1992.

*Partition – Revision – Settlement – Miscariage of justice – Partition Law, No. 21 of 1977, sections 25(1) and 26.*

**Held:**

When an agreement is entered into, the court has to be satisfied only as to whether the agreement is between all the parties having interests in the land sought to be partitioned. In the event of such agreement, the respective shares or interests to given to each party is based upon the compromise that is reached and not on an examination of title.

Where the 7th defendant had acquired interests on two deeds – on one deed an extent of one perch and the other an extent of 17 1/2 perches and was residing in a house on a portion of the land, it is unlikely that she would have settled to receive only 7 perches. The deed conveying 17 1/2 perches to the 7th defendant had been suppressed and she had been made to understand she would be given what she had claimed in her statement. The 7th defendant had been misled by the misrepresentation and in any event the purported settlement did not bind her. There was no entry in the record that she agreed to it.

Revision will lie to set right a miscarriage of justice in the event of there being in the proceedings a fundamental vice which transcends the bounds of procedural error.

*Per* S. N. Silva, J: "The preceding examination of the facts of this case reveals that on the date of trial the 7th defendant was not represented by her registered attorneys-at-law, an instance of severe dereliction of duty by a member of a profession, legally, morally and ethically bound to serve the client to the end of the proceedings. A purported settlement has been contrived by the other parties, represented by counsel, seriously affecting the interests of the 7th defendant, whilst the trial judge played the role of the blind umpire. A deed in her favour more than 25 years old has been suppressed and the interests being the subject of that deed was given to the plaintiff-respondent on the basis of intestate succession. She was made to understand that all is well and that her interests as

claimed would be given to her. These irregularities in our view, amount to a fundamental vice in the proceedings. A serious miscarriage of justice has been caused in the face of which the court should not sit idly by. It is thus a fit case to exercise the extraordinary jurisdiction by way of revision".

**Cases referred to:**

1. *Kumarihamy v. Weragama* 43 NLR 265.
2. *Punchibanda v. Punchibanda* 42 NLR 382.
3. *Mariam Beebee v. Seyed Mohamed* 68 NLR 36.
4. *Somawathie v. Madawela and Others* (1983) 2 Sri LR 15.

**APPLICATION** for revision and/or *restitutio*-in-*integrum*.

*P. A. D. Samarasekera, P.C.* with *G. L. Geethananda* for 7th defendant-petitioner.
*N. R. M. Daluwatta P.C.* with *P. Keerthisinghe* for plaintiff-respondent.

*Cur. adv. vult.*

August 20, 1993.

**S. N. SILVA, J.**

The 7th Defendant in the above action has filed this application for *Restitutio*-in-*integrum* and/or for Revision in respect of the judgment dated 20.07.1988 and the interlocutory decree entered thereon. The 3rd and 12th Defendants filed objections to the application but did not pursue these objections at the time of hearing. The application is now resisted only by the Plaintiff-Respondent who filed a belated statement of objections dated 30.11.1990.

The action was filed by the Plaintiff-Respondent to partition the land called "Giruwaya Walawwawatta Medekebella' comprising of lot 1 to 6 in Plan No. 138 of 5.2.1983 made by J. C. Amadoru, Licenced Surveyor in extent R1-P36.96. In the plaint it was disclosed that the 7th Defendant was entitled to an extent of 10 perches. The 7th Defendant filed a statement of claim disclosing her title to 18 1/2 perches of the corpus upon two deeds. They are deed No. 4192 dated 11/10/1964 for 17 1/2 perches and deed No. 6849 dated 13.6.1968 for 1 perch. It was stated that she was in possession of lot No. 6 in preliminary plan No. 138 for and in lieu of her interests in the land, as a separate entity. Her residing house is also located in this lot which was not claimed by any other party at the preliminary survey. When the matter came up for trial on 20.7.1988 the 7th

Defendant-Petitioner was present but her attorney-at-law on record was absent. Other contesting parties including the Plaintiff were present and represented by counsel. It is recorded that the attorneys-at-law appearing for the parties informed court that all disputes in the matter have been settled and evidence is being led upon that settlement. The Plaintiff thereupon gave evidence in the course of which she stated that the 7th Defendant derived title to 7 perches upon deed No. 6849 marked 7D2. In the judgment running into two short paragraphs, learned District Judge did not consider the contents of any of the deeds but merely stated that the parties would be entitled to shares on the basis of the evidence of the Plaintiff. Accordingly, the interlocutory decree, allots 7 perches to the 7th Defendant.

This application has been filed on the basis that the 7th Defendant, who was not represented at the trial, was given the impression that she would be allotted land in the corpus according to her statement of claim. She has also stated that she handed over her title deeds to the attorney-at-law for the Plaintiff on this understanding. That, it was only when the Surveyor came for the final survey that she discovered she was being given only 7 perches and that the major portion of the land possessed by her was not being allotted to her. Thereupon she made an application for the amendment of the decree that was entered, by granting to her the interests as stated in her statement of claim. This application was refused by the District Judge on 27.09.1989 and the 7th Defendant instituted these proceedings for Revision and/or *Restitutio*-in-*integrum*. Learned President's Counsel for the Plaintiff-Respondent has opposed this application solely on the ground that the 7th Defendant-Petitioner is bound by the settlement entered into according to which the respective parties were given specific extents of the corpus. That, she agreed to accept 7 perches in lieu of her rights as prayed in the statement of claim.

A perusal of the evidence recorded and the judgment reveals that there has been no examination of title whatsoever in relation to the 7th Defendant. The Plaintiff in her evidence stated that upon deed 6849 (7D2), the 7th Defendant acquired an extent of 7 perches of John Carolis Sedera who according to the pedigree of the Plaintiff owned 1/2 share of the corpus. A perusal of deed 7D2 reveals that it

conveys only 1 perch to the 7th Defendant. The evidence does not touch upon deed 4192 dated 11.1.1964 by which the said John Carolis Sedera directly conveyed 17 1/2 perches of the corpus to the 7th Defendant. This deed is disclosed in the pedigree of the 7th Defendant. It appears that the 7th Defendant having acquired 17 1/2 perches on deed 4192 purchased a further extent of 1 perch (7D2) from one Manoris Appu and John Carolis Sedera along the Western boundary of the lot purchased on deed 4192 since that boundary was close to the outer wall of her house. If an examination of title was carried out even in a perfunctory manner, the main deed of the 7th Defendant would have been discovered in addition to the deed that conveyed her 1 perch in extent. Thus the evidence contains a misrepresentation as to deed 6849 (7D2) and a suppression of deed 4192. Learned District Judge has allowed this misrepresentation and suppression to pass. In his judgment he has merely stated that the corpus should be partitioned according to the evidence of the Plaintiff thereby adopting a stand of, hear no evil, see no evil and talk no evil.

Section 25(1) of the Partition Law provides that at the trial, "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 that action relates, and shall consider and decide which of the orders mentioned in section 26 should be made."

The submission of learned President's Counsel for the Plaintiff-Respondent is that there was no need for an examination of title in view of the settlement that was entered into by the parties. In the case of *Kumarihamy v. Weragama* [1], it was held that an agreement entered into in a partition action is binding on the parties and is not obnoxious to the Partition Ordinance if the agreement affects only the rights of parties *inter se* and is expressly made subject to the court being satisfied that all parties entitled to interests in the land are before court and are solely entitled to that land. Therefore where an agreement is entered into, the court has to be satisfied only as to whether the agreement is between all the parties having interests in the land. In the event of such agreement the respective shares or interests to be given to each party is based upon the compromise

that is reached and not on an examination of title. Hence the question to be decided is whether there was an agreement entered into in this case by all the parties having interests in the land as to the division of their respective interests.

As noted above the 7th Defendant in her statement of claim pleaded title on two deeds to an extent of 18 1/2 perches of the corpus. On the date of trial she was not represented. Before the evidence of the Plaintiff was taken, it has been recorded that the attorneys-at-law of the parties informed court that all disputes amongst the parties have been settled and that evidence is being led by the Plaintiff in terms of that settlement. This settlement notified to court by the attorneys-at-law of the parties would not bind the 7th Defendant who was present but unrepresented. It was the duty of the District Judge to have ascertained from the 7th Defendant whether she was agreeable to the settlement entered into by the other parties. This, was specially necessary considering that according to the settlement the 7th Defendant will get only 7 perches whereas the plaint gives to her 10 perches and she was entitled to 18 1/2 perches on the basis of two deeds according to her statement of claim. The District Judge should have ascertained specifically whether she was agreeable to such a drastic diminution of her rights by way of a settlement. In this connection I wish to re-iterate the observation made by Soertsz J in *Punchibanda v. Punchibanda* [2], to settlements adjustments and admissions.

> "This Court has often pointed out that when settlements, adjustments, admissions, & c., are reached or made, their nature should be explained clearly to the parties, and their signatures of thumb impressions should be obtained. The consequence of this obvious precaution not being taken is that this court has its work unduly increased by wasteful appeals and by applications being made to it for revision or *restitutio*-in-*integrum*. One almost receives the impression that once a settlement is adumbrated, those concerned, in their eagerness to accomplish it, refrain from probing the matter thoroughly lest the settlement fall through. This is a very unsatisfactory state of things and it is to be hoped that a greater degree of responsibility will be shown on these matters by both judges and lawyers."

The record does not disclose whether the 7th Defendant was questioned about the settlement and whether she agreed to it. The version of the 7th Defendant is that she was made to understand that she will be given her rights as claimed in her statement of claim and on that understanding she gave her deeds to the attorney-at-law of the Plaintiff. The claim that her deeds were given to the attorney-at-law is supported partly by the fact that the original of deed No. 6849 has been produced marked 7D2 in the evidence of the Plaintiff. Upon the deed being marked it has been initialled by the District Judge and dated 20.7.1988, being the date on which the evidence was recorded. The question that looms large is as to what happened to deed No. 4192 on which the 7th Defendant acquired 17 1/2 perches. It is inconceivable that she would have given the deed on which she got 1 perch and failed to give the deed on which she got 17 1/2 perches. This is specially so considering that her residing house is located on this land. The registered attorney-at-law of the Plaintiff has filed an affidavit denying that the deeds were given to him. This affidavit would not bear scrutiny at least in relation to one of the deeds. The original of deed 6849 (7D2) could not have got into the record unless it was given to the attorney-at-law for the Plaintiff by the 7th Defendant. In these circumstances we are of the view that the claim of the 7th Defendant that she was made to understand that the extent claimed by her in her statement of claim will be allotted to her is well founded. In any event the purported settlement will not bind her since there is no entry in the record that she agreed to it.

The final matter to be considered is whether revisionary jurisdiction should be exercised in this case to grant relief as prayed for to the 7th Defendant. In the case of *Mariam Beebee v. Seyed Mohamed* [3], a Divisional Bench of the Supreme Court considered whether revision would lie to set aside an interlocutory decree (affirmed in appeal) and a final decree in view of the finality attaching to such decrees in terms of Section 48(1) of the Partition Act. It was held that revisionary jurisdiction will be exercised for the correction of errors that result in miscarriages of justice. Sansoni, CJ observed as follows: (at p38):

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

correction of errors, sometimes committed by this court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not, I conceive, made any change in this respect of any order or decree of a lower court."

The question was considered once again in relation to the more comprehensive finality clause contained in Section 48 of the Partition Law No. 21 of 1977 (which is currently operative), by a Divisional Bench of the Supreme Court in the case of *Somawathie v. Madawela and Others*[4]. Upon a wide ranging review of the legislative history and the previous case law on the subject it was held that the pronouncement of Sansoni, CJ, referred above, in regard to the revisionary powers of court remains applicable even after the enactment of the Partition Law No. 21 of 1977. Soza J (at P30), with whom the other four judges agreed, observed that "the powers of revision and *restitutio*-in-*integrum* have survived all the legislation that has been enacted upto date. These are extraordinary powers and will be exercised in a fit case to avert a miscarriage of justice". In that case, it was found that a necessary party whose deed had been duly registered was not disclosed in the declaration filed in terms of Section 12(1) of the Partition Act by the proctor of the Plaintiff and that this party who had later claimed before the surveyor at the preliminary survey was not issued notice as required by law. It was held that these matters constitute a glaring blemish which stains the entire proceedings. That, "it amounts to what has been called a fundamental vice which transcends the bounds of procedural error."

Thus, it is settled law that revision will lie to set right a miscarriage of justice in the event of there being in the proceedings a fundamental vice which transcends the bounds of procedural error. The preceding examination of the facts of this case reveals that on the date of trial the 7th Defendant was not represented by her registered attorney-at-law; an instance of severe dereliction of duty by a member of a profession, legally, morally and ethically bound to serve the client to the end of the proceedings. A purported settlement has been contrived by the other parties, represented by

counsel, seriously affecting the interests of the 7th Defendant, whilst the trial judge played the role of the blind umpire. A deed in her favour more than 25 years old has been suppressed and the interests being the subject of that deed was given to the Plaintiff-Respondent on the basis of intestate succession. She was made to understand that all is well and that her interests as claimed would be given to her.

These irregularities in our view, amount to a fundamental vice in the proceedings. A serious miscarriage of justice has been caused in the face of which the court should not sit idly by. It is thus a fit case to exercise the extraordinary jurisdiction by way of revision. We accordingly set aside the proceedings had in the above case on 20.07.1988, the judgment and interlocutory decree entered and all orders made thereafter by the District Court. The District Court is now directed to fix the matter for trial *de novo* with notice to all parties. The application is allowed. The Plaintiff-Respondent will pay a sum of Rs. 2100/- as costs to the 7th Defendant-Petitioner.

**D. P. S. GUNASEKERA, J.** – I agree.

*Proceedings set aside and*
*de novo trial ordered.*