

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

In the matter of an application  
for leave to appeal

Court of Appeal No: CALA 171/2003

District Court of Kalutara No: 4199/P

15. M.D. Chandrasena Bandara

18. S.A. Piyasena

15<sup>th</sup> & 18<sup>th</sup> Defendant-  
Respondent-Petitioners

Vs.

2B. Missy Nona Jayaratne

3A. S.M. Don Sumanadasa

Substituted-Defendant-  
Petitioners-Respondents

Before: **Eric Basnayake J**

Counsel: N.R.M. Daluwatte P.C. for the 15<sup>th</sup> & 18<sup>th</sup> Defendant-Respondent-  
Petitioners

Dr. Jayantha De Almeida Gunaratne P. C. with Lasitha Chaminda for the  
2B, 3A, 4<sup>th</sup>, 5A & 6<sup>th</sup> Defendant-Petitioners-Respondents

Argued on: 6.10.2011 & 3.11.2011

Decided on: 2.8.2012

Eric Basnayake J

1. The 15<sup>th</sup> and 18<sup>th</sup> defendant-respondent-petitioners (15<sup>th</sup> & 18<sup>th</sup> defendants) filed this leave to appeal application inter alia to have the order dated 8.5.2003 of the learned District Judge of Kalutara set aside. By this order the learned Judge had allowed a writ of eviction against the 15<sup>th</sup> & 18<sup>th</sup> defendants. Leave to appeal was granted by this court on 20.10.2006.
2. The plaintiff-respondent filed this partition action in the District Court of Kalutara to partition the land called "Millagahawatte alias Arachchiya Watte. The judgment was pronounced on 23.8.1982 and the interlocutory decree entered accordingly. The final partition was done on 23.6.1989. Final decree entered on 31.3.1995.

3. The 15<sup>th</sup> & 18<sup>th</sup> defendants state that the 3<sup>rd</sup> defendant (now deceased) together with 5A, 6<sup>th</sup>, 16<sup>th</sup> and 19<sup>th</sup> defendant-respondent-respondents transferred whatever rights that would be allotted to them in the final decree to the 18<sup>th</sup> defendant on 25.10.1985 by deed No. 27 of 2641 attested by D.G. Wimalaratne, N.P. (P1) and the 2A defendant (now deceased) together with 14<sup>th</sup> defendant had transferred whatever rights that would be allotted to them in the final decree to the 15<sup>th</sup> defendant on 1.1.1987 by deed No. 3186 attested by D.G. Wimalaratne N.P. (P2).
  
4. The 15<sup>th</sup> & 18<sup>th</sup> defendants state that after the final plan No. 5495 of 23.6.1989 was made the 15<sup>th</sup> and 18<sup>th</sup> defendants went in to occupation of the lots 4B, 4F, 4J and 4K and have been in occupation of the said lots ever since. These allotments were allotted to the 3<sup>rd</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 5<sup>th</sup> defendants respectively in the final partition. The final plan was approved by court and the final decree was entered on 31.3.1995.
  
5. The 15<sup>th</sup> and 18<sup>th</sup> defendants state that the 2B and 3A substituted-defendant-petitioners-respondents (2B and 3A defendants) claiming to be the heirs of 2A and 3<sup>rd</sup> defendants filed an application on 4.7.2002 seeking to be substituted for the purpose of obtaining writ of possession. The 15<sup>th</sup> and 18<sup>th</sup> defendants filed objections against this application on 27.11.2002 and moved for dismissal of the application for writ. The learned District Judge after an inquiry on 8.5.2003 delivered his order allowing the writ.

### The order of the learned Judge

6. The learned Judge held that 2B, 3A, 4A, 5A & 6<sup>th</sup> defendants dispute the sale to the 15<sup>th</sup> and 18<sup>th</sup> defendants by the 2A and 3<sup>rd</sup> defendants who are both deceased, and a complaint had been made to the police. Further that these deeds had been executed after the interlocutory decree and before the final decree and therefore that the 15<sup>th</sup> and 18<sup>th</sup> defendants have no right to object to the writ.

### Submission of the learned President's Counsel for the 2B and 3A defendants

7. The learned President's Counsel submitted that the impugned deeds of transfer P1 and P2 are void in terms of section 66 of the Partition Law. The learned President's Counsel submitted that in the present case the deeds of transfer P1 & P2 are dated 1985 and 1987 and the interlocutory decree was in 1982. The deeds being executed after the registration of *lis pendens*, no rights passed on to the 15<sup>th</sup> and 18<sup>th</sup> defendants.
8. The learned President's Counsel submitted that in *Virasinghe v. Virasinghe* (2002) 1 Sri L.R. 1 it was held that "a deed of lease which has been executed after the partition action was duly registered as a *lis pendens* was void and of no effect in law in terms of section 66 (1) and (2) of the Partition Law.

9. The learned counsel further submitted that there are cases where the transfers by co-owners to other parties which have not been disputed are acted upon. On the same breath the learned President's Counsel submitted that there is no issue involving fraud. Does this mean that the transfers are not disputed? The only issue is the transfer after the registration of *lis pendens*.

Submission of learned President's Counsel for the 15<sup>th</sup> and 18<sup>th</sup> defendants

10. The learned President's Counsel submitted that the only issue in this case is the validity of the two deeds P1 & P2. They were executed after the interlocutory decree and before the final decree, in the years 1985 and 1987. The learned President's Counsel submitted that there is no question of fraud in this case. The deeds were executed by 2A and 3<sup>rd</sup> defendants. The final partition was prepared in 1989. With the preparation of the final partition the 15<sup>th</sup> & 18<sup>th</sup> defendants took possession of the lots the 2A & 3<sup>rd</sup> defendants were to be given.

11. The deeds have transferred to the 15<sup>th</sup> and 18<sup>th</sup> defendants all the rights the 2A & 3<sup>rd</sup> defendants were to get at the final partition. The final partition

decree was entered in 1995. By this date although 2A and 3<sup>rd</sup> defendants were alive, no complaint was made to the police with regard to possession of their lots (2A & 3<sup>rd</sup> defendants) by the 15<sup>th</sup> and 18<sup>th</sup> defendants.

12. If there was a fraud with regard to the two deeds P1 and P2, it would have been the 2A and 3<sup>rd</sup> defendants who would complain. The 2A and 3<sup>rd</sup> defendants did not complain as they had sold their rights. The complaints were made by 2B and 3A defendants after the deaths of the 2A and 3<sup>rd</sup> defendants. The complaints were also confined to the police. There were no cases filed against the 15<sup>th</sup> and 18<sup>th</sup> defendants alleging fraud. No cases were filed challenging the validity of the two deeds at any time. Even the learned President's Counsel for the 2B and 3A defendants made submissions on the assumption that the two deeds were valid.

13. The learned counsel for the 2B and 3A defendants based his argument under section 66 of the Partition Law. Section 66 is as follows:-

- I. After a partition action is duly registered as *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 entry of a decree of partition under section 36 or by the entry of a certificate of sale.
- II. Any voluntary alienation lease or hypothecation made or effected in contravention of the provisions of sub section 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.

- III. 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 sub section 1 and 2 of this section (emphasis added).

14. The learned President's Counsel for the 15<sup>th</sup> and 18<sup>th</sup> defendants submitted that the prohibition is only with regard to an undivided share or interest. However in this case no undivided shares or interests were transferred. The transfer related to what the 2A and 3<sup>rd</sup> defendants would get from the final decree.

15. The learned President's Counsel for the 15<sup>th</sup> and 18<sup>th</sup> defendants relied on the judgment in Jayatillake vs. Somadasa 70 NLR 25 where H.N.G. Fernando C.J held **"where there is a dealing by a party with "the divided lot to be allotted to him" in a pending partition action, the transaction becomes effective to vest rights in the alienee only after the interest is in law allotted to the party, i.e., only at the stage when the final decree is entered; at that stage the lot allotted to the party becomes for the first time subject to the rights arising by virtue of the transaction"** (at pg. 27) (emphasis added).

16. It is settled law that section 66 of the Partition Law prohibits only the alienation or hypothecation of undivided interests presently vested in the owners of a land which is the subject of pending partition proceedings.

There is no bar preventing a defendant from transferring the interests which he would acquire upon the conclusion of the partition case (Sirisoma vs. Saranelis Appuhamy 51 N.L.R. 337, Khan Bhai vs. Perera 64 N.L.R. 204, Sillie Fernando vs. W. Silman Fernando 64 N.L.R. 401, Sirinatha vs. Sirisena (1998) 3 Sri L.R. 19, Aberatne vs. Rosalin (2001) 3 Sri L.R. 308).

17. I regret that the learned Judge failed to give his mind to the relevant section of the Partition Law and the case law. The learned Judge thereby has erred in his order in the issue of writ. For the above reason I set aside the order dated 8.5.2003 and allow this appeal with costs in this court and the court below.

Judge of the Court of Appeal