

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

Karunamuni Samson De Silva
Nagoda,
Kalutara.

C.A 65/1998 (F)
D.C 4746/P

PLAIN TIF

Vs.

1. Sandradura Indralatha
7. Umange Herbert Seneviratne

Both of Kandapansala Road,
Mahawaskaduwa, Vaskaduwa.

and 12 others

AND NOW

1. Sandradura Indralatha
7. Umange Herbert
Seneviratne

Both of Kandapansala Road,
Mahawaskaduwa, Vaskaduwa.

**1ST & 7TH DEFENDANT-
APPELLANTS**

Vs.

Karunamuni Samson De Silva
Nagoda,
Kalutara.

PLAINTIFF-RESPONDNET

BEFORE: Anil Gooneratne J.

COUNSEL; S. Kumarasingham for Defendant-Appellants
Rohan Sahabandu for the Plaintiff-Respondent

ARGUED ON; 12.07.2012

DECIDED ON; 15.10.212

GOONERATNE J.

This was a partition action filed in the District Court of Kalutara to partition a land called 'Kongahawatta' in extent of about 1Rood; 37.2 perches. Plaintiff and 1st to 7th Defendant had produced different pedigrees. It was the 1st Defendant's position that lots 3, 4 & 7 of plan 'X' No. 4746, does not form part of the corpus and that same should be excluded, since 15th Defendant-Respondent and his predecessors in title possessed the said lot and thereby obtained prescriptive title. Parties proceeded to trial on 29 points of contests. The learned District Judge had by his judgment of 2.12.1997 dismissed the Plaintiff's action, and in the judgment the trial Judge observes as follows:

1. On comparison of Plaintiff's pedigree and that of the pedigree of 1st & 7th Defendant, states the more acceptable pedigree is of the 2nd to 7th Defendants.

2. Lot 6 & 7 in plan 'X' are parts of main road and the land to the east of the road was for a long period existed as a separate land.
3. Lot 4 of plan 'X' purchased by 13th Defendant for road access without any objection from any party.
4. Lot 3 of plan 'X' purchased by 15th Defendant and that lot 3 on purchase, ownership had changed hands as separate land. As such building shown as 'A' in lot 3 along with the said lot owned by 15th Defendant.
5. Based on 1st & 7th Defendant pedigree the balance portion of the corpus should be owned by the 7th Defendant.

By this appeal from the judgment of the learned District Judge the 1st & 7th Defendant-Appellant as prayed for in their Petition of Appeal seek to vacate (4) above by which 15th Defendant had been given title to lot 3 and to set aside the judgment.

The Appellants argue that the entire extent of land comprising the corpus includes lots 1 – 7 and that is the land sought to be partitioned. This is due to the fact the Court Commissioner says so according to his plan and report. Appellant in his written submissions stress the following (execution of deeds violation of Section 66(1) of the Partition Law).

- (a) The Partition Action No. P 4746/1987 commenced at the Kalutara District Court on 30.10.1987 and concluded on 02.12.1997 on which day the judgment was entered.
- (b) Deed No. 1316 (marked 15 ①) by which the 7th Defendant-Appellant transferred the land in question to one Trenchil Vijaya is dated 19.4.1988 and Deed No. 2182 (marked 15 ②) by which Trenchil Vijaya transferred it to the 15th Defendant-Respondent is dated 14.11.1990.

(c) It would be clearly seen that both these Deeds were executed during the pendency of the Partition Action P 4746/1987 the judgment in which is Appealed against now.

Section 66 (1) of the Partition Law No. 21 of 1977 states as:

“After a Partition action is duly registered as a Lis pendens under the Registration of Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share of 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”

The Appellant also argue that the 7th Defendant’s execution of deed 1316 during the pendency of the suit does not absolve the 15th Defendant-Respondent. Appellant argues that the entirety of it is a nullity. This court observes that no such points of contest had been raised in the original court based on Section 66 of the Partition Law. When one has to urge a legal point of a certain point of time (at the trial) and to bring it up years later without parties having the opportunity to test it, at the very outset, one cannot take cover and push the case on the footing that legal issues could be raised at any time even at the appeal stage. 48 NLR 472. This court cannot extend every possible legal principle to cure an omission. Each case, is dependent on facts and circumstances of the case.

I would refer to the following authorities in the context of the case in hand which case was in fact dismissed by the trial judge.

Nazeer Vs. Hassim 48 NLR 282...

Where, pending a partition action, some of the co-owners covenant to convey absolutely all the shares, right, title and interest which will accrue to them under and by virtue of the final decree in the partition action, the other contracting party obtains an immediate interest in the property, but the title can only accrue upon the entering of the final decree.

In the case of a plurality of landlords, each of them is entitled to claim his share of the rent from the tenant, unless there is some express agreement to the contrary.

Obiter, where a tenant is sued for rent by a stranger as landlord, section 632 of the Civil Procedure Code does not prevent the tenant from suing his immediate landlord in interpleader.

In the case of Jayatillake Vs. somadasa 70 NLR 25...

Section 67 of the Partition Act has not altered the position which prevailed under the former Partition Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending a partition action does not prevent a party from disposing, during the pendency of the action, of the interest that will be ultimately allotted to him in the final decree.

As interest which vests only upon entry of the final decree is not contemplated in the term “encumbrance” in section 48 of the Partition Act. Accordingly, where, after interlocutory decree has been entered in a pending partition action and before the final decree, a party mortgages the interest that will be allotted to him under the final decree, the mortgagee will be entitled to sue on the mortgage bond after the final decree is entered, even if the interest mortgaged is not conserved in the final decree. In such a case, it cannot be contended that the final decree is free from the “encumbrance” of the mortgage.

In the case of Giran Appuhamy Vs. Ariyasinghe (Pg. 74, Selected Legal Essays – C Ananda Grero) ...

In the case of *Giran Appuhamy v. Ariyasinghe* it was held by H. N. G. Fernando C.J (agreeing with Abeyesundara J.) that where in a partition action, a particular portion of land is excluded from the partition on the ground that some person or persons have title to it as a separate land, whether by prescriptive possession or otherwise, section 67 of the Partition Act does not render void dealings with that portion during the pendency of that action .

It was held by Herat J. and Abeyesundere J. in *Fernando Vs. Fernando* 64 NLR 404...

Where, prior to the entering of the interlocutory decree in a partition action, a party transfers by sale or donation whatever will be allotted to him by the final decree, the lot in severalty finally allotted to the transferor or those representing him (if he has died before the entering of the final decree) will automatically pass and vest in the transferee, without any further conveyance by the transferor or his representatives.

I agree that lot 3 was transferred by 7th Defendant to 15th Defendant-Respondent as in the judgment of the trial judge. Lot 3 registered from 1950. It appears to this court that there is clear title to lots 3, 4 & 7. Plan shows it as a different land separately registered. It does not look proper for the 7th Defendant to take up the position that lot 3 is a different land. Further on the other point that land claimed by the 15th Defendant was 30 perches but plan 4040 indicates 20 perches (lots 3, 4 & 7). This is something that should have been raised as a point of contest. That would have given an opportunity for parties concerned to verify the factual correct

position. Trial judge did not permit the prayer to the plaint and dismissed the plaint. Based on the issues or points of contest, judge has given his decision. The approbation and reprobation on the part of the 7th Defendant seems to confuse litigation. If parties, so desire they will have to consider and decide whether there exist a cause of action to file separate suit? This court is not inclined to disturb the judgment of the District Court. The judgment of the District Court is affirmed. Appeal dismissed without costs.

Dismissed.

JUDGE OF THE COURT OF APPEAL.