

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

1. Suraweera Aratchige Babinona
Of Wedagama, Payagala.

And others

PLAINTIFF

Vs.

C.A 1197/1996(F)
D.C. Horana 3327/P

1. V. Karunaratne of
Dmbagoda, Horan.

And others.

30. V. Mahinda Nimalsiri of
Dombagoda, Horana.

**30th DEFENDANT-
RESPONDENTS**

Suraweera Aratchige Babinona
of Wedagama, Payagala.
And others

PLAIN TIFI

BEFORE: Anil Gooneratne J.

COUNSEL: Hemasiri Withanachchi with Jayantha de Silva
30th Defendant-Appellants

Thilak Wijsesingeh for 16th and 47th Defendant-Respondents

ARGUED ON: 27.07.2011

DECIDED ON: 04.11.2011

GOONERATNE J.

This is an appeal from a partition case by the 30th Defendant-Appellant. The prayer to the petition of appeal pray for a re-trial. Parties proceeded to trial on 15 points of contest. There was no dispute about the original owner of the property called 'Koronchina' who had 6 children and one of them was Girigoris, whose share was 1/6 to the property. The heirs of Girigoris were Thamis Appu, Manchihamy and Nonchihamy. It was the complaint of the learned Counsel for the Appellant that the persons disclosed in paragraph 7 of the statement of claim of 28th to 30th Defendants were not noticed by the District Court, but in the course of the argument in reply by the learned Counsel for 16th & 47th Defendant-Respondents it revealed that the 42nd to 46th Defendants were added to the case. The contest is on the shares allotted by the District Judge as regards the 30th Defendant-Appellant.

The 47th Defendant-Respondent rely on deeds marked 47 D1 to 47 D7 to prove his share and title to the corpus. No shares are allotted to 42nd to 46th Defendants. Deed marked 16 D4 is relied upon by the 16th Defendant-Respondent to prove his share to the property. Learned Counsel for the 30th Defendant-Appellant in order to prove some form of misdirection by the learned District Judge in allotting shares stressed the fact that one of the

heirs of Girigoris, namely Nonchihamy's share devolving on 3 persons are not explained in the judgment and in evidence. He also pointed out that Plaintiff does not explain devolution from Nonchihamy

The contention of the 16th & 47th Defendant-Respondents is that, Appellant admitted that 47th Defendant-Respondent is entitled to 1/4th of the 1/18th share of Themis. Further Themis gave his entitlement to Podi Appu by deed No. 28108 of 24.5.1926 and the said Podi Appu has given his share to Lokunona by deed No. 31779 of 22.9.1943. thereafter Lokunona transferred 1/4th from her undivided 1/18th to 47th Defendant-Respondent (47 D6) .

The Appellant has admitted above in the Petition of Appeal paragraph 5 pg. 20, therefore 11th & 47th Defendant Respondent stress that there cannot be any dispute as regards the 47th Defendant-Respondent's share.

What is emphasized by these Respondents is the failure to mark and produce deed No, 11403 of 9.1.1980. The 2/18th share claimed to be of Lokunona cannot be accepted in the absence of the said deed. Does Manchihamy's 1/18th share devolve between the Appellant and the 16th Defendant-Respondent? Deed 47 D6 shows that Lokunona owned only 1/18th share of the corpus.

By deed 16 D4 two children of Manchihamy transferred 1/18th share to 16th Defendant-Respondent-Appellant claim for Manchihamy's share is baseless.

The 30th Defendant-Appellant in the written submission raise a vital question on deed 16D4. Reference made to 1st Plaintiff's evidence on rights of Girigoris who had 3 children and Girigoris being a child of original owner Karonchi Appu. One child of Girigoris namely Thamisi who conveyed her rights to Podiapp who in turn transferred to Lokunona. The said Lokunona by deed 1468 transferred 1/4th out of 1/8th share to Anulawathie and the balance share to Lokunona was conveyed to 28th – 30th Defendants and 6 others by deed No. 11403 of 9.1.1980.. (Respondents took up the position that deed 11403 was not marked and produced in evidence).

Manchihamy another child of Girigoris had 2 children from two marriages and those two children Haramanis Appu and Seiman Appu by deed 4421 of 26.2.1988 (16D4) transferred to the 16th Defendant (Pg 143 – 144 of brief) The point emphasized is that the above deed 16 D4 was executed after the institution of the partition action and the Registration of the lis pendens and that the deed does not deal with shares that would be allocated eventually in terms of the decree in the partition action and hence such deed is void under Section 66(1) and 66 of the Partition Act.

Section 66(1) and Section 66(2) read thus:

- (1) 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 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.
- (2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (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.

Counsel has cited the following case law.

16 N.L.R 393..

A sale by a party to a partition action after interlocutory decree and before final decree “of all the advantages or disadvantages, such as costs, & c., and also the share which he would be entitled to either in common or partition” by virtue of the decree in the partition action, was held to be valid, and not obnoxious to section 17 of the Partition Ordinance

53 N.L.R 241.

The sale by a co-owner in land of whatever interests might ultimately be allotted to him under the decree in a pending partition action may be construed as a *conventio rei speratae*. In such a case, if some benefit, even to a far smaller extent than the parties had originally hoped for, accrued to the seller under the partition decree, the purchaser is not entitled to claim a cancellation of the sale on the ground of failure of consideration.

Another point is conveyance by Manchihamy to Thamis (son of Girigoris). The deed 27907 of 1926 not produced and marked in evidence? If the above deed was marked in evidence the children of Manchihamy could not dispose of on deed 16 D4 to 16th Defendant. It is the position of the 30th Defendant-Appellant that the learned trial Judge failed to allocate correct shares to 28th – 30th Defendants and 42nd – 46th Defendants. Further the 16th Defendant's share is far excessive. In the judgment there is no reference to deed 27907. The points of contest No. 14 refer to the said deed and the District Judge has answered points of contest No. 14 in the affirmative. In the absence of producing deed No. 27907 children of Manchihamy cannot dispose her share by deed 16 D4.

Both points of contest 14 & 15 answered in the affirmative and as such the 2/18th shares from the rights of Girigoris should devolve on Thamis. Thereafter on the basis of the chain of title such 2/18th shares should devolve on 47th Defendant, 28th – 30th Defendants and 42nd – 48th Defendants.

This court is mindful of the long lapse of time taken to conclude the action in the original court and as well as at the appeal stage. Further several parties are involved in the partition suit. However the allocation of shares need to be done precisely, however irksome the task