

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

Case No: CA/386/96(F)

DC Avissawella Case No: 878/T

Hapugoda Rajapaksha Wannakku
Mudiyanselage Chulananda.
Medagoda,
Amithirigala.

Petitioner

-Vs.-

Chairman - Mahabodhi Society,
Maligakanda Road,
Colombo 10.
And others

Respondents

And

In the matter of an Appeal in terms
of Section 754(1) of the Civil
Procedure Code,

Hapugoda Rajapaksha Wannakku
Mudiyanselage Chulananda.
Medagoda,
Amithirigala.

Petitioner Appellant

-Vs.-

Chairman- Mahabodhi Society,
Maligakanda Road,
Colombo 10

And others

Respondent - Respondents

And now

In the matter of an application for
intervention under and in terms of
Section 404, of the Civil Procedure
Code,

Lalith Prabash Hapangama.
56/3, Dharmapala Mawatha,
Madiwela,
Kotte.

**Proposed 3rd Intervenant
Respondent - Petitioner**

-Vs.-

Hapugoda Rajapaksha Wannakku
Mudiyanselage Chulananda.
Medagoda,
Amithirigala.

Petitioner –Appellant- Respondent

01. Chairman-Mahabodhi Society,
Maligakanda Road,
Colombo 10.

02. Hapugoda Rajapaksha Wannakku
Mudiyanselage Manindra
Jayasuriya. (nee Somabandu),
Amithirigala South.
03. Jayasuriya Arachchige Don
Vindhaka Upamal Jayasuriya.
(Minor)
04. Hapugoda Rajapaksha Wannakku
Mudiyanselage Manindra
Jayasuriya,
(Guardian of the 3rd Respondent)
05. Thotaliyange Somapala.
06. Aththanayake Mudiyanselage Sunil
Karunasena.
07. Muthugala Arachchige Abeysiri.
08. Ranasinghe Mudiyanselage
Sanjayaya Priyantha.
Kalugala,Palle, Amithirigala.(Minor)
09. Dewage Dayawathie.
Kalugala, Palle,
Amithirigala.
(Guardian of the 8th Respondent)
10. Upagoda Pathira
Arachchige Dona Pemawathie
Karunanayake.
Amithirigala South.

11. Ganepola Arachchige
Wijesena.
Amithirigala South.
12. Koraralage Gunarathna.
Amithirigala South.
13. Hapugoda Rajapaksha Wannakku
Mudiyanselage Babynona
Dombepola.
Namalgamuwa,
Amithirigala.
14. Hapugoda Rajapaksha Wannakku
Mudiyanselage Isadhawathie
Ramanayake.
Wehelpola,
Nikkawatta.
15. Hapugoda Rajapaksha Wannakku
Mudiyanselage Kumari Shamalee.
16. Hapugoda Rajapaksha Wannakku
Mudiyanselage Vishanthi Shamalee.
17. Hapugoda Rajapaksha Wannakku
Mudiyanselage Chandana
Chulananda. (Minor)
18. Hapugoda Rajapaksha Wannakku
Mudiyanselage Dinesh Chulananda.
(Minor)

19. Jayathilake Mudiyanseelage Dona Hemalatha.

(Guardian of the 17th & 18th Respondents)

Respondent -Respondent - Respondents

G.W.I.Ganegoda.
"Somabandu Niwasa,"
Amithirigala.

2nd Intervenient Petitioner- Respondent

Before:

Janak De Silva J.

&

N. Bandula Karunarathna J.

Counsel:

Dilini Wijesekara for the 1st intervenient Petitioner.

Athula Perera, AAL with Vindya Divulwewa for the 2nd intervenient Petitioner.

Nayana K. Athukorala for the 3rd Intervenient Petitioner.

C.Witharana for the Substituted- Petitioner- Appellant-Respondent.

Written Submissions: By the Petitioner-Appellant-Respondent on the
18/01/2019

By the substitute/ Intervenient-Petitioner
on the 18/01/2019

By the 3rd Intervenient-Petitioner on the
01/02/2019

Argued on: Written Submissions only

Order on: 01/07/2019

N. Bandula Karunarithna J.

Order

The present Appeal is preferred to this Court by the Petitioner-Appellant- Respondent, canvassing the Judgement of the Learned District Judge of Avissawella, dated 14th June 1996. The said Judgement was delivered in the Testamentary Proceedings instituted by the Original Petitioner, who is now deceased, asking to issue the Probate on the Last will, dated 10th December 1981, left by one M.R.W.M.Gunapala Somabandu, who died on 25th November 1987.

The Testamentary Action was filed on 18th October 1983, and proceeded until 14th June 1996. On that day the Petition was dismissed. This Appeal was filed on 12th August 1996, against the said Judgment.

Three Parties calling themselves as Intervenient Petitioners have made separate applications to intervene in the proceedings of this final Appeal. The Petitioner- Appellant- Respondent, objected for the said intervenient applications, arguing that the Intervenient Petitioners are now seeking to intervene in the Appeal for the first time and none of them made any attempt to intervene in the proceedings of the District Court. He further argues that as they were not Parties in the Original Testamentary Case, none of them have legal

status to make application in the present Appeal for the first time. Considering the objections, now it is due for the Order.

It was argued by the Petitioner- Appellant- Respondent that, all three Interventient Petitioners have abused the process of Court and seeking to delay the proceedings unreasonably, before this Court. Further it was alleged that they had obtain transfers in their favour in respect of isolated properties, belonging to the estate of the deceased Somabandu. The Petitioner- Appellant- Respondent says that, G.W.I Ganegoda relies on a purported transfer X1 dated 03rd October 1993, from Manindara Jayasooriya, on a power of Attorney, marked as X2.

The Petitioner- Appellant- Respondent further argued that, Lalith P. Hapangama relies on a deed of declaration, marked as P3, and a subsequent Transfer marked as, P4 dated 26th June 1995. In that the declaration clearly states that the property was owned by the deceased Gunapala Somabandu, the father of the vendor therein, Manindra Jayasooriya.

The Proposed 3rd Interventient- Respondent- Petitioner (hereinafter referred to as '3rd Petitioner') became the lawful owner of the property more-fully described in the schedule to his petition for intervention dated 29th June 2016, by virtue of Deed of Transfer bearing No.31 attested on 01st June 2015, by Lekha Cooray, Notary Public. It was marked as P1, which property had previously constituted a part and parcel of the estate of the Deceased in District Court Avissawella Case No:878/T, against the judgement of which, the instant Appeal is pending before this Court.

At the time of the aforesaid purchase, his predecessor in title to the said property, was Ms.Hettiarachchige Dulani Perera. She claims her title by virtue of 8 Deeds. They are as follows;

- (a) Deed of Transfer bearing No.1227 and dated 21.12.1940, attested by D.S.S. Attanayake Notary Public.
- (b) Deed of Declaration bearing No.615 and dated 29.10.1986, attested by U.Guwardene Notary Public.
- (c) Deed of Transfer bearing No. 3808 and dated 26.06.1995, attested by K.Gnanasiri Notary Public.

- (d) Deed of Transfer bearing No. 14253 and dated 07.04.1997, attested by S. Wickramarachchi Notary Public.
- (e) Deed of Transfer bearing No. 214 and dated 20.08.1999, attested by I.N.Ranatunga Notary Public.
- (f) Deed of Transfer bearing No. 8986 and dated 16.04.2000, attested by K.A.D.D.Kumarapeli Notary Public.
- (g) Deed of Transfer bearing No. 706 and dated 02.04.2012, attested by D.N.Weerawardene Notary Public.
- (h) Deed of Transfer bearing No. 1221 and dated 09.05.2015, attested by D.N.Weerawardene Notary Public.

Presently, a factory is situated in the said property. It was said that the 3rd Petitioner is engaged in, as the Chairman and Managing Director of Lalan Energy Solutions (Private) Limited, LSI Green Energy (Private) Limited and Lalan Rubbers (Private) Limited.

The 3rd Petitioner says that, he had purchased the said property as he had no knowledge and information, regarding the instant Appeal pending before this Court. At the time of purchasing it, prior to the execution of the Deed marked P1, a title search had been done by the Notary who attested it. The relevant Certified Extracts had been obtained, upon which the clear, undisturbed, and independent devolution of title of the 3rd Petitioner's predecessors in title had been verified and established.

It is evident that the original owner of the said property had been the Deceased, in the District Court Avissawella Case No:878/T, against the judgement of which, the present Appeal is pending before this Court. As the said 2nd Respondent- Respondent- Respondent is one of the 3rd Petitioner' Predecessors in title and as she has sold her rights in respect of the said property, there is a possibility that she may no longer be interested in defending the judgement in Case No:878/T at the District Court of Avissawella.

In the circumstances, it was argued that, for the 3rd Petitioner to intervene and participate in the instant Appeal in order for him to secure and preserve the already acquired title to the same, has arisen.

Therefore the 3rd Petitioner made the present application to intervene in this appeal in terms of section 404 of the Civil Procedure Code.

Section 404 of the Civil Procedure Code is as follows:-

“In other cases of assignment, creation, or devolution of any interest pending the action, the action may, with the leave of the court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed, as the case may require.”

When perusing the documents in this case, it is very clear that the 2nd Respondent- Respondent -Respondent, who is one of the 3rd Petitioner’s predecessors in title, has sold her rights after the decision of the District Court and pending this appeal. As the District Court action was not a land action, there was no restriction on such transfer.

In the case of PLESS POL V. DE SOYSA Ex parte SHATTOCK (10 N.L.R.252), it has been held as follows:-

“Under the Roman-Dutch Law the assignment of the rights of party in a pending action after *litis contestatio* is not illegal and void. Even if as a matter of procedure, such an assignment was prohibited by the Roman-Dutch Law after *litis contestatio*, such prohibition is removed by the provisions of section 404 of the Civil Procedure Code.”

In the case of EUGIN FERNANDOO Vs.CHARLES PEREEA AND OTHERS [1988(2) S.L.R.228], it has been held as follows:-

“A party who has parted with his interests in the *corpus pendente lite* can bring a *rei vindicatio* action against the defendant adding the purchaser, as a co-plaintiff,”

It was decided In the case of PERERA Vs. REMIAH 1997(1) S.L.R.225 that, “The District Court has failed to consider the effect to the Deed of Gift by which the interests of the deceased defendant devolved on the Petitioner and that she had title to the premises in suit at the time of her application for substitution. The Petitioner has acquired

interest and to the property which is the subject matter of the action and is entitled to be substituted in place of the deceased defendant in terms of Section 404.”

Vithanage Pathiranage Anuruddha Lakmal Gunathilaka, who is the substitute/ intervenient-Petitioner relies on an agreement, with Manindra Jayasooriya who is the 3rd and 4th Respondent-Respondents, to sell the disputed property by deed marked 2P1, dated 3rd August 1986, which specifically refers to the Testamentary Action No. 878/T. This deed was followed by two Deeds of renunciation dated 08th January 2004, which were marked as P8 A and P8 B.

It was the view of the Petitioner- Appellant- Respondent that, a party cannot be heard to say of his unawareness of testamentary proceedings as the Court, adhering with the civil procedure, caused to publish necessary notice of the action and the Decree Nisi in newspapers. Not only that, he further says the intervenient parties does not state the manner in which or the specific dates on which they became aware of the present Testamentary Case. Therefore, it was argued by the Petitioner- Appellant- Respondent that intervenient parties are suppressing such crucial fact, which conduct draws the inference that the Intervenient Petitioners were aware of such proceedings from the beginning. It was alleged that they have deliberately refrained from taking any action to intervene.

In his Objection the Petitioner- Appellant- Respondent further says that, no one can claim of unawareness of law, as the Law stood as at the days of the purported transfers, there was specific prohibition to alienate properties without obtaining probate or letters of administration, under sections 539 B of the Civil Procedure Code (CPC), until amended by Act No. 14 of 1993. After the amendment, section 545 of the CPC applies.

Section 539 B was operative until 31st March 1993, made it imperative to obtain limited letters for sale of property of estate and permission could only be granted for a limited purpose.

The substitute/ intervenient- Petitioner, Vidana Pathiranage Anuradha Lakmal Gunathilake, made an application before this Court by filing an

amended Petition supported by an affidavit dated 08th January 2018, to be substituted and intervened in this action, in terms of Article 138 & 139 of the Constitution read with section 18 (1), 404 and 754 of the Civil Procedure Code.

It was argued that the substitute/Intervient-Petitioner- Respondent had entered into an agreement to sell, bearing No.5087 dated 03rd August 1986, executed by T.D.Samson de Silva, Notary Public with Hapugoda Rajapakshe Wannaku Mudiyansele Manindra Jayasuriya, nee Somabandu, to sell the disputed land for a valuable consideration of Rs.175,000/-. That was in respect of a portion of the subject matter of the above numbered testamentary action, namely allotments of lands marked Lots 1,2,3,4,& 5 depicted in Plan No. 982 dated 09th May 1942, made by J.P. De Silva Licensed Surveyor of the Estate called as Galenda Uda Hena situated in Amithirigala.

Following the subsequent failure of Hapugoda Rajapakshe Wannaku Mudiyansele Manindra Jayasuriya, nee Somabandu (hereinafter referred to as the 2nd Respondent) to honour the said Agreement, the intervenient-Petitioner- Respondent had filed an action bearing No.540/ZL before the District Court of Colombo on 31st January 1987, and the subject matter of the said agreement was transferred to him by executing a deed by the Registrar of the District Court of Colombo as per the order of the District Court.

It was argued that under and by virtue of the rights derived from the 2nd Respondent, to the predecessor of the substitute/ intervenient - Petitioner Respondent, he is seeking to intervene into the instant Appeal.

Further it was argued that the understanding of the Petitioner that since the said land was bought by the Intervient-Petitioner-Respondent from the 2nd Respondent, it was written unto his name by the Registrar of the District Court of Colombo as per the Judgment of the District Court of Colombo dated 21st April 1989, it is necessary for him to become a party to this instant appeal and be heard as the successor of the Intervient-Petitioner Respondent.

It was revealed that there is a Partition action bearing No.126/P filed by one D.B. Dobepola to partition a 100 Acres land which is comprised the subject matter of the said testamentary action, 878T. The Intervenant-Petitioner- Respondent and the 2nd Respondent are parties to that action as 25th and 1st Defendants respectively. The Appellant in this Appeal has not been made a party to the same, presume that he has no valid title to the subject matter of the testamentary action. The substitute/Intervenant-Petitioner further states that on 28th July 2018, Intervenant-Petitioner- Respondent made an application to this Court to be intervened as a party to this appeal and it was allowed.

Thereafter the Intervenant-Petitioner- Respondent had transferred his rights and title of the land and premises to the Petitioner by Deed of Transfer No.2160 dated 31st March 2015, attested by Sisira Ranatunga, Notary Public for a valuable consideration while pending this appeal.

It is my view that the Petitioner's application to be intervened and be substituted is not allowed, grave prejudice will be caused to the Petitioner since his rights are not represented in this Court as the Intervenant-Petitioner- Respondent has withdrawn and as he is not pursuing with the matter.

As it was argued by the substitute/Intervenant-Petitioner-Respondent that the 2nd Respondent has been absconding from Courts and Intervenant-Petitioner- Respondent has also withdrawn his appearance, there is no one to protect his interest to the land that he has bought for a valuable consideration, which is a portion of the subject matter of the instant application.

The deeds marked P1 and P2 annexed with the Petition dated 08th January 2018, clearly establish on Prima Facia, the paper title of the substitute/Intervene -Petitioner to the corpus. Therefore, he has an absolute right to be substituted /intervened in this appeal.

Section 760A of the Civil Procedure Code provides as follows:

“where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Supreme Court may in the manner provided in the rules made by the Supreme Court under Article 136 of the Constitution determine, who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who had died or undergone a change of status and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid,”

It is clear that the change of the status of the Interventient-Petitioner-Respondent has occurred after filing this appeal and the same has made the record defective. Therefore, the substitute/intervene-Petitioner is the proper person to be substituted in place of the Interventient-Petitioner-Respondent as he is successor of the Interventient- Petitioner- Respondent to the part of the corpus.

The Petitioner – Appellant – Respondent, argued that the applications to intervene were lodged after 20 years from filing of the Appeal and the intention is to delay the proceedings of this Appeal, by intervening at this moment.

It is important to note that those parties moving to intervene in this Appeal, have acquired their rights only after the Testamentary Action was dismissed on the 14-06-1996.

Substitute – Intervene – Petitioner, namely Vidana Pathirana Anuradha Lakmal Gunathilaka got his rights on the 31- 03-2015, by Deed No.2160.

The 2nd Interventient – Respondent – Petitioner namely, G.W.I. Gangegoda became the Lawful owner of the disputed property on Deed No.3210 dated 05-10-1993, and the Power of Attorney bearing No.2153 dated 18-09-1993, and the Agreement dated 31-03-2008, which is almost 12 years after the dismissal of the Testamentary case.

The 3rd Intervenant – Respondent – Petitioner namely, Lalith Prabash Hapangama became the Lawful owner of the property in question on Deed No.31, dated 01-06-2015.

Therefore, it is obvious that the abovementioned Petitioners who are seeking to intervene in this Appeal could not become a party to the original Testamentary Action in the District Court. This Court is of the opinion that if these Applications to intervene are not allowed, grave prejudice will be caused to the Intervenant Petitioners.

It was decided in Harold Fernando vs Fonseka and others 1998 (3) SLR 301 in a Testamentary case, delay cannot defeat the claim of the Intervenant - Respondent – Petitioner to intervene in the action.

There would be no delay as this Appeal will be decided on merit, in the near future with all the necessary parties.

In the event of this Court is determined to set aside the Judgment of the District Court of Avissawella dated 14th June 1996, intervenient parties would be prevented from enjoying their lands, which were bought for a valuable consideration as bonafide purchasers.

In the light of the aforesaid circumstances it is clear that all the intervene Petitioners being bonafide purchasers of the premises, they have a right to be substituted or intervened in this appeal. The intervene Petitioners are having clear title to the part of the corpus of this appeal. If those applications are not allowed grave prejudice will be caused to them. The Objections of the Petitioner- Appellant- Respondent is rejected. Therefore, we allow the applications made by all the intervenient Petitioners to be Intervened.

No order for cost.

JUDGE OF THE COURT OF APPEAL

Janak De Silva J.

I agree.

JUDGE OF THE COURT OF APPEAL