

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

In the matter of an appeal from the
final judgment in the District Court
of Avissawella in Case No. 9669/P.

CA/DCF/340, 341, 342 & 343/99
D.C. Avissawella, Case No. 9669/P

12A. S.Dammika.

**SUBSTITUTED DEFENDANT-
APPELLANT**
[CA/DCF/340/99]

14. Warnakulasooriya Aratchige
Asilin Nona *alias* Podimenuke
Thorane goda, Eheliyagoda

59C. Maharansilige Lal Ranjith,
"Shanthini", Thorane goda,
Eheliyagoda.

63A. Ilandari Pedige Rathnapala

DEFENDANT-APPELLANTS
[CA/DCF/341/99]

65. Tissa Kumbura Gamarallalge
Sarath Kumara,
Thorane goda, Eheliyagoda.

DEFENDANT-APPELLANT
[CA/DCF/342/99]

6A. Pussalla Bulugamage
Somawathie,
Thorane goda, Eheliyagoda.

10A. Bulugamage Somawathie of
Pussella.

DEFENDANT-APPELLANTS
[CA/DCF/343/99]

-VS-

1A. Wasantha Iddamalgoda.

2A. Udunuwara Gamaladdalage
Lorrynona.

PLAINTIFF-RESPONDENTS

1A. Nanayakkara Palliyaguruge
Belinnona of Dehipe,
Padiyapalalla.

AND OTHER 72
DEFENDANT-RESPONDENTS

Before: **M. T. MOHAMMED LAFFAR, J. and**
K. K. A. V. SWARNADHIPATHI, J.

Counsel: Dr. Sunil F.A. Coorey with Amila Kiripitige for the
Defendant-Appellants.

Rohan Sahabandu, P.C. with Chathurika Elvitigala for the
16th, 17A and 18th Defendant-Respondnets.

Written Submissions on: 01.02.2019 (by the Defendant-Appellants).
24.07.2020 (by the 16th, 17A and 18th
Defendant- Respondnets).

Decided on: 01.04.2021

MOHAMMED LAFFAR, J.

Introduction:

These appeals have been preferred by the 12th, 14th, 59th, 63A, 65th, 6A and 10A Defendant-Appellants (hereinafter referred to as the "Defendants") from the judgment of the learned District Judge of Awissawella dated 17.12.1998.

When these appeals were taken up for argument, the learned Counsel appearing for both parties consented to dispose of the appeals by way of Written Submissions that have already been tendered.

The Plaintiff-Respondent (hereinafter referred to as the "Plaintiff") instituted the above action¹ to partition the corpus, which is morefully described in the schedule to the amended plaint, amongst the co-owners. After trial, the learned District Judge delivered the impugned judgment on 17.12.1998.

Being aggrieved by the judgment, the aforesaid Defendants have preferred these appeals.

There is no dispute as to the identification of the subject matter. Admittedly, the lots 1 to 9 in the Preliminary Plan bearing No. 1235 dated 28.06.1960 made by S.R. Yapa, Licensed Surveyor (marked as 'P1') are the corpus sought to be partitioned in this case.

The Defendants those who have preferred appeals against the impugned judgment are disputing the shares allotted by the learned District Judge. Hence, I shall now ascertain as to whether the pedigree upon which the shares were allotted to the parties by the learned trial Judge is correct.

In terms of the evidence adduced and the title Deeds produced at the trial, the original owners of the land sought to be partitioned were Jamuthupedige Dineththu (1/2), Manika (1/4) and Jamuthupedige

¹ This action was instituted in the Distict Court of Awissawella in 1960, sixty years ago, to partition the subject matter amongst the co-owners.

sethuwa (1/4). On the demise of the said Jamuthupedige Dineththu (1/2), his rights devolved on his children, namely Pina, Murukkuwa, Punchi Baiya and Subaamali. The said Murukkuwa and Punchi Baiya died issueless and Subaamali went out in Diga, and therefore, the said Pina became entitled to the entire rights of Jamuthupedige Dineththu (1/2). Thereafter, Pina died, leaving three children, namely Siriya (from the 1st marriage), Hathan Kira and Hawadiya (from the 2nd marriage). The said Siriya by Deed bearing No. 5398 dated 12.10.1935 marked P1 conveyed her rights to Punchi Mahathaya who transferred his rights to Hendrick Singho by Deed No. 1176 dated 27.11.1950 marked P2. The said Hendrick Singho conveyed the said rights to the 1st Plaintiff (1/8) and the 2nd Plaintiff (1/8) by Deed No. 10363 dated 19.08.1953 marked P3.

The aforesaid Hathan Kira (1/8) transferred the said rights to Pavulis Appuhamy by Deed No. 5125 dated 18.08.1934 marked 1V1 who conveyed that right to Baby Hamu by Deed No. 3020 dated 25.10.1940 marked 1V2. The said Baby Hamu gifted undivided 7/40 shares (7/40 out of 1/8) to Anginahamine Rodrigo and Liyang Singho Appuhamy by Deed of Gift bearing No. 4158 dated 04.05.1942. The said Anginahamine Rodrigo and Liyang Singho Appuhamy conveyed their rights to Don Abraham Wickramaingha by Deed No. 6130 dated 01.05.1943 who transferred the said rights to Baby Nona by Deed No. 10303 dated 22.09.1950 marked 1V3 who transferred the same to Johanahamy by Deed No. 14025 dated 01.02.1956 marked 1V4 who conveyed the said rights to the 1st Defendant by Deed No. 789 dated 10.01.1951 marked 1V5. On the demise of the aforesaid Babyhamu, her remaining rights devolved on her heirs, namely the 5th to 10th Defendants.

The aforesaid Havadiya conveyed his rights (1/8) to Siriya by Deed bearing No. 13990 dated 27.10.1928 marked 22V1 who conveyed the same to the 22nd Defendant by Deed No. 4710 dated 23.11.1942 marked 22V2.

Upon the demise of the second original owner, Manike (1/4), her rights devolved on her children, Sethuwa (1/8) and Adara (1/8). Sethuwa's rights devolved on her surviving children, Kiribalaya (1/16) and Upendra (1/16)

upon her death. Kiribalaya died issueless, and therefore, the said Upendra became entitled to the entire rights of Sethuwa. The said Upendra by Deed bearing No. 11982 dated 20.10.1954 marked 2V1 conveyed his rights to the 2nd Defendant and Babby. As Babby died issueless, the 2nd Defendant became entitled to the entire rights of the said Sethuwa (1/8).

The aforesaid Adara's rights devolved on her children, Kira (1/16) and Pinsethuwa (1/16). The said Kira by Deed bearing No. 14368 dated 13.01.1930 marked 11V1 conveyed his rights to Babyhamy (1/32) and Saadirissingho (1/32). On the demise of the said Babyhamy her rights devolved on her heirs, namely the 5th to 10th Defendants. The 6th Defendant by Deed bearing No. 14444 dated 12.10.1956 marked 11V2 conveyed his rights to the 11th Defendant. The said Saadirissingho's rights devolved on the 11th Defendant upon his death. Upon the demise of the aforesaid Pinsethuwa her rights (1/16) devolved on her children, namely the 17th Defendant (1/48) and two sons who have not been made parties to the action, and therefore, the rights of the said two sons should be made unallotted (2/48).

On the demise of the third original owner, Jamuthupedige Sethuwa (1/4), his rights devolved on his children, namely Kirihathanee (1/8) and Pinthu (1/8). The said Kirihathanee's rights devolved on her children, Kiriwasthuwa, Hurathala and Pinaadara. As the said Kiriwasthuwa and Pinaadara went out in Diga, the said Hurathala became entitled to the entire rights of the said Kirihathanee. The said Hurathala died, leaving two children, namely Omariya and Ukkuthina who have conveyed their rights to Thennamalee by Deed No. 5625 dated 14.01.1897 marked 12V1. On the demise of the said Thennamalee her rights devolved on her children, namely Kiribandu, Hathankira, Babby, Assandamalee and Hurathalmally. The said Kiribandu's rights devolved on his children, namely Salochina and Babaya and both of them by Deed bearing No. 2362 dated 13.08.1956 marked 19V1 (an extract from the land registry) conveyed their rights to the 19th Defendant (1/60).

The said Hathankira by Deed No. 25915 dated 06.12.1948 marked 12V2 transferred his rights to Siriya who conveyed the same to the 12th Defendant by Deed No. 32214 dated 10.11.1949 marked 12V3. The aforesaid Babby, Assandamalee and Hurathalmally by Deed bearing No. 13729 dated 03.12.1928 marked 6V1 transferred their rights to Appusingho who conveyed the same to Babyhamy by Deed No. 3020 dated 25.10.1940 marked 6V2. On the demise of the said Babyhamy her rights devolved on her children, namely the 5th to 10 Defendants.

The aforesaid Pinthu's rights (1/8) devolved on his children, namely Ukkuwa, Kiribaby, Kirihathana and Manika an undivided 1/32 shares each. The said Manika died, leaving four children, namely Kiribaba, Kirisonda, Ananda and Laisa. Kiribaba conveyed his rights to Punchihamy by Deed No. 3402 dated 20.01.1915 marked 16V1 who transferred the same to the 16th Defendant by Deed No. 740 dated 19.08.1935 marked 16V2. Since, the aforesaid Kirisonda, Ananda and Laisa are not made parties to the action, their rights are to be made unallotted. According to the evidence adduced, the rights of the said Ukkuwa, Kiribaby and Kirihathana devolved on Surangtha, Ayada, Malmada and Kiribada. Surangtha's rights devolved on Sethuwa and Punchikira. Sethuwa conveyed his rights to the 22nd Defendant by Deed No. 5539 dated 16.02.1943 marked 22V3. Punchikira's rights devolved on his children, namely the 30th and 34th Defendants. On the demise of the said Ayada her rights devolved on her children, namely Siriya, Pinsonda, Sakrithy and the 57th Defendant. The said Siriya, Pinsonda and Sakrithy transferred their rights to Podinona by Deed No. 8939 dated 13.09.1920 marked 27V1. As the said Podinona is not a party to this action her rights are to be made unallotted. The said Kiribada's rights devolved on his heirs, namely Jema, Suwanda and the 13th Defendant. Jema conveyed her rights to the 23rd Defendant by Deed No. 7498 dated 24.06.1946. As the said Suwanda is not a party to this action her rights are to be made unallotted.

The learned District Judge, in terms of the oral and documentary evidence adduced, has allotted shares of the subject matter to the co-owners².

I shall now consider the grounds of appeal advanced by the foregoing Defendants against the impugned judgment.

The appeal filed by the 12th Defendant (Appeal No. CA/DCF/340/99):

The 12th Defendant has been allotted 224/3840 shares in the impugned judgment. The contention of the 12th Defendant was that she is entitled to an undivided 352/3840 shares.

Although the 12th Defendant claims 352/3840 shares, she failed to buttress that claim with satisfactory evidence. The written submissions and the Petition of Appeal of the 12th Defendant do not disclose the manner in which she is entitled to 352/3840 shares.

According to the evidence adduced, it is well established that the 12th Defendant is entitled to 224/3840 shares by virtue of the title Deeds marked 12V2 and 12V3 (rights of Hathankira). Thus, the appeal of the 12th Defendant is not sustainable.

The appeal filed by the 65th Defendant - (Appeal No. CA/DCF/342/99):

Admittedly, the 65th Defendant was not a co-owner to the subject matter at the time of the institution of this case. During the pendency of the instant partition action, after a long period of time, 34 years from the institution of the said action, the 65th Defendant has purchased certain rights from the 27th Defendant by Deed bearing No. 579 dated 08.12.1994.

Now, it is settled law that in partition actions, those who purchased rights after the registration of the *lis-pendent* are not entitled to be added as parties to a partition action.

² Vide page 100 of the Appeal brief (Volume II).

In **Abeyratne vs. Rosalin**³ it was observed by the Court of Appeal that,

“Though the 3rd Defendant-respondent had transferred his right, title and interest to the 3rd, 23rd and 24th Defendants (appellants) they had no right or status to be added as a party. They cannot be awarded undivided rights by the judgment and the interlocutory decree.”

Thus, the 65th Defendant who purchased rights after the registration of the *lis-pendent* is not entitled to be added as a party to the action and therefore he has no right to appeal against the impugned judgment. Hence, the Petition of Appeal of the 65th Defendant is liable to be dismissed *in-limine*.

Section 66 of the Partition Law spells out that, any voluntary alienation, lease or hypothecation made, after the registration of *lis pendent*, pertaining to the land sought to be portioned, shall be void. But, in the event of the partition action is dismissed, such Deeds are deemed to be valid.

However, under certain circumstances, apex courts permit voluntary alienation.

In **Nazeer vs. Hassim**⁴ it was held that,

“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.”

³ [2001] 3 SLR 308

⁴ 48 NLR 282

In **S.B.D.T. Karunaratne vs. Perera**⁵, it was observed that,

“Where, pending a partition action, a co-owner gifts to certain persons the shares to which he will be declared entitled in the action, the interests which are allotted in that action to the donor pass automatically to the donees when the final decree is entered. It is not necessary that the interests which the donees obtained on the Deed of gift should be expressly conserved to them in the final decree, even though they intervened in the action.”

In **T.H. Lannie Esmi Silva vs. K.D. Leela alias Lilie Francina**⁶ it was observed by T.B. Weerasuriya, J. (agreeing with N.K. Udalagama, J.) that,

“It is to be noted that Section 66 of the Partition Law expressly prohibits any voluntary alienation during the pendency of the action of any undivided shares or interest of or in the land to which the partition action relates and makes it voids. However, as stated earlier, there were certain decided cases which had taken the attitude that a voluntary alienation so long as it is not of any undivided shares or interest of or in the land to which the action relates is permissible.”

Moreover, it appears to this Court that the right of the 27th Defendant, from whom the 65th Defendant is claiming title, has been made unallotted in the judgment. Hence, there is no impediment for the 65th Defendant to lead fresh evidence before the learned trial Judge towards the said unallotted rights.

The appeal filed by the 6A and 10A Defendants (Appeal No. CA/DCF/343/99):

In terms of the proved pedigree, one Punchihamy has conveyed her rights to the 16th Defendant by Deed marked 16V2. The contention of the 6A and 10A Defendants was that the said Punchihamy died, leaving 8 children

⁵ 67 NLR 529

⁶ BASL-Newsletter, July 2001, at Page at 5. (C.A. Case No. 182/90(F), CA Minutes of 06.06.2001).

and their rights devolved on Babyhamy. On the demise of the said Babyhamy, her rights devolved on 5th to 10th Defendants. It is to be noted that the 6A and 10A Defendants totally failed to buttress their aforesaid contention with either oral or documentary evidence.

Furthermore, the learned Counsel for the 6A and 10A Defendants, in the written submissions, took up the position that the 5th to 10th Defendants are entitled to certain shares by Deed bearing No. 12350, and consented to the fact that they could not produce the said Deed in evidence. In the circumstances, it is abundantly clear that the learned trial Judge was not in a position to grant rights to the said Defendants on Deed No. 12350 which was not produced in evidence.

Besides, as per the proved pedigree, one Podinona obtained rights by virtue of the Deed marked 27V1. The learned trial Judge has made the said right unallotted on the basis that there is no evidence adduced pertaining to the devolution of title of the said Podinona. The contention of the 6A and 10A Defendants was that the said Podihamy, by Deed bearing No. 853, conveyed his rights to Babyhamy, and thereafter, Babyhamy's rights devolved on the 5th to 10th Defendants. Since, the said Deed No. 853 was not produced in evidence, there is no option to the learned trial Judge but to make the rights of Podinona unallotted.

In these respects, it is the considered view of this Court that the Appeal filed by the 6A and 10A Defendants is devoid of merits.

The appeal filed by the 14th, 59C and 63A Defendanats (Appeal No. CA/DCF/341/99):

The learned Counsel for the 14th, 59C and 63A Defendanats submits that one Jamuthupedige Hapuwa became entitled to an undivided 1/8 shares on prescription, and upon his death, his rights devolved on his son, Hawadiya who conveyed the said right to Podisingho Appuhamy by Deed No. 13308 dated 24.03.1928. On the demise of the said Podisingho Appuhamy, his rights devolved on his children, namely Yasohamy, Nimalawathi and Podimanike. On the demise of the said Yasohamy that

rights devolved on his nine children including the 14th Defendants. It is to be noted that the foregoing devolution of rights put forward by these Defendants has not been substantiated with either oral or documentary evidence. The said title Deed bearing No. 13308 has not been produced in evidence. It appears to this Court that there is no evidence before Court to accept the contention of these Defendants.

The attention of this Court is drawn to the fact that certain shares have been rightly made unallotted by the learned trial Judge on the footing that the devolution of title of the same has not been established. However, having produced the title Deeds, the parties to the action and even outsiders are entitled to prove their rights towards the unallotted shares before the original Court even after the delivery of the judgment.

In ***Sapin Singho vs. Luwis Singho and Others***⁷, it was observed that,

- 1) *A practice has developed whereby even an intervenient is permitted to prove his title to an unallotted share after the interlocutory decree is entered.*
- 2) *The right of a party to prove his title to a share left unallotted in the final decree is recognised.*

Conclusion:

For the foregoing reasons, I see no basis to interfere with the judgment of the learned District Judge of Avissawella dated 17.12.1998 in case No. 9669/P.

Therefore, I affirm the judgment of the learned District Judge dated 17.12.1998 and dismiss the appeals with Costs.

⁷ [2002] 3 SLR 271

The Registrar is directed to dispatch this judgement along with the original case record to the District Court of Avissawella.

Appeal dismissed with Costs.

Judge of the Court of Appeal

K. K. A. V. SWARNADHIPATHI, J.

I agree.

Judge of the Court of Appeal