

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

Seiyudeen Lebbe Mohomed  
Hussain,  
330A, Bamunumalla,  
Atulugama,  
Bandaragama.  
6<sup>th</sup> Defendant-Appellant

**Court of Appeal Case No: CA/1012/1998/F**

**DC Horana Case No: 2276/P**

Vs.

Habeeb Mohamed Saharuwan  
Beebi alias Habeeb Mohomad  
Shahryan Beebi,  
Mahawaththa,  
Atulugama,  
Bandaragama. (deceased)  
Plaintiff-Respondent  
& Several Others

Before: Mahinda Samayawardhena, J.

Counsel: Gamini Premathilaka with Sunil Wanigatunga for  
the 6<sup>th</sup> Defendant-Appellant.

Danushka Rahubadda with Wasantha Sandaruwan  
for the 1<sup>st</sup> Defendant-Respondent.

Other parties are absent and unrepresented.

Argued & Decided on 19.09.2018

Samayawardhena, J.

This is a partition action.

The plaintiff and the 6<sup>th</sup> defendant have appealed against the Judgment of the District Court.

The plaintiff's appeal (CA/1013/1998) has been abated.

The 6<sup>th</sup> defendant-appellant's appeal is taken up for argument.

Learned counsel for the 6<sup>th</sup> defendant-appellant and learned counsel for the 1<sup>st</sup> defendant-respondent were heard.

Insofar as the 6<sup>th</sup> defendant's appeal is concerned, the 1<sup>st</sup> defendant-respondent is not an affected party. The affected party is the 9<sup>th</sup> defendant-respondent who is not before Court.

The 6<sup>th</sup> defendant has not been allocated any shares in the Judgment.

The 6<sup>th</sup> defendant relies on two deeds to claim undivided rights in the corpus.

The first deed is deed No.14014 marked at the trial 6V3. By this deed Razeena Umma has transferred her undivided rights to the 6<sup>th</sup> defendant. The learned District Judge has accepted Razeena Umma's undivided rights in the corpus, but refused to accept that deed on the basis that it has been executed after the institution of the action. Therefore, Razeena Umma's share has been left unallotted.

Refusal to accept that deed, in my view, is not correct.

Partition case has originally been filed by plaint dated 29.12.1983 to partition a land in extent of 2 roods and 10 perches. *Lis pendens* in respect of that land has been registered on or around 23.01.1984.

Thereafter, an amended plaint dated 14.06.1991 has been filed by the 3<sup>rd</sup> defendant as the plaintiff to partition a larger land in extent of 2 acres 1 rood and 21 perches, and *lis pendens* in respect of the larger land has been registered on or around 07.06.1993.

The Court has thereafter proceeded to partition the larger land.

Notwithstanding the deed No.14014 has been executed after the institution of the action, it has, in fact, been executed about 9 years before the correct *lis pendens* in respect of the larger land was duly registered.

Section 66 of the Partition Law prohibits voluntary alienations not after the partition action is instituted, but after the partition action is duly registered as a *lis pendens*. (*vide Dingiri Mahathmaya v. Samaraweera [2003] 2 Sri LR 268*) The learned District Judge has failed to appreciate this difference.

The plaintiff in a partition case shall file the application for registration of the action as a *lis pendens* with the plaint-vide section 6 of the Partition Law; and summons will be issued on the defendants only after the registration of the *lis pendens*-vide section 13 of the Partition Law.

The deed marked 6V3 can be received in evidence.

Merely because this Court takes the view that deed marked 6V3 can be received in evidence, that does not mean that the contents of that deed shall unequivocally be accepted by Court.

As stated in *Cooray v. Wijesuriya* (1958) 62 NLR 158: "*Before a Court can accept as correct a share which is stated in a deed to belong to the vendor there must be clear and unequivocal proof of how the vendor became entitled to that share.*"

Even though by 6V3 Razeena Umma has transferred undivided 1/8<sup>th</sup> share from the whole land to the 6<sup>th</sup> defendant, the learned District Judge has decided that Razeena Umma is entitled to 48/1920 share from the whole land. Learned counsel for the 6<sup>th</sup> defendant-appellant does not canvass that finding.

Therefore the 6<sup>th</sup> defendant shall be declared entitled to undivided 48/1920 share from the corpus.

The next deed relied upon by the 6<sup>th</sup> defendant is deed No.14015 marked 6V5. By this deed Abdul Majeed has transferred some undivided rights to the 6<sup>th</sup> defendant. This deed has been rejected by the learned District Judge on two grounds: (a) execution after the institution of the action and (b) on prior registration.

The (a) above cannot be a ground for the rejection of this deed (6V5) executed on the same day as 6V3.

However, rejection of that deed on (b) above is justifiable.

Abdul Majeed has earlier transferred his rights by deed marked 9V1 to the 9<sup>th</sup> defendant.

Learned counsel for the 6<sup>th</sup> defendant-appellant states that although 9V1 has been executed before 6V5, 9V1 has not been duly registered at the Land Registry.

However, upon perusal of the evidence of the 9<sup>th</sup> defendant and the issues, it is clear that such a specific position has not been taken up by the 6<sup>th</sup> defendant at the trial. 9V1 has not been marked subject to proof. By looking at 9V1, which is a certified copy of the deed issued by the Land Registry, this Court sitting in appeal cannot decide whether or not it has properly been registered. The 6<sup>th</sup> defendant should have put that matter in issue at the trial Court. It is not a pure question of law, but a question of mixed fact and law, and therefore cannot be raised for the first time in appeal. (*Leslin Jayasinghe v. Illangaratne* [2006] 2 Sri LR 39, *Simon Fernando v. Bernadette Fernando* [2003] 2 Sri LR 158, *Gunawardena v. Daraniyagala* [2010] 1 Sri LR 309, *Somawathie v. Wilmon* [2010] 1 Sri LR 128)

Hence I am not inclined to disturb the finding of the learned District Judge on that point.

Appeal is partly allowed.

Let the parties bear their own costs.

Judge of the Court of Appeal