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

C.A. Case No.1247/2000 (F)

D.C. Gampaha Case No.37173/P

1. Muthugal Pedige Keerthi Nuwan Priyantha
2. Muthugal Pedige Charlotte Hemalatha

Both of "Samagi" Stores,
No.60 B, Kandy Road,
Radawadunna.

3rd & 4th DEFENDANTS-APPELLANTS

-Vs-

Munasinghe Arachchige Millie Mangalika
of Hedeniyakanda, Radawadunna.

PLAINTIFF - RESPONDENT

1. Muthugal Pedige Sirira Kumara Jayatissa
   No.64, Kandy Road,
   Radawadunna.
2. Muthugal Pedige Kumarasiri
   All of No.60/B, "Samagi Stores",
   Kandy Road, Radawadunna.
5. Sumanawathi Jayakody
6. R.P. Jane
7. Muthugal Pedige Mallika
8. Muthugal Pedige Prema Jayanthi
9. Muthugal Pedige Nimal Munasinghe

DEFENDANT - RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Sandamal Rajapakshe for the 3rd and 4th Defendant-Appellants C.J. Ladduwahetti with Keerthi Sri Gunawardena for the Plaintiff-Respondent
Decided on	:	28.06.2018

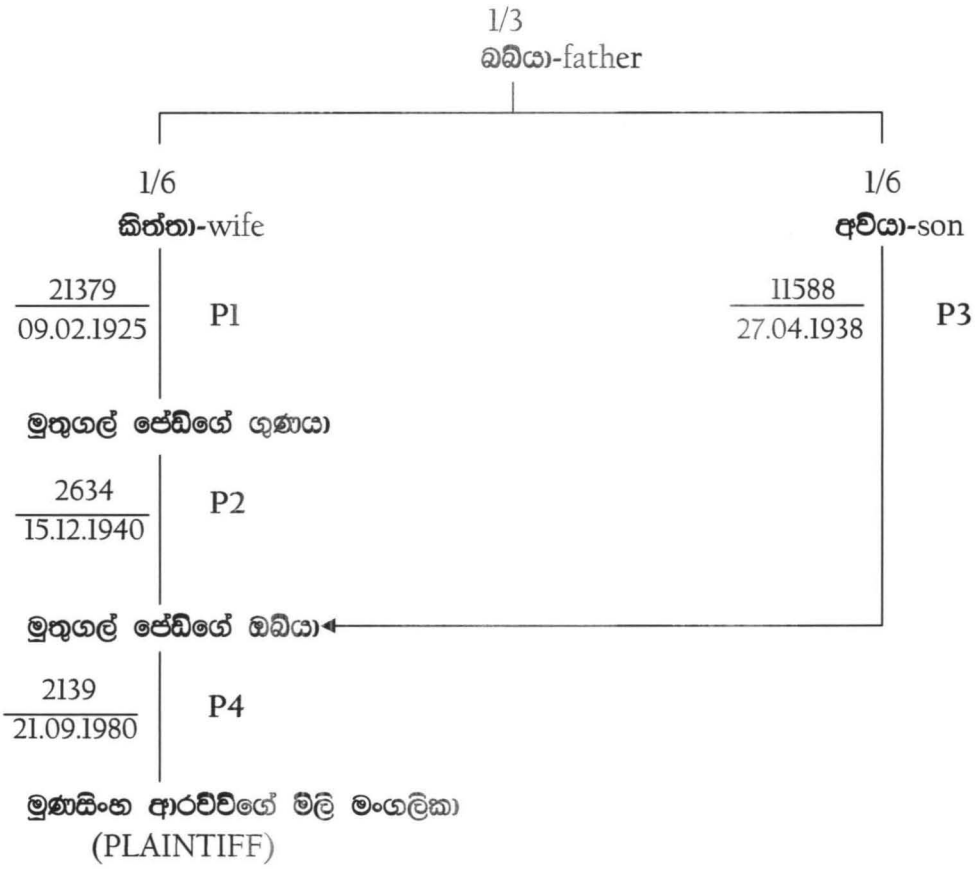
A.H.M.D. Nawaz, J.

The Plaintiff-Respondent in this appeal (hereinafter sometimes referred to as "the Plaintiff") Munasinghe Arachchige Millie Mangalika presenting a plaint sought to partition a land, to which she averred she had derived her title to a 1/3rd share from one Muthugal Pedige Obia by a deed marked P4 and dated 21.09.1980. Obia had transmitted to the Plaintiff a 1/3rd share to the corpus from what she had got on two deeds namely Deed marked as **P3** of 27.04.1938 and the Deed marked as **P2** of 15.12.1940. The pedigree filed on behalf of the Plaintiff described a corpus that was originally owned by Babiya, Gunaya and Setha.

Babiya, Gunaya and Setha had each 1/3rd of the entire land. The corpus is known as **ගොරකගහවත්ත** *(Gorakagahawatte)* and there is no dispute as to the interest flowing from the shares of Gunaya and Setha. It is the 1/3rd share of original owner Babiya that has given rise to this appeal.

According to the pedigree filed by the Plaintiff, Babiya's 1/3rd share had devolved on his widow Kiththa and son Aviya *alias* Saima in equal shares. The devolution of the shares is reflected in the following table:

Table No.1



As the table No.1 indicates, Kiththa (the widow of Babiya) had transferred her 1/6th share by **P1** to Muthugal Pedige Gunaya who later transferred it to Obia by **P2**, and thereafter Obia transferred a 1/3rd share to Mangalika-the Plaintiff by **P4**. Obia was able to transfer a 1/3rd share to the Plaintiff in 1980 because by the year 1938 she had already got 1/6th share of Aviya by **P3**.

In other words the 1/6th share which had devolved on the son Aviya was transferred by Aviya by Deed No.11588 dated 27.04.1938 (P3) to Muthugal Pedige Obia, who upon this transfer became entitled to 1/3rd share of the corpus, which the original owner Babiya had. Muthugal Pedige Obia thereafter by Deed No.2139 dated 21.09.1988 **(P4)** transferred the 1/3rd of this land to Munasinghe Arachchige Milinona-the Plaintiff in the case.

From the above narrative of devolution which is apparent upon the table above, one could see that at the time of execution of the Deed No.11588 on 27.04.1938 **(P3),** it was the paternal inheritance of Aviya which was transferred by that deed to Mutugal Pedige Obia.

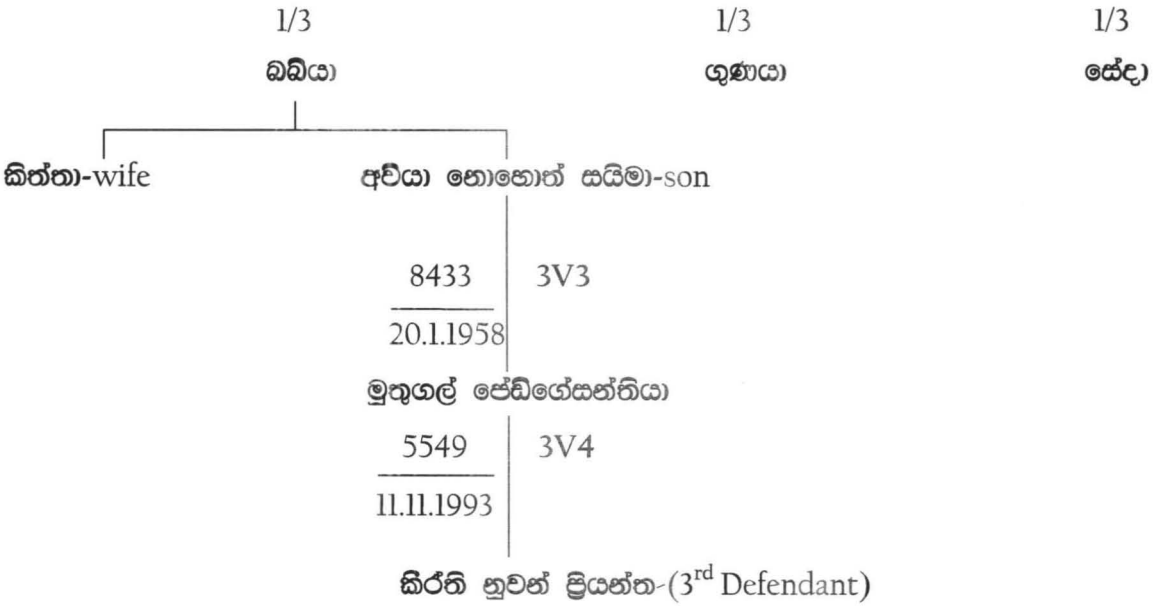
It has to be observed that the son of the original owner Babia, Aviya did not get any maternal inheritance from his mother Kiththa and he could not have had any such maternal inheritance as Kiththa had already dealt with her 1/6th share by the deed marked as **P1** in favour of Muthugal Pedige Gunaya.

Answer filed by 2nd, 3rd and 4th Defendants at page 34 of the Brief

In the joint answer dated 25.03.1996, the 3rd and 4th Defendant-Appellants along with the 2nd Defendant disputed the genuineness and authenticity of the deed marked as **P3** by which Aviya had transferred his 1/6th share to Muthugal Pedige Obia. It was pleaded at paragraph 6.3 of the answer that that P3 bearing No.11588 and dated 27.04.1938 was fraudulent. The devolution according to the joint answer can be graphically depicted as follows.

<u>Answer</u> - **dated 25.03.1996 at page 14**

Table No.2



As I said before, there is no dispute between the Appellants (the 3rd and 4th Defendants in the case) and the Plaintiff-Respondent as to the devolution under Gunaya and Setha.

The nub of the matter revolves around two deeds namely **P3** bearing No.11588 of 27.04.1938 and **3V3** bearing No.8433 of 20.01.1958. The Plaintiff-Millie Mangalika produced **P3,** whilst the 3rd Defendant-Nuwan Priyantha produced **3V3.**

The deeds **P1, P2** and P4 which are all depicted in table No.1 above were not impugned at all. It is **P3** bearing No.11588 of 27.04.1938 that was disputed by the 2nd and 3rd Defendant-Appellants when they filed their joint answer dated 25.03.1996 along with the 4th Defendant. In other words the 2nd and 3rd Defendant-Appellants disputed the genuineness of **P3** by which Aviya had transferred his 1/6th share to Muthugal Pedige Obia in 1938.

In their joint answer dated 25.03.1996, the 2nd, 3rd and 4th Defendants further pleaded that Aviya *alias* Saima transferred his share in the corpus to their father Muthugal Pedige Santhiya by a Deed bearing No.8433 and dated 20.01.1958. In other words it was the contention of these contesting Defendants that 30 years after Aviya *alias* Saima had executed **P3** dated 27.04.1938, he chose to transfer by **3V3** of 20.01.1958 his rights in the land to their father Santhiya. Santhiya later transferred that interest to Priyantha-the 3rd Defendant-Appellant by **3V4.**

So, whilst the 3rd Defendant-Appellant traced his rights in the land to Aviya *alias* Saima through **3V3** and **3V4**, the Plaintiff too claimed her title to the 1/3rd share of the land through the same source Aviya *alias* Saima through P3. Her claim was that **P3** and **P4** combined together to give her 1/3rd share of the corpus-*vide* Table No.1. In fact the learned District Judge of *Gampaha* has indeed allotted this share to the Plaintiff.

Therefore the crux of the dispute was between **P3** dated 27.04.1938 and **3V3** dated 20.01.1958. At the trial, the 3rd and 4th Defendant-Appellants raised an issue to the effect that **P3** the Deed bearing No.11588 of 27.04.1938 was not the act and deed of Aviya. Moreover, in the same issue, they claimed that **P3** was forged and fraudulent.

The learned District Judge of *Gampaha* has answered this issue against the 3rd and 4th Defendant-Appellants and has accepted P3 that transmitted Aviya's right to Obia who, with this transmission, became entitled to 1/3rd of the corpus. This 1/3rd share finally went to the Plaintiff. A perusal of Table No.1 will bring this out more saliently.

The argument at the appeal focused on the burden of proof with regard to **P3** which Aviya *alias* Saima had executed on 27.04.1938. This deed was indeed impeached by the 3rd and 4th Defendant-Appellants in their joint answer, issues and the trial.

The contention was advanced on behalf of the 3rd and 4thDefendant-Appellants that when the Plaintiff produced **P3** in the course of her examination in chief, they raised the objection "*subject to proof*" and in light of the issue that they had raised in relation to the deed which they alleged to be fraudulent, the burden lay on the Plaintiff to have established the due execution of the deed.

It was also argued that the objection "*subject to proof*" was raised twice over-once when the deed was produced by the Plaintiff and secondly when the Plaintiff closed his case-*see* ***Sri Lanka Ports Authority v. Jugolinija*** (1981) 1 Sri.LR 18. In the circumstances it was contended that it behoved the Plaintiff to have proved that **P3** was genuine. In support of his argument, Mr. Sandamal Rajapaksha the learned Counsel for the 3rd and 4th Defendant-Appellants cited the case of ***Francis Samarawickrema v. Hilda Jayasinghe and Another*** SC Appeal No. 7/2004, which has been reported *sub nom* ***F. Samarawickrema v. Jayasinghe and another*** 2009 B.L.R 85. This case was cited to drive home the argument that when the Plaintiff relies on a deed to stake a claim to a land but the Defendant alleges it to be a forgery, the due execution of the deed must be duly established in terms of the law.

What Saleem Marsoof, J. PC encountered in the above case was a *rei vindicatio* action that had originated in the District Court of *Kalutara* and the learned Judge begins his illuminating judgment by describing the appeal before the Supreme Court as a sequel to the decision of the Court of Appeal of Sri Lanka dated 03.05.1982 in C.A. Appeal No.469/78 (F) and reported as ***Hilda Jayasinghe v. Francis Samarawickrema*** (1982) 1 Sri.LR 249. In this case which traversed a labyrinthine path in both the Court of Appeal and the Supreme Court, the case of the Defendant-Appellants was that the Notary fraudulently obtained their signatures (and thumb impression) on blank papers which

were subsequently filled up in the form of a deed of sale; that no consideration passed and that the two attesting witnesses were not present at the time of the execution.

The recurrent issues in the first and second appeals ((1982) 1 Sri.LR 249 which led to SC sequel reported in 2009 B.L.R 85) were whether there was a due execution of a deed relied upon for title vis-à-vis the allegation of fraud alleged against the notary. If one carefully goes through the SC judgment reported in 2009 B.L.R 85, one would observe that Saleem Marsoof, J. (with whom S.N. Silva, P.C., C.J and Shiranee Tilakawardane, J. agreed) proceeds to answer two questions that oftentimes come to the fore in *rei vindicatio* actions. Who bears the respective burdens of proof in these cases when one party relies on a deed for title and the other party goes to impeach the deed as fraudulent and fictitious? As for due execution the learned District Judge held that Section 101 of the Evidence Ordinance deals with burden of proof in cases, and lays down that whoever desires any court to give judgment as to any legal right or liability dependent upon the existence of facts which he asserts, must prove that those facts exist. In other words the legal burden of proving all facts essential to his claim would rest upon the plaintiff in a civil suit or the prosecutor in criminal proceedings. As for the burden of proof on the question of fraud, Marsoof, J. cited the judgment of ***Subramaniam v. Thanarase*** 61 N.L.R 355 and the commentary of E.R.S.R. Coomaraswamy on the case in his treatise *The Law of Evidence* Vol.II, Book 1 page 259 and proceeded to hold that the burden would be on the Defendant.

I was confronted with the selfsame questions in ***Dhanawathie v. Nandasena*** (2016) 1 Sri.LR 18-an appeal that came on from the District Court of *Balapitiya* and I would respectfully record that what appeared to me to be the law on these two questions had appeared to be the same to Marsoof, J.

In ***Dhanawathie v. Nandasena*** *(supra)*, I had occasion to consider the burden of proof in regard to an argument of fraudulent disposition raised by the defendant in the case. The question that arose in the appeal was as to who bears the burden when fraud is alleged by the defendants. The vital issue-Issue No.4 put in by the defendant in that case was-Was the deed bearing No.33504 fraudulently executed?

I pointed out that Section 101 of the Evidence Ordinance is premised on the Latin tag-"***Ei qui affirmat 'non ei qui negat, incumbit probatio-the proof lies upon him who affirms, not upon him who denies.*** It is expressed in the commonplace dictum-one who asserts must prove.

Section 101 places the legal burden of proof on the party who asserts the existence of any fact in issue or relevant fact. Section 101 of the Evidence Ordinance obligates a party seeking judgment in the suit to prove his case. He has to prove it to the standard required as defined in Section 3 of the Evidence Ordinance. In a civil case it would be on a balance of probabilities-for a classic exposition of "balance of probabilities", *see per* Denning, J. in ***Miller v. Minister of Pension*** (1947) 2 All ER 372.

Having thus posited the burden of proof on the Plaintiff to establish due execution of the deed by the mode insisted upon in terms of Section 68 of Evidence Ordinance, I went on to hold that the burden of proof of fraud is upon the Defendant who raises it in the trial. I would recall what I said in that context.

> *"When a Defendant takes up a defence such as forgery or fraud, Section 101 of the Evidence Ordinance will equally apply to him because the Defendant, just as much as the Plaintiff, has to establish his pleaded case. Since the Defendant has taken up a defence of forgery of his signature on the deed bearing No.33504, which is in the form of an avoidance of the claim, the Defendant would bear the "burden to prove his case" if he were to succeed..."*

Needless to say, in the present case, the contesting Defendant-Appellants did purport to impeach the deed P3 on the ground of fraud, whilst the Plaintiff-Respondent rested her case on the validity of P3-a deed which had been executed as far back as 1938.

Having regard to the interplay of the respective burdens on the part of the Plaintiff and Defendant to prove due execution of a deed and fraud in its execution, it is commonplace that these obligations are often encountered by parties in *rei vindicatio* actions and they are distributed among parties because of specific provisions found in the Evidence Ordinance namely Sections 68, 101 and 103.

But a mere assertion of fraud in the pleadings or issues will not suffice. In the case before me, the identity of the person whose act is alleged or tainted as fraudulent is scarcely apparent upon the pleadings or evidence. How did any specific act of fraud which is attributed to anyone in particular vitiate the deed of 1938? I find no credible evidence of fraud proved against anyone and I see no reason to disturb the answer to the issue of fraud given in the case even though the learned District Judge has not indulged in an incisive analysis of the question of fraud. If the answer to an issue is supportable having regard to the material on record, a mere want of discussion on the evidence surrounding the issue is not *per se* a ground to vitiate the judgment in appeal.

In any event my next discussion on Section 68 of the Partition Law No.21 of 1977 will show that the impugned deed P3 remains proved by operation of law. I would however proceed to state on the question of fraud that whoever asserts the fact of fraud must establish the fact and Sections 101 and 103 of the Evidence Ordinance would place the legal burden of proving fraud on the Defendant, because it is him who has put it in issue. The above account is certainly true for *rei vindicatio* actions as well as for partition suits. But on the facts and circumstances of the case before me, the Defendant-Appellants have failed to establish fraud and as it would be abundantly clear upon the evidence given by the 3rd Defendant-Appellant alone, it is the due execution of Deed **P3** that has been established rather than the allegation of fraud. In any event it was only after a lapse of 58 years after its execution that the deed of 1938 (**P3**) was first challenged as fraudulent in the answer filed on 25.03.1996 and the case of ***Ranasinghe v. De Silva*** 78 N.L.R 500 would bar even a collateral attack on the deed.

> *"An action for a declaration that a notarially executed deed is null and void is prescribed within 3 years of the date of execution of the deed in terms of Section 10 of the Prescription Ordinance"* - Wimalaratne, J. with Sirimanne, J. and Gunasekara, J. agreeing.

In view of Section 68 of the Partition Law No.21 of 1977, the due execution of the deed (**P3**) is almost a given and I would now advert to that provision.

Due execution in Partition suits

In Sri Lanka there are various special statutes under which rules of evidence are provided for specific matters, and the special provisions prevail over the general provisions of the Evidence Ordinance, in case of any inconsistency-*Generalia specialibus non derogant*. Thus for partition suits, Section 68 of the Evidence Ordinance has not been fully transported as such into the Partition Law No.21 of 1977 and it is Section 68 of Partition Law No.21 of 1977 that governs the question of due execution in partition cases.

In order to buttress the argument that within its parameters Section 68 of Partition Law No.21 of 1977 prevails over Section 68 of the Evidence Ordinance, Salam, J. referred to two maxims in ***Wimalawathie v. Hemawathie and Others*** (2009) 1 Sri.LR 95 at p.99 namely *Lex posterior derogate priori* and *leges posteriors priores contrarias abrogant*-later laws repeal earlier laws inconsistent therewith in order

The earlier Act (Sec.68 of the Evidence Ordinance) must give way to a later enactment (Sec.68 of the Partition Law No.21/1977).

Section 68 of Partition Law No.21 of 1977 enacts:

> *"It shall not be necessary in any proceedings under this Law to adduce formal proof of the execution of any deed which, on the face of it purports to have been duly executed, unless the genuineness of that deed is impeached by a party claiming adversely to the party producing that deed, or unless the court requires such proof."*

There is a relaxation of the necessity to prove the due execution of a deed, provided it is apparent on the face of it that it has been duly executed. In two situations formal proof has to be established. Firstly the genuineness of that deed must be impeached by a party claiming adversely to it or the court must require such proof. In the instant appeal the deed **P3** has been on the face of it duly executed by Aviya *alias* Saima before a notary and two witnesses and the same has been duly registered. The Court has not seen it fit to require proof of execution of the deed but the Defendants proceeded to impeach its genuineness in the statement of claim, issues and the trial. In such a situation the proper

question to pose in terms of Section 68 is-Does the 3rd Defendant claim adversely to the Plaintiff who produced P3?

As Mr. Champaka Ladduwahetty rightly pointed out, the 3rd Defendant who holds 3V3 is not a party claiming adversely to the Plaintiff who produced **P3**, because the deed 3V3 from which the 3rd Defendant claimed his rights does not deal with the same rights already dealt with by the deed **P3**, 20 years earlier. By the deed **P3** which was executed in 1938, Aviya *alias* Saima transferred his paternal rights to Obia. By the deed 3V3, which was executed in 1958, Aviya is said to have transferred his maternal inheritance to Santhiya-the father of the 3rd Defendant. Whilst **P3** transferred paternal inheritance, 3V3 transmitted maternal inheritance. In other words P3 and 3V3 are not competing deeds and therefore 3V3 cannot claim anything adverse to P3. In the circumstances the 2nd limb of Section 68 of the Partition Law, No.21 of 1977 namely the genuineness of the deed must be impeached by a party claiming adversely to it does not apply in this case and one cannot then argue that deed **P3** has not been proved. On the contrary, in light of Section 68 of the Partition Law No.21 of 1977, this deed must be deemed to have been proved.

In fact Kittha (the mother of Aviya) had long disposed of her rights by **P1** of 09.02.1925 to Gunaya and if at all, it is with this deed of 1925 that the deed 3V3 would actually compete. **P2** and **P4** too transferred what would have been the maternal inheritance of Aviya and 3V3 could be said to compete with those deeds too as they dealt with the same subject-matter-maternal inheritance. The mother Kiththa had disposed of her inheritance by **P1** in 1925 and the son Aviya could not have had any maternal inheritance to transmit in 1958. It is noteworthy that Aviya could not have transferred what he says he had transferred in 3V3 when his mother had already dealt with her entire rights in 1925.

A perusal of deed 3V3 really shows that what had been purported to be transferred were not the rights transferred by **P3** but different rights.

It is interesting to note that the deed 3V3 by which Aviya *alias* Sima had sold his maternal inheritance in 1958, says "කිත්තාගෙන් මට උරුමයට මට අයිතිව"(at page 113). It is also interesting to note that the bottom line of the schedule referred to in the above

deed says "**පළතුරු සමග බිම්නුත් ඉහති කි ප්‍රකාර විකුණුම්කාර මට ඇති සියලු අයිතිවාසිකම් වේ**".

Therefore it is abundantly clear that what Aviya *alias* Sima had transferred in 1958 is not the 1/6th share he inherited from his father, but whatever he would have inherited from his mother Kiththa upon her death. It is significant to note that the clear 1/6th share given in 1938 by deed **P3** is missing in subsequent deed 3V3. What has been dealt with is whatever share he would have been inherited upon his mother's death. Therefore the deed **3V3** must be interpreted holistically and the words "**රුපියල් 60 කරණකොටගෙන නැසිගිය රන්හොට පේඩිගේ කිත්තගෙන් මව් උරුමයට මට අයිතිව මා විසින් පොදුවේ භුක්ති විඳින**" taken together with the words in the schedule "**ඉහති කි ප්‍රකාර විකුණුම්කාර මට ඇති සියලු අයිතිවාසිකම්**", clearly shows that what Aviya *alias* Sima had transferred was not the rights that he had transferred by way of deed P3 20 years earlier.

In the circumstances the fact remains that P3 of 1938 could not be impeached and it remains proven by virtue of Section 68 of the Partition Law.

The proof of **P3,** apart from Section 68 of the Partition Law, also emerges from the evidence given by the 3rd Defendant himself. The 3rd Defendant was the only witness who gave evidence on behalf of the contesting Defendants at page 54, wherein he states that he did not search the Land Registry before the purchase of rights on deed **3V3.**

It is also interesting to note that in cross-examination the 3rd Defendant admitted that that Obia had transferred all the rights that he had in the land, by deed **P4**, to the Plaintiff. In other words the 3rd Defendant specifically admitted that Deed **P4** had transmitted 1/3rd of the corpus to the Plaintiff. This deed **P4** included the rights sold by Aviya by deed **P3**. On the evidence of the 3rd Defendant, there is then the admission that the deed **P3** was valid and effectual-*vide* page 59 of the appeal brief.

I am therefore perforce impelled to accept the submission advanced on behalf of the Plaintiff-Respondent that the contesting Appellants did accept that the rights transferred by Aviya in 1938 went to the Plaintiff.

It has to be noted that Obia had acted upon the impugned deed from the time it conveyed her rights. Noteworthy is the question at page 58 where it was specifically put to the 3rd Defendant-Appellant whether Obia possessed the rights he had purchased upon **P3** from 1938 to 1980. This specific question has been answered in the affirmative by the 3rd Defendant-Appellant. In other words the 3rd Defendant-Appellant has admitted that Obia had been in possession of his rights that accrued to him in 1938 by way of the deed **P3.** Needless to say it is the case of the Appellants that deed **P3** had been acted upon by the predecessor in title of the Plaintiff.

Thus due execution of **P3** has been established and there is no established fraud that vitiates this deed. Before I part with this judgment, I must say that Section 90 of the Evidence Ordinance too raises the presumption that deed bearing No.11588 of 27.04.1938 **(P3)** has been duly executed.

Presumption as to documents thirty years old-Section 90

It is pertinent to observe that the presumption with regard to deeds which are over 30 years old would also apply in this case. This deed was attested in 1938 and duly registered, long years ago. It was produced from the custody of the Plaintiff. The illustration *(a)* to the Section 90 of the Evidence Ordinance clearly states that if the Plaintiff has been in the possession of the land and if the deed relating to the land is produced from his custody, the production of the deed is from proper custody.

The principle underlying Section 90 is that if a document, 30 years old or more, is produced from proper custody and is, on its face, free from suspicion, the court may presume that it has been signed or written by a person whose signatures it bears or in whose handwriting it purports to be. The ground of the rule is the great difficulty, indeed in many cases, the impossibility of proving the handwriting, execution and attestation of documents in the ordinary way after a lapse of many years.

Another ground is the circumstances of age, or long existence of the document, together with its place of custody, its unsuspicious appearance, and perhaps other circumstances, suffice, in combination, as evidence to be submitted to Court.

Proof of custody is required as a condition of admissibility to afford the court reasonable assurance of the genuineness of the document as being what it purports to be.

Section 90 does away, ordinarily, with the necessity of proving those documents, for documents 30 years old are said to prove themselves, that is, no witnesses need, unless the court so requires, be called to prove their execution or attestation.

This section does away with the strict rules of proof enforceable in the case of private documents by giving rise to a presumption of genuineness with regard to documents more than 30 years old.

On the strength of the evidence in the case the presumption in Section 90 may properly been drawn and the burden would then shift to the opposite party to show that it is a fraud on the registration, that deed is illegal, void and not acted upon. No such rebuttal of the presumption has occurred in the case.

In effect Section 90 of the Evidence Ordinance is worded in general terms as it is designed to meet situations varying in character, where passage of time might have obliterated the proof of the genuineness of any disputed document.

In the end I would conclude that the learned District Judge of *Gampaha* reached the correct decision by placing reliance on P3 and allotting the 1/3rd of the corpus to the Plaintiff and this deed remains proven by various methods that I have enumerated above. In the circumstances I affirm the judgment of the District Court of *Gampaha* dated 17.11.2000 and proceed to dismiss the appeal.

JUDGE OF THE COURT OF APPEAL