

In The Court Of Appeal of the Democratic Socialist  
Republic of Sri Lanka.

CA Appeal No 518/98 (F)

D.C. Kalutara 6177/P

Susil Harischandra,  
18,Kuda Magalkanda,  
Maggona

18<sup>th</sup> defendant-appellant

Gallage Leelawathie Fernando,  
357, Gnegoda Aluthgama.

Plaintiff-respondent.

1. Kalutarage Mile Fernando
  2. Kalutarage Punchi Nona  
Fernando
  3. Kalutarage Thilakaratna  
Fernando
  - 4.Sinhara Sisil Clement de Silva
  5. Sinhara Roshani Chandima  
Silva
  6. Sinhara Ranga Vides Silva
  7. K. Hinton Abeysiri
  8. W.M.Adilin Andradi
  9. D.Alis Nona
  10. M Gnanawathie
- Stores Road, Ganegama,  
Alutgama.
11. Sudhasingha Thilak Jayanath
  12. Weerapurange Lalitha  
Fernando.
  13. Hettihandi Gnanasiri.

14. Sudhasingha Thilad  
Jayananda.

15. Delpa Bdalge Wijedasa,  
Wijaya Motors, Ganagama,  
Alutgama.

16. Hinton Abeysiri, Kadawaraya  
Watta, Alutgama.

17. Dewapurage Alis Fernando.

19. Nihal Andradi, 421, Galle  
Road, Alutgama

20. A. H. Fernando, Galle Road,  
Alutgama

21. Hikkaduwa Nanasoma, 191,  
Galle Road, Alutgama

22. Gnanaseeli Wickramasingha, .

23. Murukkuwatura Chandrawathie

Defendant-Respondent

Before: A.W.A.Salâm J.

Rohan Sahabandu for 18<sup>th</sup> defendant-  
appellant and S.W.Premaratna for the  
plaintiff-respondent.

Written Submissions filed on : 30.06.2008.

Decided on: 01.04.2009

Abdus Salâm, J.



The deceased-plaintiff filed action to partition the defined and  
divided allotment of land known as lot 3 of "Welle Elabodawatta"

depicted in final plan of partition No. 366, filed of record in DC Kalutara case No. 31046. There was no corpus contest and an important feature in the case was the agreement of the parties as to the identity of the land sought to be partitioned.

Devolution of title to the subject matter, in terms of the amended plaint, starts with the original ownership attributed to (1) Liyasel Fernando (2) Andiris Fernando (3) Peter Fernando (4) Michael Fernando (5) Melie Fernando (1<sup>st</sup> defendant-respondent) and (6) Punchinona Fernando (2<sup>nd</sup> defendant-respondent). Liyasel Fernando and Andiris Fernando had died without marriage and issues and their rights had devolved on the surviving collaterals Peter Fernando, Michael Fernando, Melie Fernando and Punchinona Fernando.

Peter Fernando has died interstate leaving as heirs the 3<sup>rd</sup> defendant-respondent Thilakaratna Fernando and Kamalin Fernando. Kamalin Fernando had died leaving as her heirs her husband Sisil Clement Silva (4<sup>th</sup> defendant-respondent) and her children Roshan Chandima de Silva (5<sup>th</sup> defendant-respondent) and Ranga Vides Silva (6<sup>th</sup> defendant-respondent).

The 1/4<sup>th</sup> share of Michael Fernando from and out of lot 3, which gave rise to the main controversy in the case, has been transferred on deed No 509 dated 15<sup>th</sup> December 1992 attested by H. R.

Marikkar to the plaintiff. The devolution of title set out in the plaint is as follows.

1. Plaintiff - 8/32
2. 1st defendant - 8/32
3. 2nd defendant - 8/32
4. 3rd defendant - 4/32
5. 4th defendant - 2/32
6. 5th defendant - 1/32
7. 6th defendant - 1/32

The plaintiff also pleaded in the amended plaint that even though the 17<sup>th</sup> defendant-respondent and 18<sup>th</sup> defendant-appellant had allegedly purchased rights from Michael Fernando on deed No's 6240 and 3124 respectively, the said deeds are obnoxious to section 66 of the Partition Act and of no force or avail in law and no title passes on the said deeds.

The contention of the 18<sup>th</sup> defendant-appellant and 17<sup>th</sup> defendant-respondent (hereinafter collectively referred to as the "contesting defendants") was that Michael Fernando referred to in the amended plaint transferred an undivided (1) 10 perches on deed No 2741 dated 23<sup>rd</sup> April 1987, (2) 5 perches on deed No 2753 dated 11<sup>th</sup> May 1987, and (3) 10 perches on deed No 2808 dated 3<sup>rd</sup> June 1987 and (4) 10 perches on deed No 2948 dated 20<sup>th</sup> January 1988 aggregating to 35 perches from and out of the right, title and interest that he would be declared entitled to in the partition action to them and therefore the plaintiff-respondent is not entitled to any shares from the corpus as Michael Fernando did not have any rights

in lot 3 to alienate, when he had purportedly transferred  $\frac{1}{4}$  share to the plaintiff on deed No 509.

The dispute therefore narrowed down as to whether the rights in the land had devolved on the parties, as set out in the amended plaint or in the statements of claim of the contesting defendants. By judgment dated 15<sup>th</sup> June 1998 the trial judge held *inter alia* that relied upon by the contesting defendants are obnoxious to section 66 of the Partition Act and no rights pass on the said deeds. Hence, he declared deed No's 6240, 3124 and several other deeds of the same type as being void in law. The 18<sup>th</sup> defendant-appellant has preferred the instant appeal, to have the said judgment of the learned district Judge set aside and the partition action dismissed.

Admittedly, Michael Fernando was the 32<sup>nd</sup> defendant in partition action No 31046, in addition to his being one of the legal representatives of the deceased plaintiff. In that case the 32<sup>nd</sup> defendant Michael Fernando was allotted lots 15 and 22 depicted in plan of partition No. 366. Besides, in terms of the final decree, he was also entitled to an undivided  $\frac{1}{4}$ <sup>th</sup> share from and out of lot 3 depicted in plan No 366. It is common ground that the subject matter according to the preliminary plan is in extent of 1Rood and 27.8 Perches. The share claimed by the plaintiff is 16.95 perches being equivalent to  $\frac{1}{4}$ <sup>th</sup> parts of the corpus. Based on the claim made by the contesting defendants, on the strength of the pending

partition deeds, their claim cannot extend to more than 11.3 perches of the corpus, being 1/6 share of John Fernando.

There was no dispute that Michael Fernando was declared entitled to lots 15 and 22 in extent 1 Rood 16.33 Perches and 1 Rood 13.30 Perches respectively in terms of the final decree entered in partition action No 31046. It is somewhat striking that Michael Fernando has got both these lots 15 and 22 as the 32<sup>nd</sup> defendant in that case and therefore he could undoubtedly dispose of the rights by expressly charging or disposing of his interests to be ultimately allotted to him in that action.

The total extent of the lots 15 and 22 allotted to Michael Fernando works out to 2 Roods and 29.63 Perches<sup>1</sup>. He has transferred the right, title and interest that he would be declared entitled to in the partition action, on six occasions. As far as the present appeal is concerned, the following deeds of transfers appear to be noteworthy.

They are...

Deed 2747 -	to the 17 <sup>th</sup> defendant -	10 perches
Deed 2753 -	to the 18 <sup>th</sup> defendant -	5 perches
Deed 2808 -	to the 18 <sup>th</sup> defendant -	10 perches
Deed 2747 -	to the 18 <sup>th</sup> defendant -	10 perches

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<sup>1</sup> 109.63 perches

Michael Fernando also prominently featured in the final decree entered in the previous partition action in relation to lot 3 which is the subject matter of this case. In actual fact lot 3 in that case was allotted in lieu of the undivided shares of the deceased plaintiff John Fernando and in terms of the final decree allotted to 1 to 7 substituted plaintiffs. It is common ground that Michael Fernando is one of the children of John Fernando (deceased plaintiff) and a substituted-plaintiff in the action.

An important legal question that arises for consideration is whether the deeds written in favour of the contesting defendants are obnoxious to section 66 of the Partition Act, as has been held by the learned district Judge. Section 66 of the Partition Act, lays down *inter alia* that after a partition action is duly registered as a *lis pendens* under the Registration of Documents Ordinance, no voluntary alienation of any undivided share or interest or in the land to which the action relates shall be made or effected until the final determination of the action. The prohibition against alienation of undivided shares under section 66 has been held not to affect the disposal of property, by expressly charging or disposing of interest to be ultimately allotted to parties in the action. Such dispositions are not considered as being obnoxious to section 66 of the Partition Act. The scope and the type of restrictions imposed by section 66 (previously under section 17 of the Partition Ordinance No 10 of

1863) have been the subject of the decision of the appellate courts in several matters. However, in my view suffice it would be to refer to the judgment in the case of Koralage Podinona Vs Sunny Fernando<sup>2</sup>.

Based on the decision of Stanley Gunawardena J, in Koralage Podinona (supra), it is crystal clear that the different dispositions made by Michael Fernando in favour of the contesting defendants in this case, are not obnoxious to the prohibition imposed under section 66 of the Partition Act, for all those dispositions deal with undivided extent of the right, title and interest of Michael Fernando to be finally allotted in the partition action, as opposed to the prohibited nature of alienation involving undivided shares from and out of the corpus. In the circumstances, it would be seen that the learned trial judge has misread the deeds of the contesting defendants as being obnoxious to section 66 of the Partition Act, which findings I think should stand corrected at the outset, as the deeds are perfectly valid in law. Nevertheless the question whether title in respect of lot 3 could pass on the said deeds is a different issue and should be considered separately focusing on the contents of the deeds, by ascertaining exactly as to what Michael Fernando intended to transfer on those deeds.

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<sup>2</sup> 1986 2 CALR 217

It was contended on behalf of the contesting defendants that without instituting a partition action to divide lots 3, 15 and 22 the plaintiff-respondent who got undivided shares from and out of Lot 3 cannot maintain the present action in respect of Lot 3 only, as the contesting defendants hold right, title and interest that would be allotted to Michael Fernando in the partition action to the extent of at least 35 perches out of Lot 3. This argument of the contesting defendants is not only sustainable in law but inconsistent with the facts of the case. It is settled law that an action for the partition of more than one land can only be brought, if the lands sought to be partitioned are contiguous in nature and the devolution of title is common to all.

The preliminary plan prepared in this matter does not indicate Lot 15 and/or Lot 22 as being adjacent or bordering the subject matter Lot 3. On an examination of the devolution of title applicable to all three lots it is hardly possible to say that the devolution of title is common to all three lots. As such, even if the plaintiff-respondent was keen, yet the law does not allow him to have recourse to one partition action to partition all three lands in one single action, as the allotments of land the contesting defendants submitted should be brought in for that purpose, do not form contiguous allotments and come under a common devolution of title.

As far as the interlocutory decree entered in partition action 31046

is concerned, one has to be mindful of the fact that Michael Fernando has been declared entitled to three allotments of land, in two different capacities. He has been declared entitled to lots 15 and 22 in his capacity as the 32nd defendant. In the result he became the sole owner of the entirety of lots 15 and 22 in an unqualified manner without having to prove anything further.

As regards lot 3, the district Judge after the investigation of title under section 25, declared and awarded rights to John Fernando (the deceased-plaintiff) in the name of the legal representatives in a representative capacity. For instance, if John Fernando had another child who has not been substituted as a plaintiff, would it mean that the child so left out should be deprived of paternal inheritance?. The answer to this question under no circumstances can be adverse to the child concerned.

By the mere fact that certain persons were substituted in place of the deceased plaintiff and declared to be entitled to undivided rights in the land and that in lieu of those undivided rights they are allotted rights under the final decree, by itself is insufficient to make the substituted plaintiffs, co-owners of lot 3, unless they are able to establish their right of inheritance from John Fernando. As a matter of fact the district Court is not expected to carry out an investigation of title to ascertain as to the manner in which the rights of a party, who had died pending the determination of the action and declared

to be entitled to undivided shares and/or given rights under the final decree, had passed hands. Thus, it would be seen, in so far as lot 3 is concerned, Michael Fernando does not per se become entitled to any rights from an out of Lot 3, directly under the final decree. His title to an undivided 1/6<sup>th</sup> share of Lot 3 depends on two factors, namely that John Fernando is declared entitled to a particular lot under the final decree and that Michael Fernando is a son of the said John Fernando. Hence, it could be seen that even though the deeds produced by the defendants do not offend the Provisions of section 66 of the Partition Act and its objectives, nevertheless no rights can pass automatically on those deeds without proof of heirship. This would make it abundantly clear that Mike Fernando has not been declared entitled to an undivided 1/6<sup>th</sup> share of lot 3 to enable the contesting defendants to avail of the pending partition deeds to acquire rights from and out of lot 3, in contrast to the acquisition of rights from and out of lots 15 and 22.

As regards lots 15 and 22 one cannot think of any such impediment in the way of the contesting defendants. It cannot be argued that Michael Fernando is not directly entitled to the said lots in terms of the interlocutory decree and final decree entered in the case. As such it was within the power of Michael Fernando to dispose of his rights without infringing the provisions of section 66 of the Partition Act by assignment of right, title and interest that he would be declared entitled to in the partition action. As such dispositions

made by deeds produced by defendants cannot stand in the way of their right to acquire of rights in lots 15 and 22.

At this stage it is necessary to emphasize that Michael Fernando along with 5 others are deemed to have been allotted lot 3 in terms of section 48 (6) of the Partition Act. Here, the clear distinction that arises is that Michael Fernando was allotted lots 15 and 22 by the final decree in the former partition action and is deemed to have been allotted lot 3 along with 5 others. Significantly, Michael Fernando has only transferred his right title and interest that are to be allotted in the partition action and not the right title and interest deemed to have been allotted under section 48 (6) of the Partition Act. (Emphasis added to demonstrate the weight attached to direct allotment of shares as opposed to allotment of shares under the deeming provision). This distinction clearly shows that Michael Fernando had no intention to part with the rights he was to get under section 48 (6) but manifestly intended in no unmistakable terms to pass undivided interest from and out of the right, title and interest he was to be declared entitled to under the partition decree, which culminated in his being unconditionally declared entitled to lots 15 and 22.

As spelled out above, at the most the contesting defendants can only claim their share from Michael Fernando only against lots 15 and 22. As such the claim of the contesting defendants as far as lot

3 is concerned should necessarily fail. The resultant position therefore would be that the learned district Judge's findings cannot be critically looked at, except that he should have refrained himself from declaring the deeds produced by the contesting defendants as being obnoxious to the prohibition imposed by section 66 of the Partition Act. As stated above it is my considered view that the deeds in question are absolutely valid and perfectly in order except that no title passes on to the contesting defendants upon those deeds in as much as the subject matter is concerned. As it is quite evident from the words employed by the notary in those deeds, Michael Fernando has in fact transferred his right, title and interest that he would be declared entitled to and such dispositions are only referable to lots 15 and 22 to which he has been in fact directly declared entitled to.

For the foregoing reasons, it is my considered view that the appellant is not entitled to succeed in his appeal. Consequently, the petition of appeal of the 18<sup>th</sup> defendant-appellant is hereby dismissed subject to costs.

Judge of the Court of Appeal

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