

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

In the matter of an Appeal from the judgment of the High Court of Civil Appeal, Kegalle dated 9.8.2012 in terms of Section 5C of the High Court of Provinces [Special Provisions] Act No. 54 of 2006 [as amended] read along with Articles 127 and 128 of the Constitution.

**SC. Appeal 134/2013**

**SC.H.C.CA. LA. 389/2012  
Civil Appellate High Court  
No. SP/HCCA/Keg/795/10(F)  
D.C. Kegalle No. 5935/L**

Abusali Sithi Fareeda,  
No. 74, Anguruwella Road,  
Warakapola

**Plaintiff**

**Vs.**

1. Mohamed Noor,
2. Mohamed Farook,

Both of No. 76,  
Anguruwella Road,  
Warakapola.

**Defendants**

**And Between**

Abusali Sithi Fareeda,  
No. 74, Anguruwella Road,  
Warakapola

**Plaintiff-Appellant**

**Vs.**

1. Mohamed Noor,
2. Mohamed Farook,  
Both of No. 76,  
Anguruwella Road,  
Warakapola.

**Defendant-Respondents**

**And Now Between**

Abusali Sithi Fareeda,  
No. 74, Anguruwella Road,  
Warakapola

**Plaintiff-Appellant-Appellant**

**Vs.**

1. Mohamed Noor,
2. Mohamed Farook,

Both of No. 76,  
Anguruwella Road,  
Warakapola.

**Defendant-Respondent-  
Respondents**

\* \* \* \* \*

**BEFORE** : **Saleem Marsoof, PC. J.**  
**Eva Wanasundera, PC. J. &**  
**Sarath de Abrew, J.**

**COUNSEL** : S.N. Vijithsingh for Plaintiff-Appellant-Appellant.  
A.H.G. Ameen with Ms. G.M.S.K. Waduge for  
Defendant-Respondent-Respondents.

**ARGUED ON** : **01.09.2014**

**DECIDED ON** : **28.10.2014**

\* \* \* \* \*

**Eva Wanasundera, PC.J.**

In this appeal leave was granted on 11.10.2013 on the question of law pleaded in paragraph 18(6) of the Petition dated 12.09.2012 which is as follows:-

"Whether the High Court of Civil Appeal erred in law by holding that Deed bearing No. 19 dated 15.01.1966 is not obnoxious to Section 66 of the Partition Law."

Section 66 of the Partition Law reads as follows:-

66(1) After a partition action is duly registered as a *lis pendens* under the Registration of Documents Ordinance, no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the entry of a decree of partition, under section 36 or by the entry of a certificate of sale.

(2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of sub section (1) of this section shall be void

Provided that any such voluntary alienation, lease or hypothecation shall in the event of the partition action being dismissed, be deemed to be valid.

(3) Any assignment, after the institution of a partition action, of a lease or hypothecation effected prior to the registration of such partition action as a *lis pendens* shall not be affected by the provisions of sub sections (1) and (2) of this section.

Facts pertinent to the case can be summarised as follows:-

The Plaintiff-Appellant-Petitioner (hereinafter referred to as the 'Appellant') filed action in the District Court of Kegalle bearing No. 5935/L on 26.02.1997 praying for (a) a declaration that she is the owner of the land and property described in the schedule to the plaint i.e Lot 1C of Plan No. 2046/A dated 10.03.1965 surveyed by L.B. Beddewela Licensed Surveyor, of the land named 'Pinneowita Watta' of an extent of 21 ½ perches (A0 R0 P21 ½ ) as per the judgment and decree entered in Kegalle District Court case No. 17075/Partition and (b) for ejectment of 1st and 2nd Defendants and damages.

The Appellant pleaded her title claiming from Sunil Premasiri who bought 4/6<sup>th</sup> portion of the property from the children of the deceased 7th Defendant in the District Court case No. 17025/P.

The 1st and 2nd Defendants claimed that the 7th Defendant in 17075/P, named Abdul Wadood Sithi Zubeitha Umma, while the partition case was proceeding, transferred her title by deed No. 19 dated 15.01.1966 to H.K. Piyasena and H.K. Warnelis. They in turn transferred their entitlement to Lot 1C by deed No. 136 dated

05.12.1967 to the 14th Defendant Brampisingho who later transferred the said property to the 1st and 2nd Defendants.

There had been a house bearing assessment No. 76 on the property. The 1st and 2nd Defendants had been living in that house and property, each one owning and using 1/2 of the house and property for a very long time. They had been tenants of Brumpisingho, before they bought the property from Brumpisingho, on 12.04.1978 by deed Nos. 34329 and 34330. Brumpisingho was the 14th Defendant in case No. 17075/P.

The question to be decided is whether Deed No. 19 dated 15.01.1966, by which the title was transferred by A.W. Sithi Zubeitha to H.K. Piyasena and H.K. Warnelis, while the partition case was proceeding and/or pending, is obnoxious to Section 66 of the Partition Law or not.

Examining the said Deed No. 19, I observe that it is specifically mentioned in the Schedule to the said deed, as the subject matter of the sale for good consideration, by the Vendor A.W. Sithi Zubeitha as follows: "all my right title interest property claim and demand or whatever share that would be allotted to me in partition case No. 17075/P of the District Court of Kegalle from and out of the land called Pinneowita Watta ....". She had intended to sell whatever portion which would be allotted to her at the end of the D.C. Case No. 17075/P, to the Vendees, Piyasena and Warnelis. It is specifically mentioned that A.W. Sithi Zubeitha, for all purposes intended to dispose of "her share that would be allotted at the conclusion of the partition case". It is cognizably a definite portion. It was not vague. If the partition case got dismissed, this deed would not have come into effect because then, there wouldn't have been any portion of land allotted to the Vendor at the conclusion of the case. So, nothing would have passed to the Vendees if the partition case got dismissed. The partition case No. 17075/P did not get dismissed but was concluded on 23.01.1970 allotting shares to the parties.

The counsel for the Appellant argued that due to the mere reason or the fact that Deed No. 19 did not have the words 'in the final decree' added to the words "allotted to me", when A.W. Sithi Zubeitha transferred her entitlement by the said Deed, that transfer was not valid and no rights flowed from that instrument. The counsel for the Respondents argued that, the case law from the time of the Partition Ordinance to date is in favour of the proposition that, if and when "any portion which would be allotted to the vendor at the conclusion of the partition case" is transferred while the case is pending, the vendee gets proper title automatically, to the portion of land which is allotted to him at the end of the case.

As Section 66 of the Partition Law provides that any alienation after the partition action is duly registered as a lis pendens under the Registration of Documents Ordinance is void, I would like to analyse the authorities by way of decided case law regarding this point of law.

The Partition Ordinance No. 18 of 1863 preceded the Partition Law No. 21 of 1977. Section 66 of the Partition Law was in substance equal to Section 17 of the Partition Ordinance. Section 66 of the Partition Law prohibits only the alienation or hypothecation of *undivided interests presently vested in the owners of a land* which is the subject matter of pending partition proceedings.

In ***Babun Vs. Amarasekera* 1 SCC 24** Phear CJ. Explained the object of the prohibition in Section 17 of the Partition Ordinance thus;

“The sole purpose of the clause seems plainly to be, to reserve full effect to the legal proceedings for partition, when once instituted, and to take care that it shall be in the power of any party concerned to defeat them or embarrass the course of them while transferring his share or interest in the property to a stranger”.

Even at a very early stage as in the year 1904, Layard CJ. In ***Louis Appuhamy Vs. Punchi Baba* 10 NLR 196**, held that “a sale or mortgage executed during the pendency of a partition action under the Partition Ordinance No. 10 of 1863, but before the certificate of sale is signed by the Judge, is valid. A sale or mortgage executed during the pendency of a partition suit in respect of a share or interest to which a person may become entitled after the termination of such suit is valid and is not affected by Section 17 of Ordinance No. 10 of 1863.”

In ***Subasena Vs. Porolis* 16 NLR 319**, Woodrenton ACJ. Stated that “the clear object of the enactment was to prevent the trial of partition actions from being delayed by the intervention of fresh parties whose interest had been created since the proceedings began”.

In ***Khan Bhai Vs. Perera* 26 NLR 204**, a Full Bench of the Supreme Court then, decided on this same point of law, unanimously ruling that persons desiring to charge or dispose of their interests in a property subject to a partition action could do so “by expressly charging or disposing of the interest to be ultimately allotted to them in the action.”

*In Sirisoma Vs. Saranelis Appuhamy* 51 NLR 337 the effect of the sale of a contingent interest was considered. It was held that “If the instrument is in effect a present alienation or hypothecation of a contingent interest, the rights of ownership (or the hypothecary rights) vest in the grantee automatically upon the acquisition of that interest by the grantor.”

**In the same case**, at page 341, the Judges stated after analyzing the effect of the judgment of a Full Bench in *Khan Bhai Vs. Perera (Supra)* thus; “The ruling has influenced the actions of countless vendors and purchasers for over a quarter of a century and it confirms the opinion previously pronounced by an exceptionally strong Bench of Judges of this Court. Besides it is unquestionably a correct statement of the law on the point. Section 17 of the Partition Ordinance prohibits the alienation or hypothecation of ‘undivided interests presently vested’ in the owners of a land which is the subject of pending partition proceedings. **There is no statutory prohibition against a person’s common law right to alienate or hypothecate, by anticipation, interests which he can only acquire upon the conclusion of the proceedings.** That right is in no way affected by the pendency of an action for partition under the provisions of the Ordinance. Section 17 imposes a fetter on the free alienation of property and **Court ought to see that, that fetter is not made more comprehensive than the language and the intention of the section require.**”

**As such in the case of *Sirisoma Vs. Saranelis Appuhamy* 51 NLR 337, Gratian J. concluded that it is settled law that “Section 17 of the Partition Ordinance does not prohibit the alienation or hypothecation, pending partition proceedings of an interest to which a co-owner may ultimately become entitled by virtue of the decree in the pending case”.**

In *B. Sillie Fernando Vs. W. Siliman Fernando and Others* 64 NLR 404 also, it was held that “where, prior to the entering of the interlocutory decree in a partition action, a party transfers by sale or donation whatever will be allotted to him by the final decree, the lot in severalty finally allotted to the transferor or those representing him (if he has died before the entering of the final decree) will automatically pass and vest in the transferee, without any further conveyance by the transferor or his representatives.”

In *Sirinatha Vs. Sirisena and Others* (1998) 3 SLR 19, Ismail, J. (P/CA) at that time, stated that “It is clear that the object of Section 66 of the Partition Law is to prevent the passage of a partition action being prolonged by permitting new parties to

be added on every occasion that the interests presently vested in the parties to the action are alienated or hypothecated.”

Having looked at the authorities and analysing the cases, I feel that there is no bar preventing any person who is a party to a partition action, while the partition action is pending, from transferring the interests *which he ‘would acquire’ upon the conclusion of the partition action.*

I am of the view that it is settled law for many decades that in spite of the provisions included in the Partition Ordinance firstly by Section 17 and thereafter in the Partition Law by Section 66, any party to a law suit of partitioning a co-owned land is able to gift, sell, or hypothecate his entitlement to the share of the land which would be allocated to him at the end of the case.

In the instant case by Deed No. 19 dated 15.1.1966, A.W. Sithi Zubeitha transferred her title to H.K. Piyasena and H.K. Warnelis and I hold that it is a valid transfer. The land allotted to Sithi Zubeitha at the end of the case automatically got transferred to the Vendees. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant – Respondent – Respondents are the lawful owners of the land and property which were granted to them by the deeds of transfer that were executed thereafter.

For the reasons set out above, I answer the question of law raised as aforementioned in the negative. I hold that Deed No. 19 dated 15.1.1966 is not obnoxious to Section 66 of the Partition Law No. 21 of 1977. I affirm the judgment of the Civil Appellate High Court dated 09. 08. 2012 and the judgment of the District Court dated 15.10.2010. I dismiss the appeal. I order no costs.

**Judge of the Supreme Court**

**Saleem Marsoof, PC. J.**

I agree.

**Judge of the Supreme Court**

**Sarath de Abrew, J.**

I agree.

**Judge of the Supreme Court**

