

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

In the matter of an appeal against the judgment 14.6.2012 in Appeal
No.CPH/HCCA/KAN/172/2008(F) in terms of Sec.5C(1) of Act.No54of 2006

Hangidigedara Thilakaratne (Deceased)
Plaintiff

RAG Sumanawathi
Substituted Plaintiff

SC Appeal 27/2013
SC/HC(CA)LA 296/2012
CP/HCCA/KAN/172/2008/(F)
DC Kandy Case No.19585/L

Vs

Galkaduwegedara Sunil Jayathilake
Defendant

AND BETWEEN

RAG Sumanawathi
Substituted-Plaintiff-Appellant

Vs

Galkaduwegedara Sunil Jayathilake
Defendant-Respondent

AND NOW BETWEEN

RAG Sumanawathi
Substituted-Plaintiff-Appellant-Appellant

Vs

Galkaduwegedara Sunil Jayathilake
Defendant-Respondent-Respondent

Before : Eva Wanasundera PC, J
B. Aluwihare PC, J
Sisira J De Abrew J

Counsel : H. Withanachchi with Anuradha Weerakkody
for the Substituted Plaintiff-Appellant-Appellant
Chandrasiri de Silva with Nadeera Weerasinghe for the
Defendant-Respondent-Respondent

Argued on : 26.10.2015

Written submissions tendered on : 9.12.2014 by the Plaintiff-Appellant
24.11.2014 by the Defendant-Respondent.

Decided on : 10.12.2015

Sisira J De Abrew J.

The original plaintiff Hangidigedara Thilakaratne who is now dead instituted this action in the District Court of Kandy praying, inter alia, for

1. a declaration that he was the owner of the land described in the schedule B to the plaint.
2. eviction of the Defendant-Respondent-Respondent (hereinafter referred to as Defendant-Respondent) from the said land and damages.

Thilakaratne's wife Sumanawathi has been substituted in the room of Thilakaratne.

The learned District Judge after trial, by his judgment dated 3.3.2008, dismissed the plaintiff's action. Being aggrieved by the said judgment of the learned District Judge, the Substituted Plaintiff-Appellant-Appellant (hereinafter referred to as the Plaintiff-Appellant) appealed to the Civil Appellate High Court (hereinafter referred to as the High Court). The High Court, by its judgment dated 14.6.2012, affirming the judgment of the learned District Judge, dismissed the appeal. Being aggrieved by the said judgment of the High Court, the Plaintiff-

Appellant has appealed to this court. This court, by its order dated 1.2.2013, granted leave to appeal on the questions of law set out in paragraph 19 (i),(ii),(iii) of the petition of appeal which are reproduced below.

1. Did the High Court and the District Court err in law by coming to a finding that the vendors of Deed No. 933 were not allotted any share from the corpus whereas in fact the said vendors had become entitled to the corpus by Deed No.2621?
2. Did the Courts below err in law by coming to a conclusion that the plaintiff had failed to prove his title owing to the failure that there was no reference to Deed No.2621 from which the vendor therein became entitled to the land in suit in Deed No.933 relied upon by the Plaintiff?
3. Did the Courts below err in law by not taking into account the evidence adduced by the vendor in Deed No. 933 to the effect that the vendors therein had transferred the rights to the corpus which may be allotted to their predecessor, to the Plaintiff?

Court has also allowed the following question of law.

“Whether the maxim of *exceptio rei venditae et traditiae* is applicable in the circumstances of this case?”

The son of the Plaintiff-Appellant, in his evidence, relying on the plaint and documents produced at the trial, inter alia, stated the following matters.

1. Hangidigedara Jeevanhamy who was the father of Hangidigedara Thilakaratne instituted partition action No.7445/P in the District Court of Kandy seeking to partition the land described in the schedule A to the plaint.
2. While the partition action was pending Galkaduwegedara Sethuwa (hereinafter referred to as Sethuwa), the 1st defendant in the partition case No.7445/P, by deed No.2621(P1) dated 4.8.1975, transferred his rights, title

and interest that may be allotted to him in the final decree of the partition case to Galkaduwegedara Sirisena (hereinafter referred to as Sirisena).

3. The said Sirisena and Galkaduwegedara Welliya (hereinafter referred to as Welliya), by deed No 933(P2) dated 12.2.1980, transferred their rights, title and interest derived from Sethuwa to Hangidigedara Thilakaratne who was the original plaintiff in the case. (According to deed No.933 this position is not correct. Although the Plaintiff-Appellant says these facts, I have, elsewhere of this judgment, discussed whether this was the true position). Although Welliya's name appears in deed No.933 as one of the owners, he has not got any title to the property by deed No.2621.
4. In terms of the Final Decree entered on 9.5.1988 in partition case No 7445/P, Sethuwa was allotted Lot No.4 in plan No.6447A.

The said Lot No.4 is the corpus in present case. The plaintiff-Appellant relying on the above facts, claims that he is entitled to the rights, title and interest of Sethuwa who was allotted Lot No.4 of Plan No.6477A in the above partition case.

The mother of the Defendant-Respondent in her evidence relying on the answer filed by the defendant and the documents produced at the trial has, inter alia, stated the following facts.

1. Sethuwa, the 1st defendant in the partition case No.7445/P, by deed No.10839[V1] dated 13.12.1985, transferred his rights, title and interest that may be allotted to him in the Final Decree in the said partition case.
2. The Defendant-Respondent who was placed in possession of the land by Sethuwa was in uninterrupted possession.

The Defendant-Respondent only moved for dismissal of action of the plaintiff.

When I consider the documents in this case it is clear that Sethuwa, on two occasions, had transferred his rights, title and interest that may be allotted to him in the partition case No.7445/P. One was by deed No.2621[P1] to Sirisena on 4.8.1975 and the other one was by deed No.10839[V1] to the Defendant-Respondent on 13.12 1985. It is undisputed that in the Final Decree in the partition case no. 7445/P Sethuwa was allotted Lot No.4 depicted in final partition plan No.6477A.

Sethuwa, by deed No.2621[P1] dated 4.8.1975, transferred his rights, title and interest that may be allotted to him in the Final Decree in partition case No.7445/P to Sirisena. Sethuwa was the 1st defendant in the said partition case. The Final Decree of the partition case No.7445/P was entered only on 9.5.1988. Sirisena and Welliya executed the deed No.933 [P2] on 12.2.1980 which was well before the entry of the partition decree. Thus in any event when Sirisena executed the deed No.933 he had not had title to the property. It is interesting, at this stage, to consider Section 66 of the Partition Law No 21 of 1977 which reads as follows.

- (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 subsection (1) of this section shall be void ;*
- (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 subsections (1) and (2) of this section.*

It is also noteworthy to state Section 67 of the old Partition Act No.16 of 1951 which reads as follows.

- (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 or by entry of a certificate of sale.*
- (2) *Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (1) of this section shall be void.*

Although there is strict provision in the partition law which prohibits transfer of undivided share of the corpus in a partition case pending the partition action, there appears to be case law which is somewhat contrary to this prohibition. Although I do not strictly intend to follow this case law in the present case, it is necessary to state here the said judicial decisions.

In MWAP Jayathilake Vs PG Somadasa 70 NLR 25 it was held: *“Section 67 of the Partition Act has not altered the position which prevailed under the former Partition Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending a partition action does not prevent a party from disposing, during the pendency of the action, of the interest that will be ultimately allotted to him in the final decree.”*

In B. Sillie Fernando Vs W Silman Fernando 64 NLR 404 it was held: *“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 severally 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.”*

However it is interesting to find out what Sirisena and Welliya by deed No.933[P2] dated 12.2.1980 sold to Hangidigedara Thilakaratne. The schedule in the said deed No.933 states as follows:

*“All our right title and interest in and to all that land called Galkaduwehena and the share that may be allotted **to us** in the District Court of Kandy Partition case No. P 7445 in and to all that land called Galkaduwehena of two pelas in paddy*

showing extent situated at Dehigama in Gangapalatha of Yatinuwara in the District of Kandy Central Province and bounded on the East by fence of the garden of Jambukotuwa of Horatale, South by the fence of Gamawalauwehena, West by fence of the garden of Don Haramanis Appuhamy, and on the North by Ella of Koholane Kumbura, together with the house and everything standing thereon.” (emphasis added).

It is therefore seen that Sirisena and Welliya, by the said deed No.933, have transferred the share that may be allotted to them by the partition case No.7445/P in the District Court of Kandy. Were they parties in the said partition case? The answer is in the negative. Thus no share has been allotted to them in the partition case. In fact no share could or would be allotted to them in the partition case as they were not parties. In the schedule of the deed No 933(P2), Sirisena and Welliya have not referred to Sethuwa’s share that would be allotted to him in the partition case No.7445/P and to the deed No.2621. By deed No.933(P2), they have not transferred to Hangidigedara Thilakaratne what was given to Sirisena by Sethuwa by deed No.2621. By the Final Decree (P3) in the Partition case No.7445/P Sirisena and Welliya have not been allotted any share of the corpus. Therefore by deed No.2621(P1) and deed No.933(P2), the original plaintiff Hangidigedara Thilakaratne had not derived title of Lot No.4 of the final partition plan No.6477/A.

In an action for *rei vindicatio* the burden is on the plaintiff to prove his title. This view is supported by the following judicial decisions. In *Luwis Singho and others Vs Ponnampereuma* [1996] 2 SLR 320 it was held that “*actions for Declaration of Title and ejectment (as in this case) and Vindicatory actions are brought for the same purpose of recovery of property. In a Rei Vindicatio action the cause of action is based on the sole ground of violation of the Right of Ownership, in such an action proof is required that;*

(i) the Plaintiff is the owner of the land in question i.e. he has the dominium and,
(ii) that the land is in the possession of the Defendant”.

In *Loku Menika and Others Vs Gunasekare* [1997] 2 SLR 281 following facts were observed. “*The plaintiff-respondent instituted action seeking a declaration of title to the corpus. The defendant-appellant himself claimed title on a chain of title set out in his answer. The District Court held in favour of the plaintiff. In the appeal, it was urged that the learned District Judge had failed to appreciate that in a declaratory action the plaintiff must strictly prove his title.*” Court of Appeal held thus: “*The plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must prove that title against the defendant.*”

Plaintiff Hangidigedara Thilakaratne had filed a *rei vindicatio* action. Therefore he must prove the title to the land which is Lot No.4 of the final partition plan No.6477/A, but he has not proved it. Therefore his action should fail. The Defendant-Respondent has only asked for the dismissal of the Plaintiff’s action.

Learned counsel for the Plaintiff-Appellant contended that the learned High Court Judges have not applied the doctrine of *exceptio rei venditae et traditiae*. When considering the said doctrine it is important to consider a passage from the book titled ‘The Law of Property in Sri Lanka by Prof. GL Peiris’ 3rd Reprint-page 140 which states as follows.

“The general rule is that the transferor should be the owner at the time delivery is made.

However an important qualification to this rule is contained in the Roman-Dutch common law doctrine as to the *exceptio rei venditae et traditiae*. The effect of the doctrine is that, where a vendor sells without title but subsequently acquires one, this title accrues to the benefit of the purchaser and those claiming through him, the moment of its acquisition by the vendor.”

The above doctrine cannot be applied to the transfer in deed No.933 (P2) because Sirisena and Welliya have, by the said deed, transferred the share that may be allotted to them by partition case No.7445/P. But they are not parties to the said case. Therefore no share could or would be allotted to them in the said partition case. In fact in the Final Decree of the said partition case, no share has been allotted to them.

For the aforementioned reasons, I answer the questions of law raised by the Plaintiff-Appellant in the negative.

For the above reasons, I upholding the judgments of the District Court and the Civil Appellate High Court, dismiss the appeal. However in all the circumstances of the case I do not make an order for costs.

Appeal dismissed.

Judge of the Supreme Court.

Eva Wanasundera PC J

I agree.

Judge of the Supreme Court

B. Aluwihare PC, J

I agree.

Judge of the Supreme Court.