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

In the matter of an application for Leave to Appeal against judgement dated 17/12/14 delivered by the High Court of the Western Province exercising Civil Appellate jurisdiction at Gampaha in WP/HCCA / GAM/173/2009 (F) DC Gampaha case No. 37834/P.

SC Appeal 154/2016
SC /HCCA/LA No. 47/2015
WP/HCCA/Gampaha No. 173/2009 (F)
DC Gampaha Case No. 37834/P

Lulwala Hewayalage Tilanganee Weerasuriya,
182/A/1 Suraweera Mawatha, Walpola, Ragama.

1b and 2a Substituted Defendants-Respondents-Petitioner

Vs.

Kirigalbadage Gamini Chandrasena
No. 186, Boystown Road,
Walpola, Batuwatte.

Plaintiff-Appellant-Respondent

Before : Jayantha Jayasuriya, PC, CJ

S. Thurairaja, PC, J.

Yasantha Kodagoda, PC, J

Counsel	:	Dr. Sunil F.A. Cooray with Nilanga Perere for the 1b and 2a Substituted Defendant-Respondent-Appellants.
		S.N. Vijithsingh for the Plaintiff-Appellant-Respondent.
Written submissions		
filed on	:	13.09.2016 and 12.01.2021 by the 1b and 2a Substituted Defendant-Respondent-Appellant.
		20.10.2016 by the Plaintiff-Appellant-Respondent.
Argued on	:	27.08.2020
Decided on	:	17.06.2021

Jayantha Jayasuriya, PC, CJ

The Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as the "plaintiff-respondent") instituted a partition action in the District Court of Gampaha. The corpus as described in the schedule of the plaint is 24.61 perches in extent. The said land is depicted as lot 4 in plan no. P/3263 dated 13 May 1980 (the final partition plan in the aforesaid District Court of Gampaha Case P/17889), which is a divided portion of a land called Higgaha watte. Two defendants are cited in the plaint and the plaintiff-respondent claimed that he along with the two defendants are the lawful co-owners of the corpus. The entitlement of each one of them is set out in paragraph 6 of the plaint. He claims that he is entitled to 480/1392 shares and the 1st and 2nd defendants are entitled to 288/1392 and 624/1392 shares of the said land, respectively.

However, the two defendants disputed the claim of the plaintiff-respondent. They claimed that the plaintiff-respondent has no entitlement to any shares of the said property and the two defendants are the only lawful co-owners.

There is no dispute on the identity of the corpus. All parties agreed that the corpus in question was a part of the corpus in a prior partition action (P/17889). According to the final decree of the said partition action dated 04 May 1981, three persons namely Leelawathie, Rosana alias Seeta Fernando and Kusumawathie derived 480/1392, 288/1392 and 624/1392 shares of the said land respectively. Rosana alias Seeta Fernando is the 1st Defendant in the partition action initiated by the plaintiff-respondent. Said Kusumawathie had transferred all here rights and shares to one Siridasa in 1983 (subsequent to the initial partition action) and said Siridasa transferred all rights and shares derived from Kusumawathie to the 2nd Defendant.

The main contention in this case is as to who derives the shares allocated to aforesaid Leelawathie, from the final decree in the initial partition case No P/17889.

The final decree of the partition case under consideration was issued on the 04th of May 1981. The plaintiff-respondent claims that he derived the co-ownership to this property through the Deed No 451 dated 02.11.1981. Aforesaid Leelawathie [one of the three co-owners on whom the shares were devolved by the final decree in the aforementioned initial partition action (P/17889)] conveyed 10 perches (480/1392 shares) that she derived from the partition case to the plaintiff-respondent through the aforesaid Deed No 451 dated 02.11.1981. This deed was produced marked "P3" at the trial. It is on this basis that the plaintiff-respondent sets out the devolution of the title. Respective shares of the three persons, whom he named as co-owners of the said property has been calculated on this basis.

However, the two defendants disputed the devolution of the title set out by the plaintiff-respondent. They claimed that Leelawathie did not have a right to convey the shares devolved from the final decree in partition action P/17889, to the plaintiff-respondent in 1981. It is their contention that said Leelawathie, had conveyed the 'lot or lots' that would be allocated to her at the final determination of the partition action 17889/P, to one of the other two co-owners namely Kusumawathie by the deed no 3936 attested in 1976, while the said partition action was in

progress. (The aforesaid deed 3936 was marked 1V2 by the defendants through the cross-examination of the plaintiff-respondent subject to proof but did not lead further evidence to prove the execution of the said deed).

Thereafter said Kusumawathie on 3rd November 1983 transferred all shares she derived from the Final Decree in Case No. 17889/P of District Court of Gampaha and all shares said Leelawathie derived from the said Final Decree (which were already transferred to her on 28 October 1976 by aforesaid deed No. 3936 by said Leelawathie) to one R.D. Siriyadasa by deed No 5346 attested by Valentine Dias N.P. (The aforesaid deed 5346 was produced marked 2V1). Thereafter, said R.D.Siriyadasa transferred all his rights derived from said Leelawathie to L.H.Winston Suraweera (the 2nd Defendant in the partition action relevant to this matter) on 20th January 1984 by the deed No 5454 attested by M.P.Padmini Pathirathna N.P. (The aforesaid deed 5454 was produced marked 2V2). Therefore, defendents claim that the 2nd Defendant had derived all rights and shares of said Kusumawathie (including shares of Leelawathie, which were transferred to Kusumawathie by deed 3936 that was produced marked 1V2, subject to proof) and the plaintiff-respondent could not derive any rights through the transfer effected by Leelawathie by deed 451 dated 02 November 1981.

The trial in the District Court proceeded on thirteen points of contest. One of the points of contest raised by the plaintiff-respondent was:

No. 2 Whether rights to the land should be devolved on the parties in accordance with the plaint?

Three of the points of contest raised by the two defendants include:

No. 5 – Whether Leelawathie had transferred her rights to Kusumawathie by the Deed No 3936 dated 28.10.1976

No. 6 – Whether the Plaintiff has any title or possessory Rights to the property in question

No. 7 – Whether all rights of the land should be devolved in the two defendants as in accordance with the scheme of devolution set out by the two defendants.

The plaintiff-respondent raised two additional points of contest namely:

No. 12 – Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed (චිත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ සඳහන් අංක 3936 සහ 1976.10.28 දින දරණ වැලන්ටයින් ඩයස් නොතාරිස් තැන සහතික කළ ඔප්පුව වංචනික ලෙස සකස් කරන ලද ඔප්පුවක් ද?)

No. 13 – Whether the deed No 451 dated 02.11.1981 had gained priority by being properly registered under the provisions of the Registration of Documents Ordinance.

In this matter, three different stages of the proceedings namely raising points of contest, the order allowing the deed 3936 marked 1V2 be produced subject to proof and the delivery of the judgement, did take place before three different judges. It was not the same learned judge before whom the points of contest were raised, who delivered the judgement. The Learned District Judge who delivered the judgment dated 03.09.2009 held in favour of the two defendants. He answered points of contest Nos. 5 and 7 affirmatively and answered point of contest No. 6, "has no right". Furthermore, he held that points of contest Nos. 12 and 13, 'do not arise'. The learned trial judge accepted the scheme of partition of the two defendants and entered a judgment in favour of the two defendants.

Being aggrieved by the said judgment of the learned district judge, the plaintiff-respondent appealed to the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court set aside the judgment of the District Court and held in favour of the plaintiff-respondent. The learned judges of the Civil Appellate High Court ordered that the corpus be partitioned in accordance with the devolution of title and shares set out by the plaintiff-respondent.

The main ground on which the Learned High Court Judges set aside the Judgment of the District Court is that the Learned Judge's decision to consider deed No 3936 dated 28.10.1976 as evidence, is contrary to section 114(1) of the Civil Procedure Code and hence, was a misdirection of law. They further held that point of contest No. 12 namely - *Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed* (විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ සඳහන් අංක 3936 සහ 1976.10.28 දින දරණ වැලන්ටයින් ඩයස් නොතාරිස් තැන සහතික කළ ඔප්පුව වංචනික ලෙස සකස් කරන ලද ඔප්පුවක් ද?) - should have been answered affirmatively.

The two Defendants-Respondents-Petitioners-Appellants (hereinafter referred to as the "defendant-appellants") being aggrieved with the decision of the Civil Appellate High Court are challenging the above decision of the Civil Appellate High Court, before this Court. This Court had granted special leave to appeal on the following three questions of law raised by the defendant-appellants:

1). Did their Lordships at the Civil Appellate High Court err in law in deciding that deed no 3936 (1V2) is a fraudulent document for the mere reason that the same has been marked subject to proof?

2). Did their Lordships at the Civil Appellate High Court err in law by wrongly applying the principles laid down in the case of Hilda Jayasinghe v Jayawickrema 1982(1) SLR 349?

3). Did their Lordships at the Civil Appellate High Court err in law by failing to appreciate the fact that the deed no 1V2 (No 3946) is properly registered as per the law and therefore it should have the benefit of priority?

This Court had further accepted the following two questions of law raised by the plaintiff-respondent:

4). Whether the due execution of the Deed No 3936 dated 28.10.1976 marked as '1V2' is proved in terms of Section 68 of the Partition Law in the circumstances of this case?

5). If that issue is answered in the Plaintiff-Appellant-Respondent's favour, whether the questions referred to in the Petition will not arise?

Learned Counsel for the defendant-appellants and the plaintiff-respondent in the course of their oral submissions as well as in the written submissions contended that the two main issues that need to be determined by this Court are:

1. Whether the Deed No. 3936 dated 28.10.1976 had been proved?

and if this question is answered in the affirmative,

2. Whether the said deed should get priority over the deed No 451 dated 02.11.1981, the deed through which the plaintiff-respondent gained co-ownership to the land in question?

It is settled law, that a party to a partition action is not prevented from alienating or mortgaging the right to which such party might become entitled after a partition had been decreed in respect of the land, while the partition action is in progress. However, such transaction becomes effective to vest rights in the transferee only after the interest is, in law allotted to the party, namely, only at the stage when the final decree in the partition action is entered. [**Sirisoma et al v Saranelis Appuhamy** 51 NLR 337, at 343-345, **Subaseris v Prolis** 16 NLR 393 at 395, **Louis Appuhami v Punchi Baba** 10 NLR 196 at 198, **Abdul Ally v Kelaart and Another** (1904) 1 Bal 40 at 43-44].

The plaintiff-respondent does not contest existence of such right to a party in a partition action. However, the issue to be determined by this Court is whether in the given situation, there was admissible evidence available for the trial judge to consider and hold that Leelawathie, conveyed the 'lot or lots' that would be allocated to her at the final determination of the partition action 17889/P, to one of the other two co-owners namely Kusumawathie by the deed no 3936 attested in 1976, while the said partition action was in progress. In other words, whether it was lawful for the trial judge to have considered the deed produced marked "1V2" in the context of the points of contest raised and the objections raised in this matter?

The plaintiff-respondent contends, that the learned district judge erred when he decided in favour of the defendant-appellants by relying on the deed no. 3936 dated 28.10.1976 marked "1V2", for the reason that the appellants failed to prove the said deed in the course of the trial. To the contrary, defendant-appellants contend that no formal proof of deed marked "1V2" is required due to section 68 of the Partition Law No 21 of 1977 as amended.

Section 68 of the Partition Law provides:

"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".

The defendant-appellants tendered the deed in question marked 1V2, in the course of the cross examination of the evidence of the plaintiff-respondent. At that stage the plaintiff-respondent did not accept the said deed and moved that the deed be tendered "subject to proof". However, defendant-appellants at that stage disputed such requirement. Nonetheless, the learned trial judge having considered this matter ordered, "the said deed be marked subject to proof". However, no evidence had been presented during the trial to prove the execution of the deed marked "1V2". When the trial resumed before a new judge on 30 March 2009, the plaintiff-respondent had moved that the deed marked 1V2 be struck off as it had not been proved. Defendant-appellants at that stage had re-iterated that no further proof of the said deed was required. It is in this background that the learned trial judge in his judgement dated 03 September 2009 held that there is no requirement to prove the deed "1V2". The learned trial judge arrived at the said conclusion on the premise that the plaintiff-respondent had not challenged and impeached the genuineness of the deed "1V2" in his plaint and therefore did not have a right to raise point of contest No. 12 namely "Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed". Furthermore, the learned trial judge held that the need to answer point of contest No. 12 did not arise, as the plaintiff-respondent did not impeach the said deed in the pleadings of the plaint. The learned trial judge was of the view that provisions in section 68 of the Partition Law can be invoked in favour of the defendant-appellants in this matter.

The plaintiff-respondent in this matter raised point of contest No. 12 namely – "Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed", as a further issue, after the defendant-appellants raised the point of contest No.

5 namely "whether Leelawathie referred to in paragraph 3 of the plaint transferred all her rights to Suduwahewage Kusumawathie by the deed no 3936 attested by Valentine Dias Notary on 28 October 1976". Therefore, the plaintiff respondent by raising the point of contest No. 12 had impeached the genuineness of the deed "1V2" at the first given opportunity in these proceedings. The learned trial judge erred when he held that the plaintiff did not have a right to raise the point of contest No. 12 on the premise that he has no such right as he failed to challenge the genuineness of the said deed in the plaint. It is settled law that the issues or points of contest in a civil case need not be confined to the pleadings. (**Attorney-General v Smith** 8 NLR 229 at 241, **Silva v Obeyesekera** 24 NLR 97 at 107, **The Bank of Ceylon, Jaffna v Chelliahpillai** 64 NLR 25 at 27, **De Alwis v De Alwis** 76 NLR 444 at 448). Furthermore, the plaintiff-respondent in his evidence refused to accept the deed 1V2. He further contended that the defendant-appellants failed to produce this deed at the police inquiry held consequent to a compliant he made. According to his evidence, police had called all the parties to attend the inquiry with respective deeds. The defendant-appellants did not produce any deed at that stage whereas the plaintiff-respondent produced the deed of transfer P3. This portion of evidence of the plaintiff-respondent had neither been challenged nor contradicted by the defendant-appellants. When all of these facts are taken together, I am of the view that the plaintiff-respondent had in fact impeached the genuineness of the deed "1V2" and therefore the trial judge should not have dispensed with the formal proof of the deed "1V2" relying on section 68 of the Partition Law. Hence, it remained the duty of the trial judge to have considered whether the deed marked "1V2" has been proved in accordance with the law.

Section 114(1) of the Civil Procedure Code mandates that;

"No document shall be placed on the record unless it has been proved or admitted in accordance with the law of evidence for the time being in force".

Furthermore, section 68 of the Evidence Ordinance provides that;

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of court and capable of giving evidence".

At the trial, defendant-appellants did not present any evidence to establish the execution of the deed marked "1V2". On behalf of the defendant-appellants, it was submitted before this court that the dispensation of the proof of execution of the deed "1V2" being lawful on the basis that the "execution of a document impeached as having been obtained by fraud need not be proved unless particulars of the alleged fraud relate to its due execution, such as that the execution of the document was done in blank". This proposition is based on the observation of Lawrie ACJ in **Baronchy Appu v Podihamy** (1902) 2 Brownie's Reports 221 at 222….

Lawrie ACJ in the said case observed;

> *"It has, I think been decided that when a deed is impeached as having been obtained by fraud it is not necessary to prove its execution by calling the attesting witnesses".*

He further observed that;

> *"I am inclined to think that the evidence of at least one of the attesting witnesses was necessary to prove that it was a document which was signed, and not a blank sheet of paper".*

The Court of Appeal in **Piyadasa v Binduva alias Gunasekera,** [1992] 1 SLR 108 at 109 having cited the aforementioned observation of Lawrie ACJ observed;

"this decision supports the view that a document formally and duly executed need not be proved even if the signature of the executant was obtained by fraud or deception, but where the document was fraudulently or illegally executed, the due execution must be proved, because the alleged execution is in fact no execution at all".

These two judgements tend to support the proposition that in situations where a party who signed a deed takes up the position that he signed the deed due to a fraud or deception practiced on him, no formal proof of the 'execution' is warranted. Such contention is on the premise that such position amounts to an admission on the 'execution of the deed'. Such a proposition is in line with section 70 of the Evidence Ordinance, which reads as:

"The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested"

However, such a proposition does not support the contention that no formal proof of the execution of a deed is warranted as provided under section 114(1) of the Civil Procedure Code read with section 68 of the Evidence Ordinance, when *'the genuineness of such deed'* is impeached as provided under section 68 of the Partition Law. Instances on which the genuineness of a deed can be impeached is far wider than the specific instance of a specific position that a person signed the deed due to a fraud or a deception practiced on him. To the contrary, section 68 of the Partition Law provides that no formal proof is required in situations when 'a deed on the face of it purports to have been duly executed' **unless** the 'genuineness of the deed is impeached by a party claiming adversely to the party producing that deed' (emphasis added).

Therefore, in a partition action when the genuineness of a deed is impeached, the party who seeks to make his claim based on such deed should provide evidence of its execution as required

under section 114(1) of the Civil Procedure Code read with section 68 of the Evidence Ordinance, unless law dispenses with, such proof. The evidentiary requirement arising under section 68 of the Evidence Ordinance is aptly discussed by the Supreme Court in its decision in **Samarakoon v Gunasekera** [2011] 1 SLR 149.

In **Samarakoon v Gunasekera** (supra at 154) the Supreme Court held;

> *"A deed for the sale or transfer of land, being a document which is required by law to be attested, has to be proved in the manner set out in section 68 of the Evidence Ordinance by proof that the maker (the vendor) of that document signed it in the presence of witnesses and the notary. If this is not done the document and its contents cannot be used in evidence."*

Further explaining the factual position that arose in that case and explaining the legal proposition in the proper context the Supreme Court further observed;

> *"In the present case, the defendants had not challenged the due execution of deeds P3, P5 and P6. When they objected to those documents at the time the same were marked in evidence what they did was to challenge the plaintiff to prove those documents in the proper way in which a document required by law to be attested has to be proved if it is to be used as evidence. The plaintiff thus had notice that he had to prove P3, P5 and P6 in the manner provided in section 68 of the Evidence Ordinance. He had failed to lead the evidence necessary to prove those documents in accordance with the provisions of section 68. At the close of the plaintiff's case when the documents marked were read in evidence the defendants have stated that documents not proved should be excluded. This was a reference to documents marked subject to proof and proved in accordance with the law. In view of the failure of the plaintiff to prove documents P3, P5 and P6 on which the title claimed by him depended, the learned trial Judge had rightly excluded those documents and had held that the plaintiff had failed to prove his title."*

Similarly, in my view in the instant case also, trial judge's decision to consider deed marked "1V2" as evidence and decide the devolution of title based on the purported transfer of rights by Leelawathie to Kusumawathie, without formal proof of deed marked "1V2", is contrary to section 114(1) of the Civil Procedure Code read with section 68 of the Evidence Ordinance. Thereby the learned trial judge had erred in law when he held in favour of the defendant-appellants based on the deed "1V2" which was not proved in accordance with the law. The Supreme Court in **Perera & Others v Elisahamy** (1961) 65 CLW 59, considering the applicability of section 69 of the Partition Act (the provision similar to section 68 of the Partition Law) observed:

> *"Section 69 of the Partition Act is of no avail in the instant case as that section does not apply to cases in which the genuineness is impeached or the Court requires its proof"*. (at page 60)

Citing with approval the judgment of the Privy Council in [(1928) A.I.R (Privy Council) 127] the court further observed:

> *"A court cannot act on facts which are not proved"*. (at page 60)

The plaintiff-respondent's claim to the land in question and the devolution of title is based on the final decree in District Court of Gampaha Case P/17889 and Deed No 451 dated 02.11.1981 which was produced marked "P3". Defendant-appellants did not impeach the genuineness of the deed marked "P3". Furthermore, one of the attesting witnesses to this deed did testify at the trial. Therefore, the plaintiff had proved his rights to the land and the learned trial judge had erred when he failed to consider plaintiff's rights as proved by evidence in court.

In view of the reasons enumerated hereinbefore, I am of the view that the trial judge's decision to answer point of contest No. 2 as – "Entitled as per the judgment" and the decision to answer points of contest Nos. 5 and 7 namely "Whether Leelawathie who is referred to in paragraph 3 of the plaint had transferred all her rights to Suduwa Hewage Kusumawathie by the deed No 3936 attested by Notary Valentine Dias on 28 November 1976?" and "whether all rights to the relevant land should be vested with the 1a and 2a defendants in line with their statement of claim?" in the affirmative, is an error of law.

I hold that the point of contest No. 2 should be answered in the affirmative and points of contest Nos. 5 and 7 should be answered in the negative.

I see no reason to deviate from the decision of the learned judges of the Civil Appellate High Court where they have held that the learned trial judge erred when he concluded that no rights could be devolved on the plaintiff-respondent based on deed "P3". Furthermore I hold that the rights of the parties should be decided as determined by the Civil Appellate High Court. Therefore I affirm the judgment of the Civil Appellate High Court of Gampaha dated 17 December 2014.

However, the learned judges of the Civil Appellate High Court had proceeded further and answered point of contest No 12 - Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed (**විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ සඳහන් අංක 3936 සහ 1976.10.28 දින දරණ වැලන්ටයින් ඩයස් නොතාරිස් තැන සහතික කළ ඔප්පුව වංචනික ලෙස සකස් කරන ලද ඔප්පුවක් ද?**) - in the affirmative after holding that the learned trial judge erred when he answered point of contest No. 12 – "Does not arise". The learned judges of the Civil Appellate High Court arrived at this finding in the process of resolving the issue that they identified as the most important issue in this matter. According to them, "whether the deed bearing no. 3936 (which was produced marked 1V2) could be considered to be a genuine deed due to the reason that the said deed remained a deed which was

not proved as the plaintiff demanded that the said deed be produced subject to proof". The learned judges of the Civil Appellate High Court had formulated this question on the assumption that the failure to prove the relevant deed leads to the conclusion or an inference that the said deed is a fraudulent deed. In my view such construction is a misdirection of fact and law.

The sole impact of the challenge to the genuineness of the said deed by the plaintiff respondent in this matter is on the mode of proving the said deed in court. As discussed earlier in this judgment, when a party to a partition action impeaches the genuineness of a deed claiming adversely to the party which produces such deed, such second mentioned party cannot invoke the benefit under section 68 of the Partition Law but should proceed to prove the execution of such deed as provided under section 114(1) of the Civil Procedure Code read with section 68 of the Evidence Ordinance. However, the failure to prove the execution of a deed as required under aforesaid circumstances *per se* in the absence of any other evidence to establish the fraudulent nature of the deed, could not lead to an adverse conclusion on the genuineness of the deed. Such a failure would lead to a situation that the contents of such deed cannot be considered as evidence by court, only.

Therefore, the learned Civil Appellate High Court Judges decision to answer point of contest no. 12 namely "Whether the deed No 3936 dated 28.10.1976 pleaded in the statement of claim of the two Defendants' is a fraudulent deed (**විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයේ සඳහන් අංක 3936 සහ 1976.10.28 දින දරණ වැලන්ටයින් ඩයස් නොතාරීස් තැන සහතික කළ ඔප්පුව වංචනික ලෙස සකස් කරන ලද ඔප්පුවක් ද?**), in the affirmative is an error of fact and law.

Hence, the judgement of the Civil Appellate High Court in this matter dated 17 December 2017 is varied. Accordingly I hold that the answer of the learned trial judge to point of contest no. 12 namely – "does not arise" should remain unaltered, due to the reasons enumerated hereinbefore.

In view of the foregoing reasons, I proceed to answer legal issue No 4 raised before this Court (Whether the due execution of the Deed No 3936 dated 28.10.1976 marked as '1V2' is proved in terms of Section 68 of the Partition Law in the circumstances of this case?) in the negative and legal issue No 5 (If that issue is answered in the Plaintiff-Appellant-Respondent's favour, whether the questions referred to in the Petition will not arise?) in the affirmative. In view of these findings the need to answer other legal issues does not arise.

I hold that the rights of the parties should be decided as determined by the Civil Appellate High Court of Gampaha in the judgment dated 17 December 2014 and therefore affirm the judgment of the Civil Appellate High Court of Gampaha dated 17 December 2014 subject to the variation on its decision relating to the point of contest No. 12, as decided hereinbefore. The appeal of the two defendant-appellants is dismissed with costs.

Chief Justice

S. Thurairaja, PC, J.

I agree.

Judge of the Supreme Court

Yasantha Kodagoda, PC. J.

I agree.

Judge of the Supreme Court