

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

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka from the Civil Appellate High Court of North Western Province holden at Kurunegala in NWP/HCCA/KUR/41/2013(F) dated 05.04.2017.

Asirwatham Thomas Rasaiah,  
No 147, Puttalam Road, Nikaweratiya.  
(Deceased)

**PLAINTIFF**

Rasaiah Balasingham,  
No 47, Puttalam Road, Nikaweratiya.

**SUBSTITUTED PLAINTIFF**

**S.C. Appeal No. 59/2018  
S.C./H.C.C.A./L.A./265/2017  
NWP/H.C.C.A./KUR/41/2013(F)  
D.C. Nikaweratiya Case No.  
P/1564**

**Vs.**

1. Herath Bandage Sudarmarathna,
2. Herath Bandage Gunawardana, both of  
Hathigammana, Nikaweratiya.
3. U.L.M. Yakoob,  
Puttalam Road, Nikaweratiya.

**DEFENDANTS**

**AND BETWEEN**

Nesam Soundaram Ammal,  
Wetiya, Madawakkulama.

**PETITIONER**

**Vs.**

Asirwatham Thomas Rasaiah,  
No 147, Puttalam Road, Nikaweratiya.  
(Deceased)

**PLAINTIFF**

Rasaiah Balasingham,  
No 47, Puttalam Road, Nikaweratiya.

**SUBSTITUTED PLAINTIFF**

1. Herath Bandage Sudarmarathna,
2. Herath Bandage Gunawardana, both of  
Hathigammana, Nikaweratiya.
3. U.L.M. Yakoob,  
Puttalam Road, Nikaweratiya.

**DEFENDANT-RESPONDENTS**

**AND BETWEEN**

U.L.M. Yakoob,  
Puttalam Road, Nikaweratiya.  
(Deceased)

**3<sup>rd</sup> DEFENDANT (DECEASED)**

M.Y.M. Nezeem,  
No 47, Yusuf Avenue, Beruwala.

**SUBSTITUTED 3<sup>rd</sup> DEFENDANT -APPELLANT**

**Vs.**

Nesam Soundaram Ammal,  
Wetiya, Madawakkulama.

**PETITIONER – RESPONDENT**

Rasaiah Balasingham,  
No 47, Puttalam Road, Nikaweratiya.

**SUBSTITUTED PLAINTIFF – RESPONDENT**

1. Herath Bandage Sudarmarathna,
2. Herath Bandage Gunawardana, both of  
Hathigammana, Nikaweratiya.

**1<sup>st</sup> and 2<sup>nd</sup> DEFENDANT-  
RESPONDENT-RESPONDENTS**

**AND NOW BETWEEN**

Nesam Soundaram Ammal,  
Wetiya, Madawakkulama.

**PETITIONER-RESPONDENT-APPELLANT**

1. Herath Bandage Sudarmarathna,
2. Herath Bandage Gunawardana, both of  
Hathigammana, Nikaweratiya.

**1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANT-  
RESPONDENT-RESPONDENTS**

**Vs.**

M.Y.M. Nezeem,  
No 47, Yusuf Avenue, Beruwala.

**SUBSTITUTED 3<sup>RD</sup>**  
**DEFENDANT-APPELLANT-**  
**RESPONDENT**

Rasaiah Balasingham,  
No 47, Puttalam Road, Nikaweratiya.

**SUBSTITUTED PLAINTIFF-**  
**RESPONDENT- RESPONDENT**

**Before: S. Thuraiaraja, P.C., J.**

**A. L. Shiran Gooneratne, J.**

**Janak De Silva, J.**

**Counsel:** S. Peramunagama with Ranga Pieris for the Petitioner-Respondent-Appellant and 1<sup>st</sup> and 2<sup>nd</sup> Defendant-Respondent-Respondents

Dr. Sunil Cooray with Nilanga Pieris for the Substituted 3<sup>rd</sup> Defendant-Appellant-Respondent and Substituted Plaintiff-Respondent-Respondent

**Argued on:** 17.10.2022

**Decided on:** 05.12.2025

**Janak De Silva, J.**

The question of law that arises in this appeal is narrow and deals with the scope of Section 66 of the Partition Law No. 21 of 1977 as amended (Partition Law). However, brevity is not a feasible option as the factual context is complex and impinges on the question of law. Hence, there is a need to set out the factual matrix in greater detail than I would otherwise have preferred.

The deceased Plaintiff, Asirwatham Thomas Rasaiah, by his plaint dated 18.08.1981, and later by amended plaint dated 06.06.1991, instituted this action against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant-Respondent-Respondents (1<sup>st</sup> and 2<sup>nd</sup> Defendants) and 3<sup>rd</sup> Defendant-Appellant-Respondent (3<sup>rd</sup> Defendant) to partition the corpus.

It is admittedly depicted as Lots 1, 2 and 3 in the preliminary plan marked X. At the time of the preliminary survey, there were two boutique rooms marked A and B on the corpus. Room A is on Lot 1 in plan X and Room B is on Lot 3 in plan X. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint statement of claim and admitted the plaint. But the 3<sup>rd</sup> Defendant denied the plaint and claimed the entirety of the corpus as land belonging to him as sole owner and prayed for the dismissal of the partition action.

After trial, judgment was delivered on 03.04.1994 and interlocutory decree was ordered to be entered accordingly. The shares allocated to the respective parties were as follows:

Original Plaintiff	-	½ share
1 <sup>st</sup> and 2 <sup>nd</sup> Defendants	-	½ share, with building bearing No. 151
3 <sup>rd</sup> Defendant	-	Building bearing No. 149 (without soil rights)

Aggrieved by the said judgment, the 3<sup>rd</sup> Defendant, appealed to the Court of Appeal, in C.A. Appeal No. 79/94(F). The Court of Appeal by judgment dated 17.11.2000 set aside the said judgment of the District Court dated 03.04.1994 and determined the respective rights of the parties as follows:

3 <sup>rd</sup> Defendant	-	½ share together with building No. 149
1 <sup>st</sup> and 2 <sup>nd</sup> Defendants	-	building bearing No. 151 (without soil rights)
Plaintiff	-	No rights, and
Unallotted	-	½ share, which had belonged to one Vadivel who died in 1996.

The original Plaintiff passed away in 1996. His son, Rasaiah Balasingham, was substituted in his place (Substituted Plaintiff-Respondent-Respondent). Aggrieved by the said judgment of the Court of Appeal, the Substituted Plaintiff-Respondent-Respondent appealed to the Supreme Court. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also appealed to the Supreme Court.

Both applications were filed seeking special leave to appeal to the Supreme Court, from the judgment of the Court of Appeal. Upon consideration of these applications, the Supreme Court granted special leave to appeal in both applications, and accordingly, there were two appeals to the Supreme Court, namely S.C. Appeal No. 53/2001 and S.C. Appeal No. 54/2001.

The Supreme Court, by its judgment dated 13.03.2002, affirmed the judgment of the Court of Appeal, subject to the determination that the building marked “C” in Lot 2 of Plan “X” belonged to the Plaintiff, who was entitled to remain in occupation of the said building until compensation in respect of it is paid to him. Furthermore, the Supreme Court directed the District Court to inquire into the devolution of the shares belonging to Vadivel, as referred to in the judgment of the Court of Appeal, and to allot such shares accordingly, and thereafter proceed to final judgment.

Thus, at that point of time, the rights of the parties as determined by the Supreme Court were as follows:

- |  |   |   |
|--|---|---|
| 3 <sup>rd</sup> Defendant                      | - | ½ share together with building No. 149  |
| 1 <sup>st</sup> and 2 <sup>nd</sup> Defendants | - | Building bearing No. 151 (without soil rights)  |
| Plaintiff                                      | - | Entitled to remain in occupation of building marked “C” in Lot 2 of Plan “X” until compensation is paid |

Unallotted - ½ share, which had belonged to one Vadivel who died in 1996

Nevertheless, the District Court proceeded to enter interlocutory decree and issue commission for final partition, without conducting the required inquiry into the devolution of Vadivel's ½ share, in clear disregard of the judgment of the Court of Appeal and contrary to the directive of the Supreme Court that an inquiry be held in respect of the said ½ share of Vadivel and that the same be duly allotted before partitioning the corpus.

Therefore, the 3<sup>rd</sup> Defendant filed a petition dated 28.07.2003 and sought several relief including the allotment of ½ share of Vadivel to him (in which event the 3<sup>rd</sup> Defendant would be the sole owner of the entire corpus for partition), and the amendment thereafter of the interlocutory decree which had been entered in disregard of the judgment of the Court of Appeal and of the Supreme Court.

The District Court then fixed the said application of the 3<sup>rd</sup> Defendant for inquiry. When the said inquiry into the devolution of the ½ share of Vadivel was taken up on 07.06.2004, the District Court made order holding that the 3<sup>rd</sup> Defendant cannot give evidence at the inquiry into the revision of the said order of the District Court. The Court of Appeal thereafter by judgment dated 26.07.2006 set aside the said order of the District Court, and permitted the 3<sup>rd</sup> Defendant to give evidence at the said inquiry.

At the conclusion of the said inquiry, the District Court, by order dated 07.09.2009, held that Deed No. 3395 dated 20.09.1993 on which the 3<sup>rd</sup> Defendant claimed the ½ share of Vadivel, and the Deed No. 256 dated 20.01.2001 on which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants claimed the said ½ share of Vadivel through Vadivel's only child, Nesam Soundaram Ammal, who is the Petitioner-Respondent-Appellant abovenamed, had both been executed pending the present partition action in violation of section 66 of the Partition

Law and that the said share cannot be allotted to any party by the interlocutory decree on the basis of either of the said two deeds.

Subsequent to this order, the Petitioner-Respondent-Appellant made an application dated 28.09.2009, praying that she be held entitled to the said  $\frac{1}{2}$  share of Vadivel on the basis of inheritance from her father who died pending this action in 1996. The inquiry into the said application of the Appellant commenced on 09.11.2010 and at the end of this inquiry, the District Court delivered judgment dated 28.11.2012, holding that the Petitioner-Respondent-Appellant is entitled to the said  $\frac{1}{2}$  share of Vadivel.

Aggrieved by the said judgment of the District Court dated 28.11.2012, the Substituted 3<sup>rd</sup> Defendant – Appellant - Respondent duly sought to appeal to the Civil Appellate High Court of the Northern Province holden in Kurunegala, in case No. NWP/HCCA/KUR/41/2013(F). Moreover, the Substituted 3<sup>rd</sup> Defendant – Appellant – Respondent, being further aggrieved by the order of the District Court dated 07.09.2009, sought to invoke the revisionary jurisdiction of the said Civil Appellate High Court of North Western Province holden at Kurunegala.

Upon the conclusion of the appeal, the Learned High Court Judges delivered their judgment on 05.04.2017 holding that the Substituted 3<sup>rd</sup> Defendant–Appellant–Respondent is entitled to the said  $\frac{1}{2}$  share of Vadivel.

Being aggrieved by the said judgment dated 05.04.2017 of the Learned High Court Judges, the Petitioner-Respondent-Appellant sought leave to appeal from this Court which was granted on the following question of law.

*“Whether the Deed No. 3395 dated 20.09.1993 attested by Notary Public W.T.M.P.B Tennakoon is a valid Deed in view of Section 66 of the Partition Law?”*



### ***Section 66 of the Partition Law***

Prior to exploring the scope of the statutory prohibition embodied in Section 66 of the Partition Law, let me examine the position in common law on the alienation of *res litigiosae* (property which is the subject of a law suit).

In Roman Law, *res litigiosae* could not be alienated [Cod. 8.37.2]. But the *prohibition only applied to the parties to that litigation and only to the particular interest involved in the litigation*. The effect of the prohibition was to render the alienation void. The rationale for the prohibition appears to be that the alienation by the plaintiff or defendant was presumed to have been made in fraud of his adversary. The prohibition against alienation *pendente lite* was only given effect to when by virtue of such alienation some right was asserted in the action itself, or in the execution of the decree in which it culminated, or by way of opposition to the right declared by the decree. When the litigation ended the alienation operated to the extent of the rights adjudged to the alienor by the decree.

However, according to Roman-Dutch Law, such an alienation is permitted, provided the rights of third persons are not affected [Grotius 3.14.10; Voet 44.6.3; Groenewegen *ad Cod* 8.37; Van der Keessel *Th* 630; Wessels § 420; *Coronel v. Gordon Estate and GM Co* 1902 TS 95 at 101; *Hall v. Howe* 1929 TPD 91 at 94; *Ex Parte Deputy Sheriff Salisbury* 1957(3) SA 740 (SR)].

Let me now examine how different legislative enactments dealing with Partition actions have addressed the issue of alienation *pendente lite*.

Section 17 of the Partition Ordinance No. 10 of 1863 read as follows:

***“Whenever any legal proceedings shall have been instituted for obtaining a partition or sale of any property as aforesaid, it shall not be lawful for any of the owners to alienate or hypothecate his undivided share or interest therein, unless and until the Court before which the same were instituted shall, by its decree in the***

matter, have refused to grant the application for such partition or sale, as the case may be; and **any such alienation or hypothecation shall be void**" (emphasis added)

Section 67 of Partition Act No. 16 of 1951 read 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.***  
(emphasis added)

Section 66 of the Partition Law 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 ;***

*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 subsections (1) and (2) of this section.” (emphasis added)*

In ***Baban v. Amerasinghe* [(1878) 1 S.C.C. 24]**, Court held that the operation of Section 17 of Partition Ordinance No. 10 of 1863 is limited to what unquestionably was the intention of the enactment, viz. the preventing of partition proceedings from being defeated or embarrassed by alienations or encumbrances made *pendente lite*. Accordingly, it was held that, although an alienation or encumbrance made *pendente lite* cannot be recognized in the partition proceedings, it is in other respects binding as between the parties to it.

The jurisprudence on the above statutory provisions dealt *inter alia* with two important questions.

Firstly, the question arose whether the statutory prohibition covered only the owners who are parties to the partition action or included all owners irrespective of whether they were parties to the partition action.

In ***Anamalay Pillai v. Perera* [2 Browne 200, 6 N.L.R. 108]**, a share of a party to a land, the subject of a partition suit, was, pending the decision of the action, seized in execution and sold to M, who subsequently sold it to plaintiff. The issue arose whether this sale was valid.

Moncreiff, A.C.J. after examining Section 17, held that its effect was to make the impugned sale absolutely void.

Middleton, JJ., also held that the prohibition resulted in any transaction entered contrary to Section 17 being absolutely void. However, he opined (at page 211) that the words in the section are unnecessarily wide for the attainment of the object and hoped that legislation will be initiated to modify the terms of Section 17.

Wendt, J. (dissenting), considered the position in common law of *res litigiosae* and several other cases including ***Baban* (supra)** and ***De Silva v. Carlina* [9 S.C.C. 141]** but refrained

from setting out his position on whether Section 17 applied to owners who are not parties to the partition action.

In ***De Silva [supra]***, Clarence, J. (at page 142) held that the word “owner” in Section 17 must be confined to owners who are before Court in the partition proceedings. This decision was followed in ***Wijewardene v. Seetalahamy [5 N.L.R. 190]***.

Nevertheless, in ***Dewar Umma et al. v. Ismail Marikar et al. [(1906) 3 Bal. Rep. 99]***, Wood-Renton, J. declined to follow this line of authority. He held that an alienation by an owner, though he be not a party to the partition proceedings is obnoxious to the statutory prohibition against alienation *pendente lite*. He relied on the decision in ***Anamalay Pillai [supra]*** and held that the *ratio decidendi* in that case seems to involve the proposition that, while a partition suit is pending, the property vests in the Court. He concluded that if this view is correct, it is clear that an alienation by an owner whether a party to the proceedings or not is obnoxious to the statutory prohibition. In ***Saparamadu et al v. Saparamadu et al [10 N.L.R. 221]***, Court affirmed and followed this line of reasoning.

I am inclined to agree with this approach. The whole purpose of the statutory prohibition is negated if its application is limited to owners who are parties to the partition action. Moreover, the concern Wendt, J., expressed in ***Anamalay Pillai [supra. page 205]***, of the effect in construing the statutory prohibition to cover even owners who are not parties to the partition proceedings must now be examined in the context of the requirement to register *lis pendens*.

The second question which Courts have had to grapple over some period is whether the statutory prohibition applies only to the alienation of undivided shares.

In ***Subaseris v. Prolis*** [(16 N.L.R. 393 at 394], Wood Renton, A.C.J. (as he then was) emphasized the objective of this statutory prohibition as follows:

*“It must be remembered that section 17 of the Partition Ordinance imposes a fetter on the free alienation of property, and the Courts ought to see that that fetter is not made more comprehensive than the language and the intention of the section require. The section itself prohibits only, in terms, the alienation of undivided shares or interests in property which is the subject of partition proceedings while these proceedings are still pending, and the clear object of the enactment was to prevent the trial of partition actions from being delayed by the intervention of fresh parties whose interests had been created since the proceedings began.”*  
(emphasis added)

Our Courts have consistently upheld this view on the objective of this statutory prohibition, which has been uniformly applied in partition matters in Sri Lanka by successive legislation. [***Baban*** (supra), ***Annamalai Pillai*** (supra), ***Hewawasan v. Gunasekere*** (28 N.L.R. 33)].

Nevertheless, in ***Louis Appuhamy v. Punchi Baba*** [10 N.L.R. 196 at 198], Layard, C.J. outlined an exception for the general application of this statutory prohibition as follows:

*“I do not think that that section was intended to embrace or affect or to hinder or prevent persons from alienating or mortgaging the right to which they might become entitled after a partition had been decreed in respect of the land, the subject of a partition suit to which they were parties. Such 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 partition suit has terminated, appears to me not affected by section 17.”* (emphasis added)

In ***Kahan Bhai v. Perera*** [26 N.L.R. 204 at 208], a Full Bench of the Supreme Court presided over by Bertram, C.J. reaffirming this exception, held that:

*“Persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so **by expressly charging or disposing of the interest to be ultimately allotted to them in the action.**”* (emphasis added)

Moreover, in ***Sirisoma v. Sarnelis Appuhamy*** [51 N.L.R. 337 at 341], Gratien, J. also taking the same view, held that:

*“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.**”* (emphasis added)

Therefore, it is now trite law that the prohibition for alienation does not apply to contingent interests in the land (those that might ultimately be allotted to him in the final decree) being alienated pending partition and Section 66 only prohibits the alienation of undivided interests presently vested in the co-owners. [***Wijesinghe v. Sonnadara*** (53 N.L.R. 241, ***Sillie Fernando v. Silman Fernando*** (64 N.L.R. 404), ***Karunaratne v. Perera*** (67 N.L.R. 529), ***M.W.A.P. Jayathilake v. P.G. Somadasa*** (70 N.L.R. 25), ***Sirinatha v. Sirisena*** (1998) 3 Sri LR 19, ***Sithi Fareeda v. Mohamed Noor*** (2014) 2 ABH LR 287, ***Harischandra v. Fernando*** (2009) BLR 155, (2009) ACJ Civ. 34, ***Lulwala Hewayalage Tilanganee Weerasuriya v. Kirigalbadage Gamini Chandrasena*** (S.C. Appeal 154/2016, S.C.M. 17.06.2021), ***Premalatha Jayasuriya v. Buddhika Wickramasuriya*** (S.C. Appeal 27/2018, S.C.M. 09.08.2023), ***Madara Mahaliyanage Bandusena v. Don Dharmadasa Weerasekera & Others*** [S.C. Appeal No. 172/2017, S.C.M. 30.01.2024].

Similarly, it is further well established that the grantee of such contingent interest need not be made a party to the case as he has no absolute interest other than contingent interest vested in him pending partition [***Nazeer v. Hassim* (48 N.L.R. 282), *Abeyratne v. Rosalin* (2001) 3 Sri LR 308], *Sirinatha v. Sirisena* (1998) 3 Sri LR 19, *Madara Mahaliyanage Bandusena* (supra)] and where contingent interests in a property are alienated pending partition without any express conditions, upon the entry of the final decree, the lot in severalty allotted to the grantor shall, by operation of law, immediately vest in the grantee without the necessity of executing a further deed [***Sirisoma* (supra), *Sillie Fernando* (supra), *Madara Mahaliyanage Bandusena* (supra)**].**

***Validity of the Deed No. 3395 dated 20.09.1993***

As the 3<sup>rd</sup> Defendant correctly submitted, what was conveyed to the 3<sup>rd</sup> Defendant by Vadivel, according to the schedule to the Deed No. 3395 dated 20.09.1993, is all his interests to which he will be entitled to by the judgment in this action No. 1546/P. The number of this action is also specifically and expressly referred to in the said schedule. Therefore, on the face of the deed, it does not constitute a violation of Section 66 of the Partition Law as the aforementioned exception applicable to contingent interests in land is clearly engaged in the given circumstances.

However, the Petitioner-Respondent-Appellant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants challenge the validity of Deed No 3395 dated 20.09.1993 on the basis that Rengasamy Vadivel, *who was never a party to the partition action and who was never made application to intervene in this action*, is not a qualified person to execute the said deed on the basis of entitlement of share of the property in suit to be allocated to him.

In view of this contention put forward, the pivotal issue to be examined by this Court is *whether a person who was not a party to a partition action is not qualified to execute his contingent interests over the land which is the corpus of that particular partition action*, in terms of Section 66 of the Partition Law.

As explained earlier, the prohibition in Section 66 of the Partition Law applied to both co-owners who are parties as well as co-owners who were not made parties. In these circumstances, there is no justification to limit the ability to transfer contingent interests in the corpus in a partition action to co-owners who are parties to the action.

Moreover, through a consistent line of authority, our Courts have affirmed that the purpose of the prohibition under Section 66 of the Partition Law is to prevent the trial of partition actions from being delayed by the intervention of new parties whose interests have arisen after the commencement of the proceedings. Similarly, the justification for permitting the execution of contingent interests also flows from the same objective, as such transactions do not interfere with or delay the pending partition proceedings.

According to Wessels [Law of Contracts, Vol. 1, paras. 393-395], the sale of a chance or expectation may be either *conventio spei simplices* or a *conventio rei speratae*. In **Wijesinghe (supra. page 244)**, Gratien, J. held that a sale by a co-owner in land of whatever interests might ultimately be allotted to him under the decree in a pending partition action may fairly be construed as a *conventio rei speratae*.

In **Sirisoma (supra)**, Gratien, J. held that there is no statutory prohibition against a person's right to alienate or hypothecate, by anticipation, interests which he can only acquire upon the conclusion of the partition proceedings.

The foundation of this right to alienate contingent rights *pendente lite* in a partition action is founded on a common law right. Section 66 of the Partition Law does not impinge on that common law right. It necessarily follows that it matters not whether the alienation of such contingent right was made by a party to the partition action or not. Any such alienation is valid.

For all the foregoing reasons, I hold that even a co-owner who has not been made a party to the partition action has the power to transfer to any person *pendente lite* his contingent rights which he may derive from the partition action.



Accordingly, I answer the question of law in the affirmative.

In view of my conclusions, the rights of the parties to the corpus are as set out below:

- |  |   |   |
|--|---|---|
| 3 <sup>rd</sup> Defendant                      | - | The whole corpus together with building No. 149   |
| 1 <sup>st</sup> and 2 <sup>nd</sup> Defendants | - | Building bearing No. 151 (without soil rights)  |
| Plaintiff                                      | - | Entitled to remain in occupation of building marked "C" in Lot 2 of Plan "X" until compensation is paid |

It was contended that should the Court conclude that the 3<sup>rd</sup> Defendant was the sole owner of the corpus, the partition action must be dismissed. However, allocation of the above interests to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Plaintiff is based on the judgment of the Supreme Court dated 13.03.2002. That is a final judgment.

Therefore, although the end result of my conclusion is that the 3<sup>rd</sup> Defendant is the sole owner of the corpus, the partition action cannot be dismissed. Accordingly, the District Court must now take further steps according to law in accordance with this judgment.

In conclusion, I must mention that the Petitioner-Respondent-Appellant and 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that due execution of Deed No 3395 dated 20.09.1993 has not been proved. However, in my view the question of law on which leave to appeal was granted does not cover this issue. Hence, I have not examined the validity of this contention.

For all the foregoing reasons, I affirm the judgment of the Civil Appellate High Court of North Western Province holden at Kurunegala dated 05.04.2017.

The Appeal is dismissed with costs fixed at Rs. 75,000/=.

**JUDGE OF THE SUPREME COURT**

**S. Thuraiaraja, P.C., J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**A.L. Shiran Gooneratne, J.**

I agree.

**JUDGE OF THE SUPREME COURT**