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

In the matter of an appeal under and in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC / APPEAL / 68 / 2013

SC / HCCA / LA / 159 / 2012

WP / HCCA / COL / 269 / 04 (F)

DC COL: 18634 / 99 / P

Pallewela Gamaralalage

Nalika Jeewanthi,

516/2, Sausiripaya Road,

Uudumulla,

Battaramulla.

PLAINTIFF

-Vs-

1. **Noor Mohamed Riza Jumaa,**
   No. 31/3, Bullers Lane,

   Colombo 07.

   DEFENDANT

2. **Herath Dheeraratnalage Saman Bandara,**
   304, Udumulla Road,
   Battaramulla.

   ADDED 2ND DEFENDANT

   AND

   Pallewela Gamaralalage

   Nalika Jeewanthi,

   516/2, Sausiripaya Road,

   Uudumulla,

   Battaramulla.

   PLAINTIFF – APPELLANT

   -Vs-

1. **Noor Mohamed Riza Jumaa,**
   No. 31/3, Bullers Lane,

   Colombo 07.

DEFENDANT-RESPONDENT

2. **Herath Dheeraratnalage Saman Bandara,**
   304, Udumulla Road,
   Battaramulla.

ADDED 2ND DEFENDANT – RESPONDENT

AND BETWEEN

Pallewela Gamaralalage Nalika Jeewanthi,

516/2, Sausiripaya Road,

Uudumulla,

Battaramulla.

PLAINTIFF – APPELLANT – PETITIONER

-Vs-

1. **Noor Mohamed Riza Jumaa,**
   No. 31/3, Bullers Lane,

   Colombo 07.

DEFENDANT – RESPONDENT – RESPONDENT

2. **Herath Dheeraratnalage Saman Bandara,**
   304, Udumulla Road,
   Battaramulla.

ADDED 2ND DEFENDANT– RESPONDENT-RESPONDENT

AND NOW BETWEEN

Pallewela Gamaralalage

Nalika Jeewanthi,

516/2, Sausiripaya Road,

Uudumulla,

Battaramulla.

PLAINTIFF – APPELLANT– PETITIONER-APPELLANT

-Vs-

1. **Noor Mohamed Riza Jumaa,**

No. 31/3, Bullers Lane,

Colombo 07.

DEFENDANT–RESPONDENT–RESPONDENT - RESPONDENT

2. **Herath Dheeraratnalage Saman Bandara,**
   304, Udumulla Road,
   Battaramulla.

ADDED 2ND DEFENDANT – RESPONDENT-RESPONDENT-RESPONDENT

Before: Murdu N.B. Fernando, PC, CJ

A.H.M.D. Nawaz, J &

Arjuna Obeysekere, J

Counsel: Kushan D' Alwis, PC with Chamila Wickramanayake, Dilsha Fernando and Milinda Munidasa for the Plaintiff – Appellant – Petitioner – Appellant.

Manohara de Silva, PC with Hirosha Munasinghe, Harithriya Kumarage, Kaveesha Gamage, Sasiri Chandrasiri and Senal Kariyawasam for the Respondents.

Argued on: 09.07.2024

Decided on: 25.07.2025

A.H.M.D. Nawaz, J.

1. The question that arises in this case is whether a settlement reached between a Plaintiff and a Defendant in a previous *rei vindicatio* action can bind a third party who acquired rights from the Defendant prior to the settlement. A further question is whether the decree recording the settlement in that previous *rei vindicatio* action can operate as *res judicata* in a subsequent action filed by the third party against the Plaintiff in the earlier case. There are other notable issues of civil law raised by this case, but these are best appreciated once the factual background which is engulfed in the two actions concerning the same subject matter is set out.

2. The subject matter in question is a parcel of land known as Lot 1 of a larger land. I would first deal with the 1st case and thereafter dwell on the 2nd case which has given rise to this appeal.

The first case concerning Lot 1: Noor Mohamed v. Saman Bandara

3. The first action concerns a claim brought by Noor Mohamed (the Plaintiff in that case) against Saman Bandara (the Defendant), alleging obstruction of possession in respect of Lot 1, a portion of land formerly owned by Saman Bandara's grandfather, William Dias, as far back as the 1930s.

4. Noor Mohamed had bought Lot 1 from Ida Claris -an intestate heir of William Dias and whether Ida being one of the six intestate heirs of William Dias was the owner of the entirety of Lot1 when she sold Lot 1 to Noor Mohamed is another question that arises in this appeal but I will address this in the course of this judgment. Suffice it to say at the moment that Saman Bandara was a son of Ida Claris who has also disposed of his interest in Lot 1.

5. At the outset, it is appropriate to set out a chronological account of the material facts, which also illustrates the sequence of events that led to the creation of Lot 1 from the larger land.

6. Upon the death of William Dias in 1937, the larger land devolved on his intestate heirs: his widow, Dolphi Perera, and five children. The widow inherited a half share, while the five children each acquired a one-tenth (1/10) share.

7. The heirs subsequently subdivided the larger land into five lots. There is evidence that from 1968, one of the children, Ida Claris, took up occupation of Lot 1. This subdivision took place on 28.11.1968 by way of a plan bearing No 815/A.

Deed of Declaration dated 8th October 1979

8. Though the land was subdivided into lots 1, 2, 3, 4 and 5, the intestate heirs of William Dias-Dolphy Perera (the widow), Vincent Dias, Cyril Dias, Beatrice Dias, Dunstan Dias and Ida Dias (the five children of William Dias) made a deed of declaration on 8.10.1979 and thus, declared themselves as owners of the subdivided lots. In other words, all the heirs of William Dias-the widow and the 5 children inclusive of Ida recognized and acknowledged themselves as co-owners of the larger land.

Conveyance of Lot 1 by Ida to one Noor Mohamed in 1980

9. Just one year afterwards, i.e. on 2nd April 1980, Ida conveyed Lot 1 to Noor Mohamed who is the Defendant-Respondent in this appeal before us. He became the Plaintiff in the first case by virtue of this conveyance. The extent of Lot 1 is 28.9 perches and it is crystal clear that in view of the recognition of co-ownership by all the heirs in the deed of declaration, Lot 1 which Ida conveyed to Noor Mohamed has to be necessarily co-owned, as there is nothing in the record before us to indicate that the other heirs have relinquished their interests in Lot 1.

10. While discussing the first case, let me also state that the effect of co-ownership over Lot 1 has not been borne in mind by both the District Court and the Civil Appellate High Court Judge having regard to the present appeal before us. Be that as it may, so much for the conveyance of the entirety of Lot 1 by Ida to Noor Mohamed in 1980.

11. Upon the disposition of the entirety of Lot 1 to Noor Mohamed in April 1980 by deed No 40, Noor Mohamed commenced possession of Lot 1 and it has to be recalled that although Ida transferred the entirety of Lot 1 to Noor Mohamed, the said conveyance was behind the back of Ida's mother and her 4 siblings. Since Ida had declared her co-ownership in the deed of declaration of 1979, it follows that Ida would have had just 1/10th share of Lot 1, whilst the other heirs had 9/10th of Lot 1. But the fact remains that Ida chose to sell the entirety to lot 1 and the *nemo dat non habet* doctrine would entail that Noor Mohamed, if at all, secured by way of the transfer deed No 40 just 1/10th of lot 1.

12. On the proved facts, Noor Mohamed became a co-owner of Lot 1 along with the mother of Ida and Ida's 4 siblings.

13. The mother died intestate on 29 August 1984. Upon her demise, her one-half share in Lot 1 devolved equally upon her five children, each inheriting a one-tenth (1/10th) share in the entirety of Lot 1. As a result, Ida, who had previously held a one-tenth (1/10th) share in Lot 1, acquired an additional one-tenth (1/10th)

share by way of succession from her mother. Accordingly, her total interest in Lot 1 became two-tenths (2/10th or 1/5th).

14. As previously stated, Ida's conveyance of Lot 1 to Noor Mohamed in 1980 occurred prior to the death of her mother on 29 August 1984. At the time of that conveyance, Ida held only a one-tenth (1/10th) undivided share in Lot 1. Nonetheless, she purported to convey the entirety of Lot 1 to Noor Mohamed. Following the demise of the mother, Ida inherited an additional one-tenth (1/10th) share by way of intestate succession. Applying the principle of *exceptio rei venditae et traditae*, this subsequently acquired interest would also enure to the benefit of Noor Mohamed. Consequently, Noor Mohamed's total entitlement in Lot 1 amounts to two-tenths (2/10th), or one-fifth (1/5th), of the property.

15. In the final analysis, Noor Mohamed remains a co-owner of Lot 1, holding an undivided one-fifth (1/5th) share alongside the surviving siblings of Ida. This shared ownership arises from the inevitable passage of time and the mother's crossing of life's threshold in 1984.

16. It is not lost on this Court that Mr.Manohara de Silva PC quite adroitly contended that Ida had the entirety of Lot 1, if one applied **the doctrine of the collation or hotchpot**. In response, Mr. Kushan D'Alwis, President's Counsel, firmly rejected this position, contending that the doctrine is wholly inapplicable to the present factual matrix. I shall return to this issue in due course.

17. As I have enunciated as above, it would appear that Ida would have inherited 1/5th share of Lot 1 upon the death of the mother and I am irresistibly drawn to the conclusion that Ida's siblings did have co-ownership over Lot 1 along with Noor Mohamed.

18. This conclusion would be rebutted by evidence of an overt act on the part of Noor Mohamed and any adverse possession on the part of Noor Mohamed vis-à-vis the other co-owners has to be found as a fact in the second case filed over the same subject matter, which was a partition suit.

19. However, the second case—a partition action in which these issues were central—was dismissed by the District Judge of Colombo on the ground that the land was incapable of being partitioned. The dismissal was based on several factors, including the finding that co-ownership had never devolved upon the Plaintiff in that case, Nalika Jeewanthi. I respectfully disagree with this conclusion. Saman Bandara's co-ownership rights over Lot 1, which he acquired as a gift from his uncles and aunt, should have lawfully devolved upon his vendee, Nalika Jeewanthi —the Plaintiff in the second case the partition suit.

20. Prior to the transfer of 20 perches of Lot 1 to the said Nalika Jeewanthi, Saman Bandara-the son of Ida had received the interests of his uncles and aunty over Lot 1 by way of a gift made to him by the said uncles and aunty on 12/12/1997.

21. There were developments after this gift was made. Saman Badara began to disturb Noor Mohamed in his possession and it is in the circumstances that Noor Mohmed filed an action for *rei vindicatio* against Saman Bandara.

22. But this 1st case never went to trial as it resulted in a settlement between Noor Mohamed and Saman Bandara who is the son of Ida.

Settlement in the 1st case

23. The settlement was reached between Noor Mohamed and Saman Bandara 'on 18.12,1998. One of the terms of settlement was that Saman Bandara agreed to institute a partition action within 6 months. During the pendency of this action and prior to the settlement in the District Court in December 1998, Saman Bandara had transferred his title to a part of Lot 1 on 11.03.1998 to Nalika Jeewanthi -the Plaintiff in the latter action. It has to be remembered that Nalika Jeewanthi attempted to intervene in the case but was unsuccessful.

24. Having transferred his interest to Nalika Jeewanthi on 11th March 1998, it strikes this Court that Saman Bandara entered into the aforesaid settlement in December 1998. I hasten to point out that the settlement cannot bind the vendee Nalika Jeewanthi as she was not a party to the settlement. The six-month limitation that Saman Bandara set in the settlement to file a partition action against Noor Mohamed was behind the back of his vendee and it

would be inequitable to hold that a vendee should be bound by the settlement which the vendor effected in court without any kind of intimation or participation on the part of the vendee to the said settlement. Since Saman Bandara had already parted with his interest to Nalika Jeewanthi, he had no interest to partition before the expiry of 6 months and he did not do so. However, Nalika Jeewanthi who was unsuccessful in entering into the first case filed the partition action which is the 2nd suit.

2nd Partition suit

25. The partition action filed by the vendee, Nalika Jeewanthi, was dismissed by the District Court on 20.10.2004. I have already concluded that Nalika Jeewanthi was entitled to institute the partition action, as she had acquired co-ownership rights—if any—through her vendor, Saman Bandara. However, whether Saman Bandara himself had lawfully obtained an interest in Lot 1 from his uncles and aunt was a matter that the learned District Judge did not examine in extenso.

26. The failure of Saman Bandara to initiate a partition action within six months has been imputed to Nalika Jeewanthi, the Plaintiff. Such an approach is impermissible, as Saman Bandara's omission does not bind Nalika Jeewanthi, his vendee. Furthermore, the question of whether Noor Mohmed had ousted the other co-owners—the uncles and aunt, who were Saman Bandara's predecessors in title—received inadequate consideration in both the District Court and the Civil Appellate Court.

27. Thus, the settlement decree in the 1st case cannot operate as *res judicata* so as to prevent the 2nd action. The learned Judges of the Civil Appellate Court by the judgment dated 16.03.2012 dismissed the appeal of Nalika Jeewanthi.

28. Having regard to the settlement reached between Noor Mohamed and Saman Bandara in the 1st action, the learned judges of the High Court allude to the case of ***Talagune v De Livera***[1] and endorse the long held principle that rights of the parties must be determined at the time of action and thus, the decision made on the settlement in the first case would relate to the date of the plaint in the partition action. It has to be borne in mind that the decision made in the 1st case was not made on merits. It was a decision made on a settlement.

29. One cannot relate rights emanating from that settlement and impute it as rights inherent to Nalika Jeewanthi -the Plaintiff in the partition action. First, Nalika Jeewanthi was not a party to the settlement. Saman Bandara could not have entered into a settlement so as to wipe out Nalika Jeewanthi's right, if any in Lot 1. I cannot hold that the long held principle that rights of parties relate back to the date of the plaint would apply in full force to a case where a settlement is effected especially when that settlement is not on merits and no rights emanate from that settlement binding a third-party such as Nalika Jeewanthi.

[1] (1997) 1 Sri LR 253

30. In the circumstances, the dismissal of Nalika Jeewanthi's appeal in the High Court is erroneous.

31. Before I part with the judgment, I must refer to collation or hotchpot which was advanced on behalf of the Defendant-Respondent before this Court-Noor Mohamed. The Court appreciates the full force of that argument but in my view, it would not apply to the facts of this case.

Collation or Hotchpot

32. Section 35 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876 as amended states that, "Children or grandchildren by representation becoming with their brothers and sisters heirs to the deceased parents are bound to bring into hotchpot or collation all that they have received from their deceased parents above the others either on the occasion of their marriage or to advance or establish them in life, unless it can be proved that the deceased parent, either expressly or impliedly, released any property so given from collation".

33. This provision no doubt altered the law as regards liability to collation, but it did not give a new meaning to the expression "bring into hotchpot or collation", which was a term of art that was already known to the common law. Moreover, it may well happen that where some of the children are liable to collation, "all that they have received from their deceased parents above the others" is not

represented by any specific parcel or parcels of land or any other specific thing, and that the excess can be brought into collation only by bringing its value into account. It seems that the context of the expression "bring into hotchpot or collation" in the section confirms rather than negatives the view that the legislation did not intend to take away the heir's option to discharge a 1iability to collation by bringing the value of the property into account.

34. The clear implication of this provision is that two classes of gifts are now liable to collation, namely, (a) those given on the occasion of marriage, and (b) those given to advance or establish children in life, unless it appears either expressly or impliedly that it was intended that they should be released from that liability.

35. None of these issues were ever raised in the partition suit and thus, the question of collation did not receive any consideration in the courts below.

36. From the foregoing analysis, it is quite clear that the partition action was not conducted with a view to ascertaining the rights of parties having regard to the established legal principles and thus, the central questions of co-ownership and ouster, if they arise in the case, have not been properly addressed and this case suffers for want of investigation. In the circumstances, I take the view that rights of parties to co-ownership and the inconvenience if any of continuing such relationship must be examined afresh.

37. I thus set aside the judgments of the District Court dated 20th October 2004 and the Civil Appellate Court dated 16th March 2012 in the partition action and proceed to answer the questions of law raised on behalf of the Plaintiff-Appellant before this Court in the affirmative. Accordingly, I order a retrial on the same pleadings and evidence must be taken from the respective parties and their privies in afresh order to resolve questions of co-ownership over Lot 1 and decide whether the said Lot 1 should be partitioned or not.

38. We direct the learned District Judge, Colombo to accord priority to this case and conclude it as expeditiously as it should.

Judge of the Supreme Court

MURDU N. B. FERNANDO, PC, CJ

I agree

Chief Justice

ARJUNA OBEYESEKERE, J

I agree

Judge of the Supreme Court