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

In the matter of an Appeal

Kadireshan Kugabalan
No.52, Main Street,
Kandapola

Plaintiff

SC Appeal 36/2014
SC (HC CA) LA. No. 232/2012
CP/HCCA/KAN/136/2010(FA)
D.C. Nuwara Eliya Case No.1279/L

Vs-

Sooriya Mudiyanselage Ranaweera
Gajabapura, Mahagastota,
Nuwara Eliya.

Defendant

AND
Sooriya Mudiyanselage Ranaweera
Gajabapura, Mahagastota,
Nuwara Eliya.

Defendant-Appellant

Vs

Kadireshan Kugabalan
No.52, Main Street,
Kandapola
Plaintiff-Respondent

AND NOW BETWEEN

Kadireshan Kugabalan
No.52, Main Street,
Kandapola
Plaintiff-Respondent-Petitioner-Appellant

Vs

Sooriya Mudiyanselage Ranaweera
Gajabapura, Mahagastota,
Nuwara Eliya.
Defendant-Appellant Respondent-Respondent

Sooriya Mudiyanselage Kanthi Ranaweera
No.32, Gajabapura, Mahagastota,
Nuwara Eliya.
Substituted Defendant-Appellant Respondent-Respondent

Before: Sisira. J. de Abrew J
S.Thurairaja PC J
Gamini Amarasekere J

Counsel: Dr.J.A.De Gunarathne with Prakrama Agalawatta and Mohan Walpita
for the Plaintiff-Respondent-Petitioner-Appellant
Harsha Soza President's Counsel with Nishaka Jayasena
for the Defendant-Appellant-Respondent-Respondent

Argued on : 21.9.2020

Decided on: 12.2. 2021

Sisira J. de Abrew, J

Plaintiff-Respondent-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) filed this action in the District Court of Nuwara Eliya against the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) seeking a declaration, inter alia, that the Plaintiff-Appellant is the owner of the property in question and to eject the Defendant-Respondent from the property in question. The learned District Judge by her judgment dated 6.7.2010 held the case in favour of the Plaintiff-Appellant. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Respondent filed an appeal in the Civil Appellate High Court of Kandy and the learned Judges of the Civil Appellate High Court by their judgment dated 14.5.2012, set aside the judgment of the learned District Judge and dismissed the action of the Plaintiff-Appellant. Being aggrieved by the said judgment of the learned Judges of the Civil Appellate High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 5.3.2014, granted leave to appeal on questions of law set out in paragraphs 17(a) and 17 (b) of the Petition of Appeal dated 25.6.2012 which are set out below.

1. Did the Honourable High Court err and/or misdirect itself in holding that the Plaintiff had failed to prove the said deed of transfer (P1) and (P1c) by calling a witness from the Divisional Secretariat thereby leave room to draw a presumption adverse to the Plaintiff under Section 114 of the Evidence Ordinance in as much as when the aforesaid documents were

read at the close of the Plaintiff's case, when no objection was taken it stood as evidence for all purposes of the law?

2. Does the judgment of Honourable High Court stand as a judgment given per incuriam of the authoritative precedent laid down by Your Lordships' Court in Sri Lanka Ports Authority Vs Jugolinija Boal East (1981) 1 SLR 18?

Facts of this case may be briefly summarized as follows. The Plaintiff-Appellant takes up the position in the plaint and in his evidence that the Defendant-Respondent (Sooriya Mudiyanselage Ranaweera) conveyed property in question to him by Deed bearing No.10650 dated 13.12.2001 (marked P1) alleged to have been attested by Sinnathamby Dhayumanavan Notary Public. The Defendant-Respondent in his answer and evidence takes up the position that he never put his signature on Deed marked P1; that the signature found in Deed marked P1 is not his signature; that he never sold the property in question; and that he did not know a Notary Public by the name of Dhayumanavan. When the above matters are considered the most important question that must be decided in this case is whether the Deed bearing No.10650 dated 13.12.2001 (marked P1) alleged to have been attested by Sinnathamby Dhayumanavan Notary Public has been proved in court in accordance with Section 68 of the Evidence Ordinance. The Plaintiff-Appellant in this case called Sinnathamby Dhayumanavan Notray Public to prove Deed bearing No.10650 dated 13.12.2001 (marked P1) as a witness. But the Plaintiff-Appellant did not call the attesting witnesses in the said deed. Sinnathamby Dhayumanavan Notary Public in the attestation of the said deed states that the executants were unknown to him. Thus Sinnathamby Dhayumanavan Notary Public has admitted in his attestation that Sooriya

Mudiyanselage Ranaweera (the Defendant-Respondent in this case) was unknown to him at the time of the attestation of the Deed bearing No.10650 dated 13.12.2001 (marked P1). Sinnathamby Dhayumanavan Notary Public in his evidence given before the learned District Judge has admitted that he, in his attestation, has stated the above matter. Thus it is established that Sooriya Mudiyanselage Ranaweera, the alleged executant in the Deed bearing No.10650 dated 13.12.2001 (marked P1) was not known to Sinnathamby Dhayumanavan Notray Public who is alleged to have attested the said deed (marked P1). Further in the attestation of the deed (marked P1), Sinnathamby Dhayumanavan Notary Public has failed to state that the attesting witnesses knew Sooriya Mudiyanselage Ranaweera, the alleged executant in the deed (marked P1).

When I consider the above matters, it is necessary to consider whether Sinnathamby Dhayumanavan Notray Public can be regarded as an attesting witness in the deed (marked P1). In order to find an answer to this question it is necessary to consider Section 68 of the Evidence Ordinance and relevant judicial decisions that may be stated below.

Section 68of the Evidence Ordinance reads as follows.

> *"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 the court and capable of giving evidence."*

In Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560 Basnayake CJ held as follows.

> *"A Notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance."*

In Marian Vs Jesuthasan 59 NLR 348 Sinnetamby J held as follows.

"Where a deed executed before a notary is sought to be proved, the Notary can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant." His Lordship Justice Sinnetamby at page 349 further held as follows. *"To become an attesting witness a notary must personally know the executant and be in a position to bear witness to the fact that the signature on the deed executed before him is the signature of the executant."*

In Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560 Basnayake CJ delivered the judgment on 6.7.1956. In Marian Vs Jesuthasan 59 NLR 348 Sinnetamby J delivered the judgment on 20.7.1956. Therefore, it is seen that Sinnetamby J delivered the judgment after Basnayake CJ delivered the judgment in Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560. I would like to follow the judgment in the case of Marian Vs Jesuthasan (supra).

In the case of Ramen Chetty Vs Assen Najna [1909] Current Law Reports of Ceylon 256 Hutchinson CJ and Middleton J held as follows.

> *"The evidence of the Notary who attested a document, to the effect that the signatory and the witnesses signed in his presence and in the presence of one another, is not sufficient to prove the document, where the signatory was not known to the Notary. To prove a document, whether*

notarially attested or otherwise, it must be proved that the signature of the signatory is in his handwriting."

Section 31(9) of the Notaries Ordinance reads as follows

"He shall not authenticate or attest any deed or instrument unless the person executing the same be known to him or to at least two of the attesting witnesses thereto ; and in the latter case, he shall satisfy himself, before accepting them as witnesses, that they are persons of good repute and that they are well acquainted with the executant and know his proper name, occupation, and residence, and the witnesses shall sign a declaration at the foot of the deed or instrument that they are well acquainted with the executant and know his proper name, occupation, and residence."

Sinhala version of Section 31(9) of the Notaries Ordinance reads as follows.

යම් ඔප්පුවක් හෝ නීත්‍යානුකූල ලේඛනයක් ලියා අත්සන් කරන තැනැත්තා හෝ ඔප්පුවට හෝ නීත්‍යානුකූල ලේඛනයට සාක්ෂි දරන සාක්ෂිකරුවන් යටත් පිරිසෙයින් දෙදෙනකු තමා දනිතහොත් මිස ඒ ඔප්පුවේ හෝ නීත්‍යානුකූල ලේඛනයේ තත්‍යභාවය සහතික කිරීම හෝ එය ලියා සහතික කිරීම ඔහු විසින් නො කළ යුතු ය: තව ද පසුව සඳහන් කළ අවස්ථාවේ දි ඒ සාක්ෂිකරුවන්, සාක්ෂිකරුවන් වශයෙන් පිළිගැනීමට පෙර ඔවුන් හොඳනමක් ඇති අය බවට ද ලියා අත්සන් කරන්නා හොඳින් හඳුනන බවට ද ඔහුගේ නියම නම, රක්ෂාව සහ පදිංචි ස්ථානය ඔවුන් දන්නා බවට ද නොතාරිස් සැහිමට පත් විය යුතු අතර, ලියා අත්සන් කරන්නා තමන් හොඳින් දන්නා බවට සහ ඔහුගේ නියම නම, රක්ෂාව සහ පදිංචි ස්ථානය තමන් දන්නා බවට ඒ සාක්ෂිකරුවන් විසින් ඔප්පුවෙහි හෝ නීත්‍යානුකූල ලේඛනයෙහි පහතින් ප්‍රකාශනයක් අත්සන් කළ යුතු ය.

Considering the above legal literature, I hold that when a deed executed before a Notary Public is sought to be proved in evidence, the Notary Public can be

regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance only if the following matters are satisfied.

1. There must be evidence from the Notary Public to the effect that he knew the executant personally at the time the executant placed his signature on the deed OR that he (the Notary Public) knew the attesting witnesses personally and the attesting witnesses knew the executant personally.

2. There must be evidence from the Notary Public to the effect that the signature found in the deed is the signature of the executant.

3. There must be evidence from the Notary Public to the effect that two attesting witnesses placed their signatures in his presence.

I have earlier pointed out that the Notary Public who is alleged to have attested Deed bearing No.10650 dated 13.12.2001 (marked P1) did not know the executant in the said deed and that the Notary Public has, in his attestation, failed to state that the attesting witnesses knew the executant personally. For the above reasons, I hold that the Notary Public in Deed bearing No.10650 dated 13.12.2001 (marked P1) cannot be regarded as an attesting witness.

For the above reasons, I hold that the Deed bearing No.10650 dated 13.12.2001 (marked P1) has not been proved in accordance with Section 68 of the Evidence Ordinance and that it cannot be used as evidence in this case.

The next point urged by learned counsel for the Plaintiff-Appellant was that Deed bearing No.10650 dated 13.12.2001 (marked P1) was not objected by the Defendant-Respondent when the case for the Plaintiff-Appellant was closed. Learned counsel therefore contended that the Defendant-Respondent has admitted the said deed marked P1. He relied on the judgment in the case of Sri

Lanka Ports Authority and Another Vs Jugolinija Boal-East [1981] 1SLR 18 wherein this court held as follows.

> *"If no objection is taken, when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the curses curiae of the original civil courts."*

In Balapitiya Gunananda Thero Vs Talalle Methananda Thero [1997] 2 SLR 101this court held as follows.

> *"Where a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case. This is the curses curiae."*

In the present case, Deed bearing No.10650 dated 13.12.2001 (marked P1) was produced at the trial subject to proof. But it was not objected to when the Plaintiff-Appellant closed his case. It has to be noted here that the Defendant-Respondent in his evidence took up the position that he never signed the said deed. I have earlier held that the that the Notary Public in Deed bearing No.10650 dated 13.12.2001 (marked P1) cannot be considered as an attesting witness.

In considering the contention of learned counsel for the for the Plaintiff-Appellant, I would again like to consider Section 68 of the Evidence Ordinance. For the purpose of clarity, it is reproduced below.

> *"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 the court and capable of giving evidence."*

In the case of Robins Vs Grogan 43 NLR 269 wherein Howard CJ held as follows.

> *"A document cannot be used in evidence, unless its genuineness has been either admitted or established by proof, which should be given before the document is accepted by Court."*

Therefore, it is seen that although a document is produced in court with or without objection, it cannot be used as evidence if it is not proved. If the principle enunciated in the case of Sri Lanka Ports Authority and Another Vs Jugolinija Boal-East (supra) is accepted in respect of deeds, even a fraudulent deed marked subject to proof can be used as evidence if it is not objected by the opposing party at the close of the case of the party which produced it. In such a situation, one can argue that courts will have to disregard section 68 of the Evidence Ordinance. I do not think that the principle enunciated in the case of Sri Lanka Ports Authority and Another Vs Jugolinija Boal-East (supra) extends to such a situation. Whether the opposing party takes up an objection or not to a deed which is sought to be produced, the courts will have to follow the procedure laid down in law. In this connection I would like to consider the judicial decision in the case of Samarakoon Vs Gunasekara [2011] 1SLR 149 wherein this court observed the following facts.

> *"In order to prove the Plaintiff's title to the property which is the subject matter of the action, he produced at the trial the notarially executed deeds marked P3 to P6 which were marked subject to proof. No witnesses were called at the trial on behalf of the Plaintiff to prove the said deeds. At the end of the Plaintiffs case, when the Plaintiff's Counsel read in evidence the deeds produced in evidence marked P3 to P6, the defence had made an application to Court to*

exclude those documents which were not properly proved. The learned District Judge held that the documents P3 to P6 had not been properly proved and accordingly, that the Plaintiff had failed to prove his title to the land in question.

The Plaintiff appealed against the decision of the District Judge to the High Court. The High Court reversed the District Judge's finding on the basis that when a deed had been duly signed and executed it must be presumed that it had been properly executed."

His Lordship Justice Amaratunga (with whom Ratnayake J and Ekanayake agreed) held as follows.

The High Court in total disregard of the specific and stringent provisions of Section 68 of the Evidence Ordinance had relied on an obiter dictum made in a case where due execution was challenged, to reverse the decision of the District Judge.

In terms of Section 2 of the Prevention of Frauds Ordinance a sale or transfer of land has to be in writing signed by two or more witnesses before a notary, duly attested by the notary and the witnesses. If this is not done the document and its contents cannot be used in evidence.

His Lordship Justice Amaratunga at page 151 further held as follows.

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.

In the case of Perera and others Vs Elisahamy 65 CLW 59 His Lordship Basnayake CJ held as follows.

> *"Even though no objection was taken to the document when its contents were first spoken to by a witness, it should not have been used as evidence and acted upon by the Court. A Court cannot act on facts which are not proved in the manner prescribed in the Evidence Ordinance."*

Considering all the above matters, I hold that when a document which is required to be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance is produced in evidence subject to proof but not objected to at the close of the case of the party which produced it, such a document cannot be used as evidence by courts if it is not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. I further hold that failure on the part of a party to object to a document during the trial does not permit court to use the document as evidence if the document which should be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance has not been proved.

When I consider all the above matters, I cannot accept the above contention of learned counsel for the Plaintiff-Appellant and I reject it.

I have earlier held that the Deed bearing No.10650 dated 13.12.2001 (marked P1) had not been proved in accordance with Section 68 of the Evidence Ordinance and could not be used as evidence in this case.

For the aforementioned reasons, I answer the 1st question of law as follows.

The Plaintiff-Appellant has failed to prove the Deed bearing No.10650 dated 13.12.2001 marked P1 and the learned Judgers of the Civil Appellate High Court have not made any error in their judgment.

I answer the 2nd question of law as follows.

The judgment of the Civil Appellate High Court is correct.

For the above reasons, I affirm the judgment of the Civil Appellate High Court dated 14.5.2012 and dismiss this appeal with costs. The Defendant-Respondent is entitled to the costs of this appeal and the courts below.

Appeal dismissed.

Judge of the Supreme Court.

S. Thurairaja PC J

I agree.

Judge of the Supreme Court.