

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

Abid Asgar Ali Patel
83/1, Davidson Road,
Colombo 4.

PLAINTIFF

C.A 145/1998
D.C. Mt. Lavinia 418/1995 (Land)

Vs.

Irish Evelyn Mona Jansen
67/3, Nallawatta Raod,
Maharagama.

DEFENDANT

AND

Irish Evelyn Mona Jansen
67/3, Nallawatta Raod,
Maharagama.

DEFENDANT-APPELLANT

Vs.

Abid Asgar Ali Patel
83/1, Davidson Road,
Colombo 4.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: S. N. Vijithsingh with Chitrananda Liyanage
for the Defendant-Appellant

Plaintiff-Respondent is present in person

ARGUED ON: 28.8.2012

DECIDED ON: 12.12.2012

GOONERATNE J.

Action was instituted in the District Court of Mt. Lavinia by the Plaintiff. Abid Asgar Ali Patel, to declare deed of gift bearing No. 11780 marked P1 null & void. (as described in schedule 1) and the items gifted and described in schedule 2 of plaint which were gifted to Defendant-Appellant be declared that such gifting is null & void and that such items be returned to the Plaintiff-Respondent. In the alternative claim for a sum of Rs. 100,000/- (prayer 'C' of plaint). Prior to considering this appeal this court would refer to Journal Entry of 18.5.2012 and 19.7.2012 setting out certain particulars as regards the representation of the plaintiff-Appellant, and the lapses that took place in the process of hearing this appeal. It is very unfortunate that an

Attorney-at-Law made an application on behalf of a President's Counsel who had not been retained and had nothing to do with this case. The registered Attorney-at-Law for Plaintiff-Respondent subsequently revoked proxy. This court having given sufficient time to enable Plaintiff-Respondent to make arrangements for his appearance, yet the Plaintiff never attempted to do so. As such this appeal had to be taken up for hearing on 28.8.2012, on which date Plaintiff-Respondent was present in court but unrepresented.

At the trial before the District Court 4 admissions were recorded and parties proceeded to trial on 8 issues. The admissions recorded in this case in the Original Court would also have an impact on the final outcome of this case. The devolution of title and the Plaintiff's title to the property are all admitted facts. The execution of the deed in question (P1 No. 11780) is admitted. It was also admitted that the Defendant-Appellant was the paramour of the Plaintiff-Respondent. However immoral it might have been it has become an admitted fact in this case. As such the trial Judge need to have considered very carefully the main issue of execution of the deed in the background of the illicit affair between parties which had matured to a very great extent. Issue Nos. 1 to 3 attempts to suggest the circumstances under which Plaintiff-Respondent came to execute the deed of

gift in favour of the Defendant-Appellant which suggest directly or indirectly acts of compulsion on the part of Defendant to enter into a transaction of executing a deed. Issue No. 4 is to prove false representation and issue No. 5 is all important issue on the right to obtain relief. However the other important issue would be issue No. 7 which connects with the cause of action. Has a cause of action accrued to the Plaintiff to get the deed of gift cancelled/revoked?

The trial Judge should have focused on two matters which emerge from issue Nos. 5 & 7. In fact these two issues should have been better explained to give a clear meaning. Can the deed of gift be revoked or declared null & void in the circumstances of this case? The deed in question is in irrevocable deed. (P1). The trial Judge should have looked at all the circumstances that emanate from evidence. It is possible to argue that it is in fact a pure question of law?

The trial Judge has in his judgment given a narration of evidence of both parties, and had not given adequate reasons to accept the evidence of Plaintiff. The question of undue influence alleged to be the reason to enter into a transaction of executing a deed has not been properly explained and exemplified. Mere assertion would not suffice. However at a

certain point in the judgment of the trial Judge seems to have looked at the problem in it's correct perspective. I note the following:

මෙම දේපල පැමිණිලිකරු විසින් මිලයට ගෙන තිබුණේ 1992 මාර්තු මස 10 වන දිනය. විත්තිකාරියට තැගි දීමට අවුරුද්දකට පමණ පෙරය. එසේ මිලයට ගෙන විත්තිකාරියට හුක්තිය භාර දී ඇත. තවද, ගෙයකට අවශ්‍ය වෙනත් භාණ්ඩද පැමිණිලිකරු විසින් විත්තිකාරියට සපයා දුන් බවට දී ඇති සක්ෂිය වග්වාස කල හැක. මේ සැම ක්‍රියාවකින්ම පැමිණිලිකරු විසින් සිදු කර තිබුණේ විත්තිකාරිය තමාගේ අනියම් භාර්යාව වශයෙන් තබා ගැනීමේ හේතුවෙන් විය හැක. පැමිණිලිකරු කියන්නේ විත්තිකාරිය මෙම දේපල ලියා ගැනීමත් පසු පුලු මස 10 දින වඩා වැඩි වූ බවයි. ඉන් පසු තමාගේ ආයාතනයේ සේවය සඳහාද නොපැමිණි බවයි.

The above extract reflect the following position

- (a) property in dispute purchased on or about 10.3.1992. About an year before executing deed P1.
- (b) Having purchased as above possession handed over to Defendant.
- (c) The trial Judge accept that Plaintiff gave all essential household items to Defendant.
- (d) All this was done ('a' to 'c') as the Defendant was Plaintiff's mistress.
- (e) Having purchased the property Defendant married 10th of July. Thereafter Defendant did not turn up for work.

The points at (a) to (e) above would damage the version alleged by Plaintiff as regards undue influence. In the context of the case in hand the plea of undue influence put forward by the Plaintiff is nullified by the intimate relations the Plaintiff had with the Defendant, who was the mistress

of Plaintiff which was no secret, and as emerged from the evidence and the admissions recorded. As such due execution of the deed P1 has to be presumed. It is a final and deliberate expression of their determination. Parties reduce the contract to writing in order to have a final, certain and permanent record of the agreement they have come to . The conveyance and property Layer. Vol. a Part II E.R.S.R. Coomaraswamy Pg. 416.

Document P1 was admitted in evidence without objection. As such deed P1 becomes evidence in the case. It is therefore a document deemed to constitute legally admissible evidence as against the party who is sought to be affected by it (In this instance it is the Plaintiff). This is the *cursus curiae* of the civil court 1997 (2) SLR 101; 18 NLR 85; 42 NLR 311. However in this case deed P1 was recorded as an admission.

The intimate relations between parties at a certain stage of their life cannot be denied. There is evidence that both were even spending a period of time together in India. In these circumstances can the deed of gift be revoked? This is a legal issue which is a pure issue of law which could be raised even at the appeal stage. *Somawathie Vs. Wilmon* 2011 BLR 54. The grounds suggested by the Plaintiff is not to revoke the gift but to have it declared null & void. These are two different aspects but may be closely

connected as in both instances the beneficiary would be deprived of property gifted.

In terms of the Muslim Inheritance Ordinance, (Section 5) if an irrevocable gift is made by a Muslim it could not be cancelled. The term used is by a Muslim in the Ordinance.

Sendris Appu vs. Santakahamy 13 N.L.R 237... but if the thing promised had been transferred it could not be taken from the concubine. (matter in dispute is a deed of gift).

The deed of Gift No. 11780 is a deed not revocable.

M.S Jalaldeen on the Muslim Law of Succession Inheritance at page 85 special gifts in the Muslim Law observes it can be given to one's relatives or to anyone else whether rich or poor or even in memory of someone who is dead.

Hence in whatever circumstances may be once the gift is made it could not be cancelled.

As stated above this court observes that the trial Judge has not analysed the details to arrive at a conclusion whether there were sufficient grounds to arrive at a conclusion on undue influence. Primary facts have not been properly verified. When court has to rule on a deed there is a necessity to be extra cautious. In the context of this case and in the background of an intimate relationship between parties, it cannot be concluded that parties were led into a situation of being unduly influenced to enter into a transaction. On the other hand a deed of gift cannot be revoked as discussed

above under Muslim Law. Plaintiff-Respondent himself was married to another person. There were close relationship/association between parties. Plaintiff would not have been able to get married to the Defendant due to the Islamic faith though it may have been permissible under certain circumstances. Trial Judge's reasons are inadequate. Primary facts not verified in detail. As such I set aside the judgment of the learned District Judge, and allow this appeal in terms of the prayer to the Petition of Appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL