

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

C.A 541/1998 (F)
D.C. Kuliypitiya 10428/M

R. M. Siriwardena of
Ihalagama,
Alahenegama.

PLAINTIFF

Vs.

R. M. Jayathileke of
Thalahenegama,
Alahengama.

DEFENDANT

R. M. Jayathileke of
Thalahenegama,
Alahengama.

DEFENDANT-APPELLANT

Vs.

R. M. Siriwardena of
Ihalagama,
Alahenegama.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Dr. Sunil Cooray with Sudharshani Cooray
For Defendant-Appellant

J. Joseph with Mohamed Rusney for Plaintiff-Respondent

ARGUED ON: 17.02.2012

DECDED ON: 30.05.2012

GOONERATNE J.

This was a partition action filed in the District Court of Kuliyaipitiya. An interesting question was raised both in the Original Court and in this Court, by Defendant-Appellant. The learned District Judge entered judgment as prayed for in the plaint and directed that interlocutory decree and commission fees be deposited to partition the land in dispute. The land in question is called Bogahamulla Pahala Hena. According to the plaint (paragraph 8) Plaintiff and Defendant would be entitled equally divide the land (1/2 share each). Parties proceeded to trial on admissions of paragraphs 1 – 5 of the plaint and 12 issues. The Defendant-Appellant's position was

that he is entitled to the entirety of the land in dispute. Original owner one 'Reginahamy' by deed marked P1 bearing No. 6120 of 21.12.1979 transferred undivided $\frac{1}{2}$ share of the land to Appellant and by deed marked P2 bearing No. 911 of 10.10.1996 the said Reginahamy revoked Deed P1. Thereafter Reginahamy by Deed P3 bearing No. 9117 of 10.10.1990 transferred to Mendis Singho $\frac{1}{2}$ undivided share to Plaintiff's father. Mendis Singho by deed 844 of 10.01.1992 transferred to his son the Plaintiff (P4). Reginahamy executed deed P2 & P3 on the same date. By deed 1V1 No. 4847 on 14.10.1968 transferred $\frac{1}{2}$ undivided share to Appellant. In this way the Defendant-appellant claimed the entire property.

It was the position of the Appellant that the deed in question, deed P3 was in effect a deed of gift and not a deed of transfer, and in view of the provisions of the Kandyan Law Declaration Amendment Ordinance a deed of gift could be revoked as done in this instance by deed marked 1V2.

I would also prefer to refer to the evidence of a Grama Sevaka who gave evidence on behalf of Plaintiff. He had on 12.3.1991 visited the house of Plaintiff's father who had complained to him and at that time Plaintiff's father's mother and father were in the house and Reginahamy the

mother of Plaintiff's father produced deed 9116 (P3) for his perusal. By P3 Mendis Singho became entitled to ½ share of the land. The following to be noted, from Grama Sevaka's evidence.

ඊට පස්සේ මම ගිනිල්ලා මේ සිද්ධියට ආදාල අතින් හවුල්කරුවෙ මුණගැසුනා. ඊට පස්සේ මම ඒ පාර්ශවයන් දෙකටම එන්න කියල, ඉඩමට ගියා. ඉඩමට ගිනිල්ල ආර්. එම්. පයතිලක පාර්ශවයටයි ආර්. එම්. මෙන්ඩිස් සිංහුගේ පාර්ශවයයි දෙක එකතු කලා. ඊට පස්සේ මම දල මැනීමක් මැනල ඉඩම දෙකට බෙදල දුන්න දෙපාර්ශවයටම. මම ඒක කලේ 1991.03.12 වෙනි අගහරුවාදා. ඒක ඒ අය පිලිගත්තා. ඒ අනුව ඒ අයට සාමකාමව මායිම් බෙදල දුන්න. ඉඩම බෙදුවේ උතුරේ ඉඳල දකුණට. නැගෙනහිර පැත්ත ආර්. එම්. පයතිලකටත්, බස්නාහිර පැත්ත ආර්. එම්. මෙන්ඩිස් සිංහුටත් බෙදල දුන්න. ආටවල් දා ගන්න මම කුසුදු ගහල දුන්නා.

The main question to be decided is whether deed P3 is a deed of transfer or a deed of gift? If it is accepted as a deed of gift there is no question of same being revoked by the donor, for ingratitude. In fact that may have been the intention of the Appellant. There is a possibility that the Appellant had some influence over Reginahamy, his mother to induce her to execute a deed of revocation. All this is possible and it happens very often in our Sri Lankan society. But this court cannot arrive at such a conclusion in the absence of evidence. i.e no issue raised or evidence led based on undue

influence. However the above evidence of Grama Sevaka would give a clear indication of a land dispute between parties and the attitude of Reginahamy as a transferor or donor.

A very close examination of deed P3, (9116) no doubt indicate it is in fact a deed of transfer. At the top of pg. 1 of deed P3 the following could be very clearly identified No. 9116; date 10.10.1990; transfer; Rs.25,000/= . The entirety of Pg. 1 in P3 refer to a transfer and payment of consideration of Rs. 25,000/- to the transferee by Mendis Singho (transferee) subject to the life interest of Reginahamy (transferor). Pg 2/3 of P3 includes the schedule, validity of deed, signatures of transferor and witnesses, share to be transferred etc. There is no indication in the body of the deed and all important parts of any gift of property. It is nothing but a deed of transfer. In fact by the admission of paragraphs 1 – 5 are more particularly paragraph 5 of the plaint all doubts of the deed being a deed of gift could be rejected. In fact paragraph 5 focus on transfer deed 9116 (P3) executed in favour of plaintiff's father Mendis Singho after Reginahamy revoked deed P2. Nevertheless Defendant-Appellant argue as suggested in issue No. 12 deed P3, is in the nature of a deed of gift? Merely because some confusion arises by reading the attestation clause this court takes the view that the attestation

clause though refer to consideration in a particular way cannot alter the deed to make it a deed of gift. I am in agreement with the views of the learned District Judge, who had examined the case very closely and had the opportunity to test the demeanor of witnesses, and applied the facts of the case to some decided and relevant case law.

However before I proceed to analyse the facts in relation to case law, it would be useful to incorporate in this judgment the relevant portions of deed P3 as follows:

ඉහතකි අංක 9116 (පැ 3) දරණ චක්‍රණමකරයේ පලමුවෙනි පිටේ සඳහන් වී ඇත්තේ මෙසේය.

“..... පයමාන්ත ආරච්චිගේ රෙපිනානාම වන මට මට පසු මෙහි පහත ඇතැම් තැනක ඉහතකි ගැණුමකාරයා යයි කියන එකි කෝරළේ එකී තැපැල් සීමාවේ එකී තලහේනේ පදිංචි රත්නායක මුදියන්සේලාගේ මැන්ඩිස් සිංහේ මහතා විසින් මට ගෙවන ලද (ඒ බව මා විසින් මෙයින් පිලිගත්) ශ්‍රී ලංකාවේ භාවිතා වන මුදලින් රුපියල් විසිපන්දාහක (25,000) කරණ කොටගෙන ඉහත චක්‍රණමකාරී වන මට රත්නායක මුදියන්සේලාගේ මැන්ඩිස් සිංහේ මහතාට මෙයින් සිත්තකර චක්‍රණ අයිතිකර හිමිකර පවරා භාර දුනිම.”

The following authorities are incorporated in this judgment since the dicta in those cases could be considered and as far as the case in hand is concerned the following decided cases assist this court to arrive at a conclusions.

Nona Kumara Vs. Abdul Cader 47 NLR 457 ...

The plaintiff, when she was a minor, transferred certain lands to the first defendant by a deed which, on the face of it, was a transfer for consideration. She sought to have the deed declared null and void on the ground that her signature was obtained to it by undue influence, intimidation and threats. The District Judge held against the plaintiff on the questions of undue influence, intimidation and threats. He held, however, although no specific issue was raised, that the deed was a donation, and therefore null and void, merely because the transferor did not receive the consideration mentioned in the deed.

Held, that the deed which, on the face of it, was a transfer for consideration could not be held to be a donation merely because the transferor did not receive the consideration. The plaintiff's remedy was an action to recover the consideration and not to claim a cancellation of the conveyance.

Fernando vs. Cooray 59 NLR 169

Held (Basnayake, C.J., dissenting), that in the absence of any allegation of fraud or trust, it is not open to a party, who conveys immovable property for valuable consideration by a deed which is *ex facie* a contract of sale but subject to the reservation that that he is entitled to re-purchase it within a stipulated period on the repayment of the consideration together with interest thereon, to lead parol evidence of surrounding circumstances to show that the transaction was not a sale but a mortgage. Such parol evidence, even if admitted without objection, would offend the provisions of section 92 of the Evidence Ordinance and cannot be acted upon.

Jayawardene Vs. Amerasekera 15 NLR 280....

A person who knows the value of his property is not entitled to rescission of the sale merely by reason of the fact that the price at which he has sold the property is less than half its true value.

The case is otherwise where the property is sold at a price grossly disproportionate to its true value. In that case the law is on the side of the party who stands to lose by the transaction, and not on the side of the party who stands to make an unconscionable profit.

On the execution of a notarial conveyance the sale is complete, and the mere fact that the whole of the consideration has not been paid cannot, in the absence of fraud or misrepresentation, afford ground for the rescission of the sale and the cancellation of the conveyance.

The learned District Judge has on a balance of probability decided this case in favour of the Plaintiff-Respondent. In fact on the face of deed P3 it is nothing but a transfer deed. To state otherwise would certainly offend Section 92 of the Evidence Ordinance. Notwithstanding the evidence of the Notary as held in Fernando Vs. Cooray parole evidence, even if admitted without objection will continue to offend Section 92 of the Evidence Ordinance. No evidence to vary the consideration referred to in deed P3 would be admitted. The basic rule being that parole evidence cannot be adduced to contradict vary, add to or subtract from it's terms. Rule is founded on obvious inconvenience and injustice. Lord Coke calls the uncertain testimony of slippery memory. (The Conveyancer and Property Lawyer. E.R.S.R. Coomaraswamy pg. 417) oral evidence is not allowed where the effect of a document incidentally comes up for determination. Velan Alan Vs. Ponny 41 NLR 106. The mere statement of Notary is not

sufficient to establish the truth of the payment of such consideration 64 NLR 492. I have also to stress that paragraph 5 of plaint was admitted by the Defendant-Appellant.

In all the above circumstances of this case I see no reason to dispute the judgment of the District Court. I am convinced that the transferor of deed P3 had the intention to execute a deed of transfer. Parties should not be permitted to take advantage of a situation. Nor can very basic and acceptable rules be altered to entertain and admit documents 1V1 &1V2. The position would have been different if an unconditional deed of gift was to be revoked. Document P3 is only a deed of transfer. Therefore I affirm the judgment of the learned District Judge and dismiss this appeal with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL