

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

M. P. D. Gunapala  
Rathmalwala  
Wellarawa.

**PLAINTIFF**

C.A 381/1998 (F)  
D.C. Kuliyaipitiya 9619/P

Vs.

1. W. D. Violet Nona  
Bakmeeruppa,  
Wellarawa..
2. K. Dharmasena  
Bakmeeruppa,  
Wellarawa..

**DEFENDANTS**

**And**

M. P. D. Gunapala  
Rathmalwala  
Wellarawa.

**PLAINTIFF-APPELLANT**

Vs.

1. W. D. Violet Nona  
Bakmeeruppa,  
Wellarawa..
2. K. Dharmasena  
Bakmeeruppa,  
Wellarawa..

**DEFENDANTS-RESPONDENTS**

**BEFORE:** Anil Gooneratne

**COUNSEL:** J.C. Boange for Plaintiff-Appellant

M.C. Jayaratne with M.D.J. Bandara for the  
1<sup>st</sup> & 2<sup>nd</sup> Defendant-Respondents

**ARGUED ON:** 10.02.2012

**DECIDED ON:** 08.05.2012

**GOONERATNE J.**

This was an action filed in the District Court of Kuliyaipitiya to obtain a declaration that deed bearing No. 608 of 23.2.1986 had been fraudulently executed and an invalid deed. The point that was urged by

learned Counsel for Appellant was a vital contradiction between the evidence of the Defendant-Respondent and the Notary who attested deed No. 608 marked P3. Learned Counsel invited this court to consider the evidence (pg. 88 – 98 of the brief) where the Defendant-Respondent testified that consideration was paid in several instalments to the vendee and the Notary in his evidence stated that the whole sum of Rs. 10,000/- was paid before him and that it is stated so in the deed. It was the contention of the learned Counsel for the Appellant that evidence of the Notary should not be considered unless it is independently corroborated.

The proceedings of 21.7.1993 indicates that two admissions were recorded, viz. Plaintiff the owner of the land described in the schedule to the plaint, and that deed No. 608 was signed by Plaintiff on 23.2.1986. Parties proceeded to trial on 14 issues. Issue No. 2 refer the fact that Plaintiff is a blind person. No. 3 suggest that Plaintiff mortgaged the property and obtained a loan of Rs. 3000/- from 1<sup>st</sup> Defendant. Issue No. 4 refer to the deed No. 608 being a fraudulent deed. Issue No. 5 to 7 refer to irregular execution of deed. Defendant-Respondent suggest that Plaintiff had no cause of action and that deed in question had been regularly and properly executed as a transfer deed.

Having perused the material available in the original brief, since the Counsel for Respondent did not specifically meet the point raised by learned Counsel for Appellant, it seems to be the position of the Respondent that Section 92 of the Evidence Ordinance prohibits oral testimony to show that the transaction was different to that of a transfer. It is also the position of the Defendant that P3 was marked in evidence without any objection and no argument could be adduced to the effect that deed had been executed contrary to the provisions of the Prevention of Frauds Ordinance. Nor had the Plaintiff raised an issue in this regard.

The trial Judge has given his mind to the evidence of the 1<sup>st</sup> & 2<sup>nd</sup> Defendants. It is stated by the 1<sup>st</sup> Defendant that the Plaintiff is her uncle (father's brother). 2<sup>nd</sup> Defendant is her husband. Plaintiff had been in and out of her house and Plaintiff wanted to sell the property in question and she made payments of Rs. 1000/- in instalments up to a sum of Rs. 5000/- (pd at 1<sup>st</sup> Defendant's house). Plaintiff thereafter had taken a further sum of Rs. 2000/-. The balance sum of Rs. 3000/- paid at Notaries office by the 2<sup>nd</sup> defendant. All this evidence transpired at the trial. As such the trial Judge has correctly recorded same in his judgment. Land in dispute sold for Rs. 10,000/- as indicated in deed P3, and the 1<sup>st</sup> Defendant was not present in the

Notaries Office at the time of execution of deed P3. Trial Judge has referred to the evidence of the 2<sup>nd</sup> Defendant. His evidence corroborates the evidence of the 1<sup>st</sup> Defendant regards payments above.

At this point of this judgment this court has no hesitation in observing that there is a contradiction as regards payment for the price for the property as regards the consideration since, the version of the Appellant and the Notary differ. This is a matter to be inquired in terms of the Notaries Ordinance and this court would forward a copy of this judgment to the Hon Solicitor General to consider whether an offence is disclosed or to consider whether there is non observance of any statutory provision.

The main point that this court need to consider is whether the deed (P3) in question had been fraudulently executed?

The trial Judge in his judgment which is supported by evidence states that Notary by the name of A.S.K. Wijesinghe had attested the deed P3 and the consideration was Rs. 10,000/- as stated therein. Two witnesses called Jinadasa and Ariyadasa had signed the deed. Jinadasa had also given evidence and confirm the version of the Notary as regards the consideration and the mode of payment. The following excerpts from the judgment are incorporated to ascertain the role and duty of the above Notary.

මෙම පැ 3 ඔප්පුව සහතික කරන විට මෙම නඩුවේ පැමිණිලිකරු සහ පැ 3 ඔප්පුවේ විකුණුම් කරු වන තැනැත්තා අන්ධ පුද්ගලයෙක් බව ඔහුට පෙනී ගිය බවත් එම හේතුව මත මෙම ඔප්පුව සකස් කිරීමට පෙර ඔහු ඉතා උනන්දුවෙන් සිටිය බවත් පැ 3 ඔප්පුවේ ලියන්නේ මේ ගැන දැන ගෙනද බව ඔහු පැමිණිලිකරුගෙන් ප්‍රශ්න කල බවත් සින්නක්කර ඔප්පුවක් ලියන බව පැමිණිලිකරුට පැහැදිලි කර දී ඔප්පුව ලිවීමෙන් පසුව අත්සන් කිරීමට පෙර එම ඔප්පුව කියවා පැමිණිලිකරුට සහ සාක්ෂිකරුවන්ට පැහැදිලි කර දුන් බවත් ඉන් පසුව පැමිණිලිකරු සාක්ෂිකරුවන් සහ ඔහු එම ඔප්පුව අත්සන් කළ බවත් කියා ඇත. නොතාරිස් මහතා තවදුරටත් කියා ඇත්තේ මෙම පැමිණිලිකරු අන්ධ පුද්ගලයෙක් නිසා පැ 3 ඔප්පුව අත්සන් කිරීමට පෙර ඔහුට ඔහු විසින් සින්නක්කර ඔප්පුවක් ලියන බවට හොඳින් පැහැදිලි කර දුන්න බවත් පැමිණිලිකරු සහ විත්තිකරු ඥාතින් හෙයින් එක් අවධියක පැමිණිලිකරුට තැගි ඔප්පුවක් මගින් මෙම ඉඩම 1 වන විත්තිකාරියට ලියා දීම සුදුසු බව නොතාරිස් මහතා උපදෙස් දුන්න බවත් නමුත් පැමිණිලිකරු විශේෂයෙන්ම සින්නක්කර ඔප්පුවක් ලියන ලෙස ඔහුට උපදෙස් දුන්න බවත් ඔහු කියා ඇත. 1 වන විත්තිකාරියගේ 2 වන විත්තිකරුගේ සහ පැ 3 ලේඛනයේ සාක්ෂි කරුවෙක් වන පිනදාසගේ සාක්ෂි සහ පැ 3 ඔප්පුව සහතික කළ නොතාරිස් මහතාගේ සාක්ෂි වලට මගේ අවධානය යොමු කරන විට මට පෙනී යන්නේ පැ 3 ඔප්පුව නිත්‍යානුකූලව සකස් කර ඇති ඔප්පුවක් බවත් ය.

The learned District Judge has also given his mind to the following authorities. The case of Perera Vs. Fernando 17 NLR 486 seems to be relevant to the case in hand. Just like the present case Respondent's position that the deed of sale was in reality a mortgage.

Perera Vs. Fernando 17 NLR 486 ...

Where a person transferred a land to another by a notarial deed, purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage, and that the transferee agreed to re-convey the property on payment of the money advanced.

The admission of oral evidence to vary the deed of sale is in contravention of section 92 of the Evidence Ordinance.

The agreement to re-sell is not a trust, but is a pure contract for the purchase and sale of immovable property.

53 NLR 457.... At 459

A deed which on its face appears to be in order is presumed to have been duly executed. The mere framing of an issue as to the due execution of the deed followed in due course by a perfunctory question or two on the general matter of execution, without specifying in detail the omissions or illegalities which are relied upon, is insufficient to rebut that presumption.

At page 150 of the record the following passage appears: –

A: He signed sitting up. The witnesses were there at the same time.

Q: I am putting it to you that the witnesses were not there and your attestation is false?

A: That is not correct.

Q: The only persons who were there at the time were Mr. D.C Wijewardene, Buddarakkita (defendant) and the other person who signed other than these two persons?

A: That is not correct.

Q: I am putting it to you that you got some signatures in your house?

A: I never did that

Q: You did not do that on this day?

A: No.

It seems to me that the only reasonable inference to be drawn from these passages is that the witness's position was that the two witnesses were there at the relevant time and signed according to the requirements of section 4 of the Prevention of Frauds Ordinance (Cap. 57). As regards the notary himself, Sir Ukwatte Jayasundere contended that when

the witness states "I attested the deed" he was referring to the formal attestation which accompanies a deed. Having regard to the context in which the phrase was used I am unable to accept that interpretation. It seems to me that the reasonable and natural meaning of the expression is that the witness himself signed the deed as the attesting witness. Moreover, the artificiality of the contention is, in my opinion, demonstrated by the fact that no specific challenge was made to the witness to the effect that he himself had not signed the deed at the proper time and in accordance with the requirements of section 4 of the Prevention of Frauds Ordinance. I am, therefore, prepared to hold on the actual language of the record that the due execution of this deed is sufficiently proved. But even if that were not so, and if the correct view is that there is some small omission in the chain of evidence, I would not be disposed to say in the light of the emphasis which was placed on the various issues in the court below that such small omission was fatal to the respondent's position. There is, of course, a presumption that a deed which on its face appears to be in order has been duly executed, and it seems to me that the mere framing of an issue as to the due execution of the deed followed in due course by a perfunctory question or two on the general matter of execution, without specifying in detail the omissions or illegalities which are relied upon, is insufficient to rebut that presumption.

Gunasekera vs. Uyangodage 1987 (1) SLR 242...

The plaintiff executed a transfer in the name of 1<sup>st</sup> defendant all arrangements for the transaction being made by the 2<sup>nd</sup> defendant. The plaintiff sued the defendants for a declaration that they held the property in trust for her alleging an oral agreement to retransfer the property to her within three years on payment of Rs. 17,000/-. In the meantime the plaintiff was to remain in possession and service the housing loans while the defendants would assist her to raise a loan from a third party if the need arose. Although the consideration on the deed in favour of the 1<sup>st</sup> defendant was stated to be Rs. 17,000/- only Rs. 10,000/- was paid in terms of the agreed arrangement. The plaintiff's suit was failed after the lapse of the three years and no tender of the money had been made within the three years.

Held-

Apart from the fact that ss. 91 and 92 of the Evidence Ordinance do not permit the receipt of evidence to vary the terms of a notarially executed deed so as to superimpose on a simple transfer deed characteristics such as mortgages or agreements to transfer yet even on the facts no trust can be held to have been established. Time was of the essence of the alleged oral agreement and the constructive trust yet there was no evidence that the money was even tendered in time.

Deed P3 was not objected to by the party concerned at the stage of same being marked and produced in court.

Reference could be made to 1981 (1) SLR 18 at 24  
Siyadoris Vs. Danoris 42 NLR 311...

Where a deed has been admitted in evidence without objection at the trial, no objection that it has not been duly proved could be entertained in appeal.

Andrishamy v. Balahamy (1 Matara Cases 49) followed.

In all the above circumstances this court cannot fault the judgment of the District Court. On a balance of probability District Court prefer the version of the Respondent. As such this court will not interfere with the judgment which has considered the above authorities and held that the deed had been properly executed. However this court observes that the role of the abovenamed Notary need to be examined. As such I affirm the judgment of the District Court and dismiss this appeal without cost.

I direct the Registrar of this Court to forward a copy of this judgment to the Hon. Solicitor General to enable him to consider the observation made by this court in the light of the evidence that transpired in the Original Court.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL