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

C.A 87/1998 (F)
D.C. Mt. Lavinia 129/93/L

1. M. I. Sheela Fonseka
(nee Silva) of No. 14, Ramya Road,
Colombo 4.

2. M. Manel Silva of
No. 103, Galle Road, Dehiwela.

PLAINTIFFS

Vs.

M. Chitra Mallika Silva of
No. 103, Galle Road, Dehiwela
(Deceased)

DEFENDANT

AND NOW

T. M. Sudanga Pasindu Silva of
No. 6/1, Watarappola Road,
Mount Lavinia.

SUBSTITUTED-DEFENDANT-APPELLANT

Vs.

1. M. I. Sheela Fonseka
(nee Silva) of No. 14, Ramya Road,
Colombo 4.

2. M. Manel Silva of
No. 103, Galle Road, Dehiwela.

PLAINTIFF-RESPONDNETS

BEFORE: Anil Gooneratne J.

COUNSEL: Shantha Jayawardena for the
Substituted-Defendant-Appellant

D. P. Mendis P.C., and Saliya Mathew for
Plaintiff-Respondnets

ARGUED ON: 02.07.2012

DECIDED ON: 12.10.2012

GOONERATNE J.

This was an action filed in the District Court of Mt. Lavinia by the two Plaintiff-Respondents against the Defendant-Appellant (both parties being sisters of one family) for a declaration of title to the land described in the schedule to the plaint (prayer ඇ) and for eviction/damages as prayed for in the plaint. The land in dispute is more particularly identified as lot 2G depicted in survey plan No. 3029 of 28.2.1982 which is part of the property

bearing Nos. 103 & 103A, Galle Road. The owner of the property in dispute was the mother of the Plaintiffs and Defendant, Mrs. Mildred de Silva who by deed No. 1387 (P2) dated 1.9.1991 gifted the said property to the Plaintiffs. In the plaint it is averred that the Defendant with the permission of Plaintiffs occupied the said property. It is pleaded that from or about November 1992, the Defendant had unlawfully, and rejecting Plaintiffs title continued to occupy the premises causing damages as in paragraph 7 of the plaint.

The trial was originally taken up before the learned Additional District Judge who after recording admissions and issues indicated that he is not inclined to take up the trial for personal reasons. (vide proceedings of 7.6.1996). Then the case had been referred to the District Judge who on the same date recorded afresh two admissions and parties proceeded to trial on 5 issues. Jurisdiction of court and the ownership of property by Mildred Silva had been admitted. There was much emphasis to demonstrate the trial judge's refusal to record issues the way it was recorded before the learned Additional District Judge, at the hearing of this appeal, by learned Counsel for Defendant-appellant. In other words it was the submission of the learned counsel for Appellant that the issues framed for the Appellant do not reflect the case pleaded in her answer. I observe that the learned counsel for

Appellant, although such a position could have been urged or canvassed at a very early stage, when the trial court made orders in this regard or refused to frame issues the way the counsel suggested before the original court, no Leave to Appeal application was filed at the correct stage or point of time . In this court counsel argued that the Defendant-Appellant was denied a fair trial, and invited this court to Section 146 of the Civil Procedure Code and emphasized that it is the duty of court to frame issues. No doubt the responsibility to frame issues is cast on the trial judge. Vide Pathmawathie Vs. Jayasekare 1997 (1) SLR 248 per Wigneswaran J. "though in practice counsel appearing for Plaintiff and Defendant do suggest issues it is the prime responsibility of the judge to frame issues. Dodwells case 74 NLR 25; 65 NLR 555. Counsel also argued that issues framed, not reflected from pleadings and referred to Section 150 of the Code.

The legal position as argued by learned counsel for Appellant is correct, but factually, and considering the practicality of the position taken up should be examined. In the answer it is pleaded that (1) Deed No. 1387 is not an act or deed of Mildred Silva and thus the deed is null and void (vide paragraphs 5ඇ and 6ඇ of answer) (ii) The purported signature of Mildred Silva placed on deed 1387 is not hers and as such the deed is null and void.

In both (i) and (ii) above answer states the deed in question is null and void. This judgment may be prolix unnecessarily but for purposes of clarity I would include the set of issues recorded before the learned Additional District Judge and the learned District Judge.

Before Additional District Judge

(a) පැමිණිල්ලේ සඳහන් අංක 1387 ඔප්පුව වලංගු එකක්ද?

(b) පැමිණිල්ලේ සඳහන් අංක 1387 දරණ ඔප්පුව අත්සන් කරන අවස්ථාවේ දී එකී ඔප්පුව ප්‍රධානකරු වන මිල්ඩ් සිල්වා තමා කරන ක්‍රියාව දැන සිටියාද?

Before District Judge

(A) පැමිණිල්ලේ සඳහන් අංක 1387 ඔප්පුව අත්සන් කරන අවස්ථාවේ දී මිල්ඩ් සිල්වා නැමැත්තිය සිහි කල්පනාවෙන් සිටියාද?

(B) නොඑසේ නම් අවලංගු බල රහිත ඔප්පුවක් වන්නේද?

(C) එසේ නම් පැමිණිල්ල නිශ්ප්‍රභා කල යුතුද?

Counsel argued that the vital issue of the Appellant's case whether the deed No. 1387 was an act or deed of Mildred Silva has been illegally omitted before the learned District Judge. Thereby counsel's view was that it will narrow the scope of the trial to issues not pleaded.

This court observes that the answer of the Defendant suggest as summarized in (i) & (ii) above that the executant of the deed in question

namely Mildred Silva never executed the deed 1387 or that it was not her act and that Mildred Siva never signed deed 1387, as such the deed is null and void. There is no doubt a very subtle difference could be seen in the way issues were recorded before the District Judge and the Additional District Judge. I do not deny that the question of fraudulent deed is omitted. But what flows from the answer is that the executant 'Mildred' never executed deed 1387 and that she never signed deed 1387. As such the deed is as a result of a fraud? There is a similarity in the two set of issues i.e 'b' and 'A'. If the executant does not have the proper mental capacity a deed cannot be executed by the executant or if the executant was completely unaware of the act of preparation of the deed, there cannot be an existence of the deed concerning the donor.

In view of the above I do not see that the Appellant has been prejudiced to such an extent to deny her defence. If the Appellant succeed in proving that 'Mildred' her mother was not in a proper mental state what follows would be, if proved to declare the deed null and void.

At the hearing there was a suggestion of the trial judge being bias but such submission was not pursued by learned counsel for Appellant and as such this court does not wish to enter into such an area without a proper basis. In any event there is a lapse on the part of the Appellant by not

challenging such a position on the question of recorded issues of the case, at the relevant time or stage of the case. I am also mindful of the dicta in Gunawardena Vs. Deraniyagala & Others 2010 (1) SLR 309. It is not open to a party to put forward a ground for the first time in appeal, if the said point has not been raised at the trial under the issues so framed.

Having not moved the Appellate Court at the correct point of time, it is the view of this court that the appellant has acquired in the proceedings and has tacitly agreed to be bound by it. 2 NLR 144; if there was a refusal by the trial judge to deny a proper hearing, appellant could have preferred an interim appeal. 14 NLR 347. Above all the trial judges' views on factual matters are plausible and should not be unnecessarily disturbed since he has also expressed his views on the demeanor of witnesses.

Once issues are settled the pleadings would recede to the background. The main issue would revolve around Mildred Silva's mental capacity (issue No. 3). As observed above has the Defendant-Appellant proved issue No. 3? Having raised such issue, position pleaded in paragraph 5a and 6b/6c of the answer would recede to the background. On a perusal of the judgment of the trial judge it is evident that same is supported by the evidence led at the trial.

The judgment of the original court has focused it's attention particularly to issue No. 3. The evidence of Attorney/Notary who attested the deed had been considered along with the evidence of attesting witnesses (vide folios 117, 118 and 121 – 124 (mental capacity) of the original record)).

The Attorney/Notary and the two attesting witnesses had been known to the executant, Mildred Silva. Notary and two witnesses are also known to each other. All of them have given evidence to the effect that Mildred Silva had the proper and correct mental capacity to execute the deed though she was undergoing treatment for a very serious ailment. In fact the trial judge had recorded an item of evidence of Attorney about Mildred inquiring from attorney as to the delay in registering the instrument. **මිල්රඩ් සිල්වා එම ප්‍රමාදය පිලිබඳව දුරකථනයෙන් තමාගෙන් විමසුව බවද නිතිඥ මහතා කියයි**".

However this court observes that when a person is suffering from a serious ailment the Notary should consult a Doctor and get a certificate about mental capacity of the executant. It was not done in this instance and the Attorney had not in fact denied or attempted to avoid answering such a question in evidence. It was his position that nevertheless Mildred was alert and was at the time of execution of deed was seated and

capable of understanding the nature of the act which she performed. Evidence of the attesting witnesses support this position. Cross-examination of above witnesses had not favoured the Defendant to support lack of mental capacity. This court and the court below could not have come to a conclusion that the Notary concerned was grossly negligent or ignorant by not verifying mental capacity by medical advice.

A professional adviser does not guarantee the soundness of his advice. His duty is to bring to the exercise of his profession only a reasonable degree of care and skill but not the highest degree of skill. Only gross negligence or gross ignorance alone would justify an action for damages against him. Perera Vs. Chinniah 7 NLR 257. In the case in hand there is no material against the Attorney on the above point. A notarial instrument is entitled to the presumption in favour of the regularity of the official acts. Dewar Umma Vs. Ismail Maikar 3 Bal 90; But can be rebutted by very cogent evidence. Hagupillai Vs. Sivakuru 4 C.A.c 101.

The trial judge has also carefully considered the evidence of an important witness, namely Lakshmi Kanthi Premaratne who was the sister of the Defendant as well as the 1st Plaintiff. It was her testimony that the deceased mother 'Mildred' had done her duty towards all 4 children and that it was the mother's intention to do so for all of them. However this witness

was not present when the deed was signed by the mother in the presence of Notary and other two witnesses. It was the witnesses evidence that the deceased mother had told her prior to execution of the deed and after, that she would execute the deed in favour of the Plaintiffs (two elder sisters). Witness also confirm that the deceased mother was in a proper mental state even after the operation as the mother informed her about the execution of the deed after the operation. The trial judge has been able to comment about the demeanor of the said witness and accept her to be a truthful witness.

At this point I would rely as stated by me in cases involving demeanor, of the dictum of Viscount Simon in Walt Vs. Thomas (1947) 1 All E.R 582 at 583.. the appellant court to bear in mind that the view of the trial judge as to whether credibility lies is entitled to great weight. Judge at the first instance when estimating the value of verbal testimony, has the advantage, cited with approval in 69 NLR 97.

The trial judge having also considered the case of the Defendant-Appellant and Plaintiff-Respondent on a balance of probability favour the version of the Plaintiff-Respondent. The Court of Appeal will not without cogent reasons disturb findings of the original court on primary facts. Mere allegations of persons being not fit or incapacitated would not suffice. Appellate Court should be very cautious when such allegations are

leveled against a person. Mere allegation cannot displace the truth and primary facts need not be disturbed 1993 (1) SLR 119.

This court observes that though it is possible to comment on certain errors of the trial judge re-framing of issues, I see no real legal basis to set aside the judgment. Article 138 (1) proviso of the constitution support the view that unless substantial rights of parties are prejudiced or it occasioned a failure of justice no judgment, decree or order should be reversed or varied on account of any error, defect or irregularity. The trial judge's judgment in it's entirety and the conclusions cannot be faulted. As such I affirm the judgment of the District Court. Appeal dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL