

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

Abdul Majeed Ummu Thahira,
of No. 44, 44/6, and 44/7,
Modera Street, Colombo 15.

Plaintiff-Appellant

C.A. No. 686/99(F)
D.C. Colombo Case No. 4657/ZL

Vs.

Commulage Don Mable Jeeny
Rose of No. 46, Modera Street,
Colombo 15.

Defendant-Respondent

Before : RANJITH SILVA, J. &
A.W.A. SALAM, J.

Counsel : N.R.M. Daluwatte P.C. for the Plaintiff-Appellant.

Upali de Almeida ^{eida} with R.J.U. de Almeida for the
Defendant-Respondent.

Argued on : 03.12.2010

**Written submissions
tendered on** : 03.08.2011

Decided on : 24.11.2011

Ranjith Silva, J.

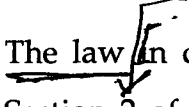
The Plaintiff-Appellant (hereinafter referred to as the Appellant) instituted action to vindicate title to the premises bearing numbers 44, 46/6, and 46/7 situated at Modara Street, Colombo 15. He sought *inter alia* a

declaration that he is entitled to quiet possession of the aforementioned premises without any interruption or disturbance from the Defendant-Respondent (who shall hereinafter be referred to as the Respondent).

The respondent did not contest the ownership of the appellant with regard to premises number 44 and thus the area of dispute was narrowed down to the ownership of premises bearing number 46/6 and 46/7. After trial the appellant was granted relief in respect of premises bearing number 44 and his claim in respect of premises bearing Numbers 46/6 and 46/7 was dismissed whilst holding in favour of the respondent. Apparently the learned Judge had done so on the strength of the deed bearing number 894 dated 23rd of March 1983.

Being aggrieved by the judgment of the learned District Judge the appellant has invoked the appellate jurisdiction of this court to canvass the correctness of the findings, conclusions and the judgment of the learned District Judge, both in relation to the dismissal of the action in relation to premises bearing Nos. 46/6 and 46/7 as well as the declaration made in favour of the respondent in respect of 46/6 and 46/7.

The said deed executed by the Executants by placing her left thumb impression is being impeached in these proceedings. At this stage of arguments both parties agreed that if the court were to decide that the deed bearing number 894 containing only the left thumb impression of the executant without any mark is properly executed ^{then} ~~that~~ the appeal should stand dismissed and vice versa.

The law  In deciding this issue it becomes very important to deal with Section 2 of the Prevention of Fraud Ordinance No. 7 of 1840 which is reproduced below without the inapplicable words.

No sale, purchase, transfer, assignment, or mortgage of land or other immovable property,..... shall be of force of avail in law unless the same **shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her** in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed or instrument be duly attested by such notary and witnesses.

The absence of an interpretation of the word "sign" or its grammatical variation is rather conspicuous. In the circumstances, one must have recourse to the Interpretation Ordinance of 1901 to ascertain the meaning of the word "sign". Section 27(2) of the Interpretation Ordinance reads "sign" with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include "Mark" with its grammatical variations and cognate expressions. Therefore, it is seen that the word "sign" includes a mark. However, the term "mark" is not defined in the Interpretation Ordinance. The law Lexicon 1997 - second edition - (The Encyclopaedic Law Dictionary) by P. Ramanathan Aiyar at page 1195 the word "Mark" is defined as follows....

"In the case of illiterate persons "Mark" takes the place of a signature. As a verb to mark is to make a visible sign upon something; to affix a significant mark to;....."

With the enactment of the Notaries Ordinance ~~in~~ Section 31(15) dispense with the necessity of having recourse to the Interpretation Ordinance to ascertain the meaning of the word "sign".

Section 31(15) reads, "If any deed or instrument executed or acknowledged before him be signed by any of the parties or witnesses thereto with a mark, or with a signature in a language other than that in which the notary is authorized to practice, he shall write over such mark or signature in his own handwriting and at the time of execution the words "This is the mark (or signature, as the case may be) of A.B." (here insert the name of the person signing with the mark or signature); and in the case of a mark he shall besides require such person to affix to the deed or instrument the impression of his left thumb and shall write over such impression at the time and in the manner aforesaid the words "This is the left thumb impression of A.B." (here insert the name of the person whose thumb impression it is).

Ordinarily ^{when} ~~went~~ a deed is signed by a mark the notary shall require that such person should affix to the deed the impression of his left thumb and ^{also} ~~all so shall~~ right ~~over such a question~~ the words "This is the left-thumb impression of A. B .". Although the said requisites laid down in section 31(15) have not been strictly adhered to in the instant case inasmuch as the deed in question contains only the left thumb impression of the ^{ant} ~~executed~~ of the deed and lacks any mark ^{would like to} ~~made by her I should~~ advert to section 33 of the Notary's Ordinance which mitigates such irregularity.

Section 33 reads thus.

No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form: provided that nothing herein before contained shall be deemed to give validity to an instrument which may be invalid by reason of non-compliance with the provisions of any other written law.

An example ~~in respect~~ of the proper application of the above proviso could be gathered from the Prevention of Frauds Ordinance. Any breach of any condition laid down in subsection to section 31 of the Notary's Ordinance does not make the instrument invalid solely on account of the non-compliance of any one of those formalities prescribed in that section, if the document is otherwise valid.

This sort of omission at best relates not to the substance but the form and thus falls within the phrase "failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form".

This position is augmented by judicial interpretation in Wijeratna and another Vs Somawathie 2002 (1) SLR page 93 at page 97 and 98. In the above case it was held - I quote "

The learned President's Counsel for the appellants queried the absence of the signature or mark of the executant in deed 986 referred to above, as provided for by section 31 (15) of the Notaries Ordinance. Apart from the fact that even the petitioners deed, bearing No. 3511 referred to above also executed by Elsina, not having the latter's signature or mark and not even been proved, the placing of the thumb impression without a mark by an executant would not invalidate a deed. Non-compliance of the Rules in

section 31 of the Notaries Ordinance does not invalidate a deed as provided for by section 33 of the same Ordinance. That section protects the deed. The absence of a mark by the executant at most would be non-observance by the Notary of the rules specified in section 31 aforesaid. As stated by the learned Counsel for the appellants, although a possibility exists for obtaining a thumb impression of a person who is dead, unconscious, asleep or when intoxicated in the instant case the person who accompanied the executant was no other than the executant's own son who later testified to a conscious act of her mother when describing the incident of attestation referred to above. It is my view that the essential element of due execution is to comply with the provisions of section (2) of the Prevention of Frauds Ordinance and as stated by E. R. S. R. Coomaraswamy in the 'Conveyancer and Property Lawyer', vol. 1, part 1 (1945) "Non-compliance with the provisions of the Notaries Ordinance will not invalidate a deed as long as the provisions of section 2 of the Prevention of Frauds Ordinance are complied with".

The facts of the instant case are on all fours with those of the judgment above referred to. In addition to what I have already stated it is pertinent to emphasize the difference of placing a mark as opposed to placing the thumb impression. A mark attributable to ^{an} ~~an~~ executant could be made by anybody and does not have distinguishing features like in the case of a ~~sick nature or the~~ left thumb impression which could safely be considered as fool proof. If one were to advance the argument that the thumb impression of ^a deceased person or a person who is in an unconscious state could also be placed on a deed but those are matters ^{we need} ~~that he did~~ not address our mind as ^{they} ~~generally those~~ do occur exceptionally and the same charge could be made in respect of a mark as well.

It is my considered view that ~~therefore~~ the formalities with regard to forms should not be applied with the same rigour and harshness with regard to the affixing of a thumb impression. In contrast to observing the formalities when affixing ^a the mark, *should be observed delegality.*

For the foregoing reasons, I hold that there is no substance or merit in this appeal and I refuse to interfere with the findings of the learned district judge ~~and~~ dismiss this appeal with costs fixed at Rs 10000/=.

Judge of the Court of Appeal

I agree

A.W.A. Salam, J

Judge of the Court of Appeal