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

1. Devayalage Upaneris
2. Devayalage Ariydasa
3. Devayalage Herathhamy

Plaintiff-Appellants

Vs.

CA Appeal No: 136/96 (F)
DC Avissawella 16181/L

1. Devayalage Piyasena
2. Devayalage Wimalasuriya
3. Devayalage Puransina (deceased)

Defendant-Respondents

Devayalage Piyasena
Devayalage Wimalasuriya

Substituted 3rd Defendant-Respondent

Before : Sisira de Abrew J &
Anil Gooneratne J

Counsel : Lakshman Perera with U. Walagampaya for the appellants
PL Gunawardene with KWS Karaliyadda for the respondents.

Argued on : 26.11.2010 and 29.11.2010

Decided on : 3.02.2011

Sisira de Abrew J.

Plaintiff appellants filed this case in the District Court of

Avissawella to get a declaration of title to 1/3rd of share of the land described in the schedule to the plaint. The learned District Judge, by her judgment dated 24.4.96, dismissed the action of the plaintiff appellants. Being aggrieved by the said judgment, the plaintiff appellants have appealed to this court.

Parties have admitted that Devayalage Babanis who was the original owner of undivided 3/4th share of the land in suit transferred his rights by deed No. 21228 dated 19.7.1911 to Andiris, Suta alias Sutan and Saima and that Sutan died on 22.10.1980.

Three plaintiffs took up the position that they were the children of Sutan, by his 1st marriage. Defendant Respondent took up the position that after the death of 1st wife of Sutan, he, in 1949, started living with Puransina as husband and wife and that during this period she gave birth to six children whose father is Sutan. In 1970 the marriage between Sutan and Puransina was registered. Puransina, the 3rd defendant took up the position took up the position that the land in question was gifted to her six children by Sutan by deed No. 1952 attested by Milroy Jayawardene on 3.6.1974. The case proceeded on following six issues.

1. Are the plaintiffs the legal heirs of Sutan?
2. Did the plaintiffs derive rights of Sutan after his death?
3. If the above two issues are answered in favour of the plaintiff, are the plaintiff entitled to the relief claimed?
4. Did Sutan transfer his rights to the defendants in this case by deed No.1952 attested by Milroy Jayawardene on 3.6.1974?
5. If the issue No.4 is answered in the affirmative can the plaintiff maintain this action?

6. Is deed No.1952 dated 3.6.1974 produced by the defendant a genuine deed in fact executed by Sutan?

Learned District Judge answered issue No 6 in the affirmative. Learned counsel for the plaintiff appellant complained that answering issue No.6 in the affirmative was wrong. He submitted that Sutan never came and signed the deed No.1952 and that it was not proved. He submitted that to prove a deed, the evidence of the Notary Public and two attesting witnesses was not sufficient. I now advert to this contention. It is relevant at this stage to mention here that the EQD could not express a definite opinion about the handwriting in the signature of Sutan appearing in deed No.1952 and other documents sent to him.

Learned counsel for the appellant contended that in 1949 Sutan was gored by a bull and as a result of this attack he was stooping and walked with aid of a walking stick. To strengthen this contention he relied on the evidence the 3rd plaintiff. Rev.Premaratne who said that in 1949 his father was gored by a bull and as a result of this attack he was stopping. His evidence was challenged by the defendants when a suggestion was made to him that he being a Buddhist priest was uttering falsehood, he did not reply. He was the only person who spoke about Sutan's stoop. Both attesting witnesses to the deed No.1952 Aranolishamy and Galadeniya who knew Sutan said that he could walk properly. Galadeniya who was the clerk of the Notary said that Sutan was a hefty man who could walk properly. In fact when learned counsel who appeared for the plaintiff at the trial suggested to the witness Aranolishamy that Sutan could not walk due to defect in the body, he denied this suggestion (vide page 112 of the brief).

Puransina who claimed that she got six children from Sutan was not questioned about Sutan's stoop. According to Puransina, she was living with Sutan from 1949 to 1980. But learned counsel who appeared for the plaintiff did not question her on this matter. In my view she was the best witness to answer this question (whether Sutan was stooping). Failure on the part of the plaintiff to question Puransina about the alleged stoop suggests that thee is no truth in the allegation that Sutan was stooping. Learned District Judge has placed more reliance on the evidence led by the defendants. When I consider all these matters, I hold the view that there is no sufficient evidence to conclude that Sutan was stooping at the time he signed the deed.

Learned Counsel for the appellant submitted that to prove a deed the evidence of the Notary and two attesting witnesses was not sufficient. In support of his contention he cited Solicitor General Vs Avaumma 71 NLR 512. In that case Court observed that "in a criminal case involving the offence of forgery of a deed of transfer of immovable property, the two attesting witnesses of the execution of the deed were the 3rd and 4th accused. The prosecution, as its contention was that it was not competent for it to call the two attesting witnesses, sought to call, as witnesses, an owner of the land and the notary who attested the deed. Counsel for the defence objected to the production of the deed on the ground of a lack of compliance with section 68 of the Evidence Ordinance. The trial Judge upheld the objection and acquitted the accused."

Held; that section 68 of the Evidence Ordinance had no application to a criminal case where the prosecution had made the attesting witnesses also

accused in the case and, far from seeking to use the deed as evidence, was impugning it as a forgery committed as a result of the abetment of the said offence on the part of the witnesses and the vendee. In such case, the elements of the charges which have to be established by the prosecution may be established in any of the ways permitted by law."

When I consider the above judicial decision and the facts of this case, I hold that the above judicial decision has no application to the contention raised by learned counsel for the appellant.

Since learned counsel foe the appellant contended that deed No.1952 was not proved and that the evidence of the Notary and two attesting witness was not sufficient to prove a deed, I must consider whether the deed No.1952 had been proved. In order to find an answer to this question I must consider Section 68 of the Evidence Ordinance which reads as follows: "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."

Is a deed of gift required by law to be attested? Answer to this question is found in Section 2 of the Prevention of Frauds Ordinance which reads as follows: "No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any

contractor agreement for the future sale or purchase of any land or other immovable property, and no notice, given under the provisions of the *Thesawalamai* Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be of force or 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 an two or more witnesses present at the same time, and unless the execution of that writing, deed, or instrument be duly attested by such notary and witnesses."

It is clear from the above section that deed of gift is a document which is required by law to be attested. Has the deed No.1952 been proved? In order to answer this question I would like to consider a judgment of Bonser CJ. In Arnolis Vs Mutu Manike 2NLR 199 Boncer CJ held: "In order to prove a mortgage bond attested by a notary and two witnesses it is not necessary that the notary and both the attesting witnesses should be called. It may be proved by the evidence of only one witness although as a matter of precaution it may be advisable in many cases to call the attesting witnesses." His Lordship in the said judgment remarked thus: Mr.Drieberg, the Acting District Judge of Ratnapura, held that as a matter of law it was necessary to call both the attesting witnesses. I am unable to agree with that statement of law. A deed can be proved by the evidence of one witness, though as a matter of precaution it may be advisable in many cases to call all the witnesses."

ERSR Coomaraswamy in his book titled "The law of evidence Vol.11(book1) at page 108 states: "The object of requiring attestation by

more than one witness is to guard against the difficulties arising out of death, unavailability, absence from jurisdiction and other causes. If one witness is called and he speaks to the attestation, the document is prima facie proved."

Applying the principles laid down in the above legal literature, I hold that a deed can be proved by the evidence of one attesting witness. I therefore reject the contention that the evidence of Notary and two attesting witnesses is not sufficient to prove a deed. In the instant case the two attesting witnesses and the notary gave evidence about the execution of deed No 1952. Both attesting witnesses said that Sutan who was known to them signed the deed. For these reasons, I hold that deed No.1952 has been proved. For the above reasons, I hold that issue No.6 has been correctly answered by the learned trial Judge.

Learned counsel who appeared for the plaintiff appellant at the trial framed following additional issues in his written submission.

1. Is the deed No.1952 dated 3.6.1974 a deed of gift?
2. Have the donees accepted the gift given on deed No.1952 dated 3.6.1974?

Donees have not signed the deed. Learned counsel therefore contended that this was not a valid gift. He cited the judgment of the Court of Appeal in Bertie Fernando Vs Missie Fernando [1986] 1SLR page211 wherein the court held: "The burden of proving acceptance of a deed of gift is on the party claiming under it. Where there has been no valid acceptance of a deed of gift, the donor is perfectly entitled to revoke it even unilaterally and make another disposition."

In the present case the learned trial judge considered the two issues and observed that deed No.1952 dated 3.6.1974 was a deed of gift. There is evidence that Puransina and her children continued to occupy the property in the deed of gift. The learned trial judge has considered these matters in page 8 and 9 of the judgment. In my view thee is evidence to answer the said two issues in the affirmative. When the above issues are answered in the affirmative plaintiff's case should fail. However the learned trial judge has remarked that these two issues were not relevant to the case.

When I consider the evidence and the judgment of the learned trial Judge I hold the view that there is no reason to interfere with the judgment of the learned trial Judge.

For the reasons stated above, I dismiss the appeal of the plaintiff appellant with costs.

Judge of the Court of Appeal.

Anil Gooneratne J

I agree.

Judge of the Court of Appeal.