

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

In the matter of an
application for leave to
appeal

Court of Appeal No: CALA 466/2005

District Court of Colombo No: 401/T

K.C. Annamalai Chettiar by
his Attorney Udaya Mohan
Ramanathan

1st Defendant-Petitioner

Vs.

A.N.A.R.S.T. Subramaniam
Chettiar & Another

Plaintiff-Respondent & three
others

Before: **Eric Basnayake J**

Counsel: Harsha Soza P.C. with Anuruddha Dharmaratne for the 1st Defendant-Petitioner
Basheer Ahamed for the Plaintiff-Respondents

Argued On: 1.3.2011

Written Submissions Tendered On: For the 1st Defendant- Petitioner: 15.3.2011

Decided On: 12.5.2011

Eric Basnayake J

The 1st defendant-petitioner (1st defendant) filed this leave to appeal application to have the order dated 31.10.2005 of the learned Additional District Judge of Colombo set aside.

By this order the learned Judge had rejected the amended answer of the 1st defendant. Leave to appeal was granted by this Court on 22.2.2006.

The plaintiff-respondents (plaintiffs) filed this action inter alia to claim that the plaintiffs are the lawful trustees of Sri Kathirvelayutha Swami Kovil (Kovil) and to have the deed No. 3757 of 16.12.2002 set aside. The deed No. 3757 was executed on 16.12.2002 between the 1st defendant on one part and 2nd to 4th defendants as the other part. In terms of this deed, only the 1st to 4th defendants have become Trustees of the Kovil. The plaintiffs alleged that the deed No 3757 is a fraudulent document executed to oust the plaintiffs as Trustees of the Kovil. Hence the prayer to have the said deed set aside.

The 1st defendant filed answer on 15.2.2005. In the answer the 1st defendant prayed for a dismissal of the plaintiff's action. The 1st defendant also prayed to have the deed No. 3757 declared null and void. The 1st defendant denied in the answer that he conspired with the 2nd to 4th defendants in the execution of the said deed. The 1st defendant also stated that he had informed the plaintiffs that action would be filed by him (1st defendant) to have the deed set aside. In paragraphs 15 to 18 the 1st defendant set out the circumstances that compelled him to sign the deed 3757.

On 15.7.2005 the 1st defendant moved to file an amended answer. In the amended answer the 1st defendant took up the position that the deed 3757 was duly executed. The prayer to the answer was amended only in seeking a dismissal of the plaintiff's action. The prayer to set aside the deed 3757 was dropped in the amended answer.

The order of the Judge

The learned Judge had thus stated in his order that the 1st defendant had changed facts and the relief claimed. The 1st defendant has stated in paragraph 18 of the answer that his signature was placed to deed 3757 due to fraudulent misrepresentation of facts by 2nd to 4th defendants. In the amended answer the 1st defendant had taken a completely different

stance. He had stated that his Attorney holder had acted contrary to instructions and given wrong advice to lawyers in the filing of the answer.

Submission of the learned Counsel for the plaintiffs

The learned counsel submitted that it is false to state that the former Attorney had acted contrary to the instructions and given wrong instructions in the preparation of the answer. He submitted that this answer was prepared according to the instructions given by the 1st defendant. It was the intention of the 1st defendant to annul the deed 3757. He submitted that originally the plaintiff and the 1st defendant were the Trustees of the Kovil. However deed 3757 ousted the plaintiff and put in place the 2nd to 4th defendants as Trustees. This is evident from an affidavit of the 1st defendant dated 3.5.2004 (pgs. 170 to 176 of the District Court record). In paragraph 12 of this affidavit the 1st defendant explains what caused him to sign deed No. 3757. The 1st defendant states in that, that the deed 3757 was signed without understanding its contents.

The 1st defendant also states that he had written a letter to the 2nd to 4th defendants finding fault with them for having misled him in to signing this deed. The documents 1D1 to 1D9 were produced by the 1st defendant in the District Court in an injunction inquiry. However these documents could not be located in the District Court record. Copies of the same were tendered in the Court of Appeal by the counsel for the plaintiffs. The documents 1D1 to 1D9 strongly indicate the intention of the 1st defendant to have the deed 3757 annulled. These documents cut across the submission of the learned President's Counsel that the answer was filed on wrong instructions of the Attorney.

It is unfortunate that when documents 1D1 to 1D9 were produced in court by the learned counsel for the Plaintiff, the learned President's Counsel for the 1st defendant pleaded complete ignorance of these documents and stated that something wrong has happened. Some of these documents are letters exchanged between the 1st defendant and the 2nd to 4th defendants. At the injunction inquiry where these documents were produced the court had pronounced an order in favour of the plaintiffs. The defendants do not appear to have

appealed against this order. These documents show clearly that it was the intention of the 1st defendant to have the deed 3757 set aside. The answer of the 1st defendant was filed after the injunction inquiry. The learned President's Counsel submits in the written submissions filed later that these documents were manipulations. The learned President's Counsel did not say so whilst on his feet.

Considering the two contrasting positions taken in the answer and the amended answer and also the documents marked 1D1 to 1D9 produced at the injunction inquiry in support of the 1st defendant's claim that he was cheated by the 2nd to 4th defendants, I am of the view that the learned Judge was right in rejecting the amended answer on the ground that the defendant cannot be allowed to introduce completely contrasting position in the amended answer. Therefore this petition is without merit and the same is dismissed with costs.

Judge of the Court of Appeal