

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

Daas Kankanamge Nobert Perera,
Kaduruduwa, Wanchawala
Galle.

Plaintiff-Appellant

C.A. NO. 1009/98(F)
D.C.GALLE CASE NO.10985/L

Vs

Daas Kankanamge Chandrapala Perera,
Kaduruduwa, Wanchawala
Galle.

Substituted-Defendant-Respondent

BEFORE : **K. T. CHITRASIRI, J**

COUNSEL : N.R.M.Daluwatta, P.C. with Chatura Galhena
Attorney-at-Law for the Plaintiff- Appellant

Rohan Sahabandu, P.C. with Hasitha Amarasinghe
Attorney-at-Law for the Substituted-Defendant-Respondent

ARGUED ON : **22. 02. 2013**

**WRITTEN
SUBMISSIONS
FILED ON** : 06th May 2013 by the Substituted -Defendant-
Respondent
05th June 2013 by the Plaintiff-Appellant

DECIDED ON : **20TH JUNE 2013**

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 30.09.1998 of the learned District Judge of Galle. In the petition of appeal the plaintiff-appellant (hereinafter referred to as the plaintiff) also sought to have a judgment in favour of the plaintiff as prayed for in his plaint dated 17.11.1986. The said reliefs prayed for in the plaint include; to obtain a declaration, declaring that the plaintiff is the rightful owner of the land referred to in paragraph 2 of the plaint and to eject the defendant and his agents therefrom. The plaintiff also prayed to have a judgment declaring that the deed bearing No.3068 by which the defendant-respondent (hereinafter referred to as the defendant) claims title is null and void. The defendant in his answer has sought to have a declaration declaring that he is entitled to the land in dispute in view of the said deed No.3068 (V3) and also to declare that the deed bearing No.42542 (P7) by which the plaintiff claims title, be null and void.

Hence, it is clear that the two parties to the action claim title to the one and the same land through competing deeds bearing Nos.42542 and 3068. Therefore, the issue before Court is to determine as to which deed prevails over the other. Admittedly, original owner of the land in dispute had been Margret Perera who is the mother of the plaintiff as well as the defendant by virtue of the deed bearing No.2151 dated 31.1.1941 marked as "P6" in evidence. The plaintiff claims title by the deed bearing No.44279 (P8) dated 21.11.1984 and the transferor in that deed namely Weerasiri, had acquired title from Margret

Perera by the aforesaid deed bearing No.42542 marked as "P7" in evidence. The defendant has obtained title directly from Margret Perera by the deed bearing No.3068 dated 28.10.1984. Accordingly, it is seen that the two parties claim title to the said land through two different deeds bearing Nos.42542 and 3068 and the vendor to both these deeds happened to be Margret Perera who is the mother of the parties to this action. Plaintiff's claim is to have the deed 42542 declared valid whilst the defendant's claim is to have the same declared null and void so that his deed 3068 would become valid in law.

The important issue before Court then is to decide whether the deed 42542 marked "P7" is capable of passing title to its vendee. Indeed, the issues suggested by both parties are directed basically to determine the validity of the deed bearing No.42542. The defendant has challenged the execution of the said deed 42542. Therefore, it is necessary to consider whether the said deed 42542 had been executed in the manner required by law.

The Notary namely, Sumathipala Maitipe who attested the deed No.42542 has given evidence. He has stated that the said deed was attested by him at a place called Kalahe and not at his office in Galle but of course, it is within his jurisdiction. He has then stated that the vendor to the deed namely, Margret Perera was feeble at the time of execution of the deed and she was around 75 years in age then. He has also said that Margaret Perera made an effort to place her signature by writing few letters but thereafter obtained her

left thumb impression as she could not sign on the deed. He has further said that Margret Perera was not feeling well at the time the deed was executed.

The Notary also has clearly stated that the consideration amounted to Rs.3,500/- that had been agreed by the parties to effect the sale of the land subjected to the deed in question was given to one Nalani Perera and not to the transferor Margret Perera. Nalani Perera's relationship to Margret Perera was also in doubt. In the attestation clause, the Notary has stated that the money or the consideration for the transaction was handed over in his presence to Nalani Perera. Accordingly, it is clear that the consideration that should have been given to the seller Margret Perera was not received by her. Instead it was given to Nalani Perera. The aforesaid facts being revealed by the evidence found at page 117 onwards in the appeal brief. Even in answer to the Court, the Notary has said that the vendor did not accept the money. (at page 128 of the appeal brief) In the circumstances, it is clear that the consideration passed in connection with the transaction that took place between the parties to the deed was not received by the transferor to that deed. Therefore, it is not incorrect to decide that the deed 42542 by which the plaintiff claims title is not capable of transferring clear title to its transferee through whom the plaintiff claims title.

Moreover, the circumstances under which the questioned deed was executed would lead to create suspicion as to the sale of the property. Such

circumstances have been critically analyzed by the learned trial judge. She has referred to the way in which the signature of Margaret Perera had been obtained to the deed. Also, she has dealt with the manner by which the thumb impression of Margret Perera was placed instead of obtaining her signature. Margaret Perera used to place her signature even when she withdrew her pension soon before this transaction took place. Significantly, Margaret Perera has signed on the deed bearing No.3068 marked "V3" when transferring the land to the defendant even after placing her thumb impression to the deed No.42542. Those circumstances show that Magret Perera was in a position to sign on the deed 42542 though she has alleged to have placed her thumb impression on the same. Those facts relating to the manner in which the deed 42542 had been executed was carefully considered by the learned District Judge and had come to the conclusion that the execution of the deed "P7" should not be accepted as an act of Margaret Perera.

At this stage, it must be noted that the trial Judge having considered the evidence recorded in this case has held that the deed "P7" is not capable of passing the title to the plaintiff. As mentioned before, she has extensively analyzed the evidence of all the witnesses including the parties to the action in coming to the said conclusion. She has evaluated the evidence and had decided to reject the evidence adduced on behalf of the plaintiff as to the execution of the deed marked "P7".

Against such a back-drop, it is necessary to mention that the best person to decide as to the facts of the case that had been led in evidence is the Trial Judge who heard and saw the witnesses giving evidence. This position had been accepted in the cases of:

- **De Silva vs. Seneviratne**
[1981 (2) S.L.R.at page 8]
- **Frad vs. Brown & Co.**
[28 N.L.R. at page 282]
- **Alwis vs. Piyasena Fernando**
[1993(1) S.L.R. at page 119]
- **Mahavithana vs. Commissioner of Inland Revenue**
[64 N. L. R. at page 217]

This Court is bound to follow the law referred to in the decisions mentioned hereinbefore. Hence, I am not inclined to interfere with the decision of the learned District Judge based on the facts of the case particularly the manner in which the questioned deed 42542 was executed.

I will now turn to consider the submissions made by the learned President's Counsel for the appellant on the issue of maintainability of the defence of "fraud" when it is taken up in a civil suit. He submitted

that a party who takes up the defence of fraud should have specifically pleaded committing of fraud and thereafter it is the burden of that person who takes up such a defence to prove the same. In support of his contention he has referred to the cases namely;

V.A. Appuhamy vs. Belin Nona [53 N.L.R.at pg.448] and

Annamaly Chetty v. Sidambaram Chetti [33 N.L.R. at pag.277]

It must be noted that the defendant in this instance has not relied on the defence of fraud. He has merely taken up the position that the execution of "P7" is bad in law. Therefore, the contention of the learned President's Counsel does not relate to the issue at hand. Even in the Court below, no such defence had been taken up. Therefore, I am not inclined to consider the law relating to the defence of fraud in this instance as contended by the learned President's Counsel for the appellant.

For the aforesaid reasons, I do not wish to interfere with the findings of the learned Trial Judge. Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL