

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

**CA/481/2000 (F)**

District Court  
Colombo- 5670 ZL

Jalenth Lekamlage Karunaratne.  
No.31, Puwakwatte Lane,  
Hendala, Wattala.

Plaintiff

VS

D.P.L.Albert Silva.  
No.136, "AsiriNiwasa",  
Demtagahakandawatte,  
Minuwangoda, Asgiriya, Gampaha.

Deceased Defendant

Peduru Liyanaralalage Dilrukshi  
Olu Silva.  
No.3/8, Araliya Uyana,  
Narammala.

Substituted-Defendant

**AND NOW**

Jalenth Lekamlage Karunaratne.  
No.31, Puwakwatte Lane,  
Hendala, Wattala.

**Plaintiff-Appellant**

VS

D.P.L.Albert Silva.  
No.136, "AsiriNiwasa",  
Demtagahakandawatte,  
Minuwangoda, Asgiriya, Gampaha.

Deceased Defendant

Peduru Liyanaralalage Dilrukshi  
Olu Silva.  
No.3/8, Araliya Uyana,  
Narammala.

**Substituted-Defendant**

**Before** : **A. H. M. D. Nawaz, J.**

**Counsel** : Nimal Weerakkody for the Plaintiff-Appellant  
Lal Matarage instructed by T. S. Jayathilaka  
for the Respondent

**Argued &**

**Decided on** : **20.01.2017**

**A. H. M. D. Nawaz, J.**

Mr. Nimal Weerakkody, Counsel for the Plaintiff-Appellant submits that this Court can make a decision on the available evidence that has already been presented before the District Court of Colombo. He would not make any oral submissions. Mr. Lal Matarage Attorney-at-Law for the Respondent proceeded to make his submissions on the evidence that has already been led before Court.

It is quite clear that this was a *rei vindicatio* action as evidenced in the plaint dated 18.11.1987. The Plaintiff-Appellant had prayed for a declaration of title to the land depicted in the schedule to the plaint and ejection of the Defendant and all those who were holding under him. This Court bears in mind the trite principle that is applicable in *rei vindicatio* actions namely 'in a *rei vindicatio* action the burden is on the Plaintiff to establish the title pleaded and relied on by him. The Defendant need not prove anything" -see ***Dharmadasa v. Jayasena*** [1997] 3 SLR 327. In a *rei vindicatio* action, the cause of action is based on the sole ground of violation of the right of ownership. In such an action proof is required that:

(i) The plaintiff is the owner of the land in question, i.e., he has the *dominium*,  
and

(ii) That the land is in the possession of the defendant. (Voet 6. 1. 34).

Vide the pronouncement Lawrie A.C.J in ***Silva v. Hendrick Appuhamy*** 1 NLR 13 at 18-“When a plaintiff comes into Court praying for a declaration of title, he must possess at that time the title which he asks the Court to declare to be his”. The above dictum was followed in the case of ***Ahamadulevve v. Sanmugam*** 54 NLR 467. It is only when this burden is satisfactorily discharged by the Plaintiff, then the burden shifts to the defendant to prove that his possession is lawful. Has the Plaintiff-Appellant in this case established his title to this property? The Plaintiff pleaded that by deed bearing No 828 and dated 5<sup>th</sup> September 1986, which was attested by L.V. Emmanuel de Silva, Notary Public, he obtained a transfer of the land in question. Even though he alleged that he obtained a transfer of the land in question, the acquisition of this deed has been challenged by the Defendant. In those circumstances it becomes imperative in terms of section 68 of the Evidence Ordinance to summon at least one attesting witness to be called to prove due execution of the deed in question. Even though the brother of the Plaintiff was summoned to give evidence as to the due acquisition of this deed, there seems to be inconsistency *inter se* between the Plaintiff and his witness as to whether the acquisition did take place. Both the Plaintiff and the original Defendant claimed title to the property in dispute through the same source namely one J.A. Anthony Mersalin de Saram and the Plaintiff's Deed bearing No. 828 was attested on 5<sup>th</sup> September 1986, whilst the original Defendant's Deed bearing No. 273 was registered on 11<sup>th</sup> April 1980. It would appear that the transfer of the property in dispute to the Defendant had been effected more than 6 years prior to the

execution of the Plaintiff's Deed. Since the said J.A. Anthony Mersalin de Saram had lawfully transferred his title to the Defendant in 1980, he could not have had any title whatsoever to convey to the Plaintiff in 1986. It was the submission of Mr. Lal Matarage that the purported transfer to the Plaintiff by Deed No. 828 on 5<sup>th</sup> September 1986 could not have vested the Plaintiff with any title.

Then the question arises as to whether the Plaintiff established his title to the land in question. It was a declaration of title that the Plaintiff sought and the Defendant challenged the Plaintiff's Deed No. 828 dated 5<sup>th</sup> September 1986 as a fraudulent deed. In the circumstances it is incumbent upon the Plaintiff to establish his deed as a genuine deed and prove his title. Due execution of the deed has to be established and I had occasion to extensively deal with the requirements of due execution of a deed in ***Hirumuthugodage Dhanawathie v. Bentara Vidanalage Nandasena*** (CA Case No 303/2000 (F) decided on 26.09.2016) and the pith and substance of the decision is that the due execution could be established by adducing the evidence of at least one attesting witness in terms of section 68 of the Evidence Ordinance. In ***Wijegoonetilleke v. Wijegoonetilleke*** 60 N.L.R 560 Basnayake C.J observed that a notary who attests a deed is an attesting witness within the meaning of that expression in Sections 68 and 69 of the Evidence Ordinance. Neither the Notary nor the Transferor was led by the Plaintiff to discharge his burden. This failure on the part of the Plaintiff becomes more pronounced in light of the fact that the Plaintiff's Deed bearing No. 828 and dated 5<sup>th</sup> September 1986 was marked subject to proof. This would only go to show that no title ever passed to the Plaintiff.

Having thus culpably failed to establish due execution and title, the Plaintiff failed to produce any document to establish that he had registered the deed. The

Plaintiff was cross examined on due registration of the deed in the proper folio but the Plaintiff could not offer any proper answer to these questions. In other words there was no proper folio in which the purported deed had been registered.

As opposed to this position, there is evidence that the Defendant produced the correct folios which made cross references to the previous folios in which the Deed of the Transferor and those of his predecessors had been registered-see V5 marked at the trial. The failure to offer this evidence compels this Court to draw an adverse inference against the Plaintiff in terms of Illustration (f) to section 114 of the Evidence Ordinance.

**This court also draws in aid Section 101 of the Evidence Ordinance which is quite explicit on the allocation of an overall burden.**

*“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, **must prove** that those facts exist.*

*When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”*

**Illustration (b)** which is analogous to some extent to the instant case states;

*“**A** desires a court to give judgment that he is entitled to certain land in the possession of **B** by reason of facts which he asserts, and which **B** denies to be true.*

***A** must prove the existence of those facts.”*

Section 101 of the Evidence Ordinance is premised on the Latin tag-“**Ei qui affirmat ‘non ei qui negat, incumbit probatio-the proof lies upon him who**

**affirms, not upon him who denies.** It is expressed in the commonplace dictum-one who asserts must prove.

Section 101 places the legal burden of proof on the party who asserts the existence of any fact in issue or relevant fact. Section 101 of the Evidence Ordinance obligates a party seeking judgment in the suit to prove his case. He has to prove it to the standard required as defined in Section 3 of the Evidence Ordinance. In a civil case it would be on a balance of probabilities—for a classic exposition of “balance of probabilities”, see *per* Denning J. in **Miller v. Ministry of Pension.**<sup>1</sup>

Thus I take the view that the Plaintiff has not discharged his burden of proving his title within the above parameters—see another formulation of this burden in cases such as **Wanigaratne v. Juwanis Appuhamy** 65 N.L.R and **Hameed v. Weerasinghe** (1989) 2 Sri.LR 271. In the circumstances, the learned District Judge of Colombo has reached a correct finding on the relevant issues before him and this Court finds no reason to interfere with the judgment of the learned District Judge of Colombo dated 18<sup>th</sup> August 2000 and I proceed to affirm the judgment and dismiss the appeal of the Plaintiff-Appellant.

**Judge of the Court of Appeal**

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<sup>1</sup> (1947) 2 All ER 372 at p 374