

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

Senarath Gedara Somadasa

No.449,Srimath Kuda Rathwatte Mawatha,  
Kandy.

**Plaintiff – Appellant-Petitioner**

**Case No.CA 539/97 (F)**

**Vs.**

**D.C. Kandy Case No.16606/L**

H.M.Razik alias Thajjik

No.69A,

Sirimavo Bandaranaike Mawatha,  
Peradeniya.

**Defendant-Respondent (Deceased)**

Abdul Razak Mohomad Ruzdy

No.69A, Peradeniya Road,

Kandy.

**Substituted- Defendant- Respondent-  
Respondent**

**Before: M.M.A. Gaffoor J.**

Janak De Silva J.

**Counsel: Mahinda Nanayakkara with D. Hettiarachchi for Plaintiff-Appellant-Petitioner**

N.R. Sivendran with Renuka Udumulla and T. Sivanandarajah for Substituted

Defendant-Respondent-Respondent

**Written Submissions tendered on:**

Substituted Defendant-Respondent-Respondent on 5<sup>th</sup> December 2017

Plaintiff-Appellant-Petitioner on 12<sup>th</sup> December 2017

**Argued on:** 8<sup>th</sup> November 2017

**Decided on:** 21<sup>st</sup> February 2018

**Janak De Silva J.**

This order pertains to an application made by the Plaintiff-Appellant-Petitioner (Plaintiff) to lead fresh evidence at the stage of appeal.

The Plaintiff filed the above action against the Defendant-Respondent (Defendant) seeking a declaration of title, eviction of the Defendant from the corpus and damages. The Plaintiff claimed that one Rathnasabapathy son of Vaithalingam Pulle was the original owner of the corpus. The said Rathnasabapathy sold the corpus to K. Ariyaratna by deed of transfer no. 6439 dated 16.4.1975 attested by A.K. Liyanage notary public. The said K. Ariyaratna sold the corpus to the Plaintiff by deed of transfer no. 1849 dated 17.11.1983 attested by Mangalika Dodanwela notary public. That was the pedigree set up by the Plaintiff.

The Defendant denied the pedigree of the Plaintiff and stated that the original owner of the corpus Vaithalingam Pulle had seven (7) children including Rathnasabapathy and that he had transferred the corpus to all seven children by deed no. 1354 dated 1925.04.03. He further stated that he bought the corpus by deed no. 4309 dated 25.02.1982 and that he has been in possession of it from 1967. He also pleaded prescriptive title.

The learned District Judge held that the Plaintiff had failed to prove his title to the corpus and dismissed the action. In the judgement it is stated inter alia that the Plaintiff had failed to produce two deeds no. 1354 dated 1925.04.03 and no. 5578 dated 1946.05.17 which are important to the pedigree he pleaded. The Plaintiff has appealed against the said judgement.

While the appeal was pending the Plaintiff made an application by way of petition and affidavit on 8<sup>th</sup> October 2013 to lead fresh evidence at the stage of appeal. The fresh evidence sought to be introduced is the deed no. 5578 dated 1946.05.17 and a letter dated 12.11.2012 issued by the Registrar of the Land Registry, Kandy. This application was supported on 25<sup>th</sup> October 2013 and Court issued notice on the Defendant. The journal entries thereafter indicate that several attempts at serving notice on the Defendant proved futile.

When this matter was mentioned on 26<sup>th</sup> March 2014, the Defendant was represented. The Court on this day granted permission to the Plaintiff to file a comprehensive affidavit and the Defendant was to be given an opportunity to file objections thereafter.

The Plaintiff filed a further affidavit dated 26<sup>th</sup> May 2014 to which the Substituted Defendant-Respondent-Respondent filed his objections. The Plaintiff thereafter filed what he refers to as a "comprehensive affidavit" on 27<sup>th</sup> July 2015 seeking to admit five (5) documents as fresh evidence. The Substituted Defendant-Respondent-Respondent filed his objections to the said affidavit on 31.05.2017.

The Substituted Defendant-Respondent-Respondent has raised a preliminary objection to the application made to lead fresh evidence. It is submitted that the 3<sup>rd</sup> affidavit of the Plaintiff is undated and therefore is not a valid affidavit. The Defendant relies on section 12(3) of the Oaths and Affirmation Ordinance and several authorities which deal with defective affidavits. In terms of section 12(3) of the Oaths and Affirmation Ordinance, it is the duty of the Commissioner of Oaths to state the date on which the affirmation was administered. Admittedly in this case it was not done. In *Gernel v. Nandasena and others*<sup>1</sup> a question on the validity of an affidavit was raised as the place of attestation was not set out in the jurat. The Supreme Court held that the omission of the Commissioner of Oaths was something that the party should not be penalized for unless he acted recklessly.

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<sup>1</sup> (2012) B.L.R. 79

Mulla on the Code of Civil Procedure<sup>2</sup> has a reference to *Mehar Singh and Others v. Mahendra Singh*<sup>3</sup> where the affidavit did not have the date and place of the execution of the affidavit. Justice S.S. Chandh stated as follows:

“A defect in verification is only an irregularity and not fatal. It is no ground in rejecting the affidavit”<sup>4</sup>

I also observe that in the case before court the affirmant has placed the date on which he signed just below his signature. No allegations have been made by the Defendant that the affirmant was not present before the Commissioner of Oaths or that the contents of the affidavit were not read and explained to the affirmant by the Commissioner of Oaths.

In the above circumstances, I overrule the preliminary objection taken to the 3<sup>rd</sup> affidavit filed by the Plaintiff.

Section 773 of the Civil Procedure Code vests power in the Court of Appeal to, if need be, receive and admit new evidence additional to, or supplementary of, the evidence already taken in the court of first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial. Article 139(2) of the Constitution grants a similar power to the Court of Appeal to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of First Instance touching the matters at issue in any original case, suit prosecution or action, as justice of the case may require.

These statutory and constitutional provisions permit fresh evidence to be admitted subsequent to trial as justice may require. However, this power must be exercised with great caution. The rights of the parties are determined by the evidence led before the trial judge which is tested by cross-examination. Such leading of evidence, oral and documentary, including from third parties and official witnesses, is facilitated by procedures set out in the Civil Procedure Code. A litigant must show due diligence by resorting to these procedures in obtaining evidence in support of his

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<sup>2</sup> Mulla on the Code of Civil Procedure; 17<sup>th</sup> Ed., Vol. 2, 857

<sup>3</sup> AIR 1987 Delhi 300

<sup>4</sup> Ibid. page 302

case. Parties expend vast resources, time and effort in litigating and therefore it is important that there is finality to litigation. This cannot be achieved if fresh evidence is permitted at the stage of appeal unimpeded. There are also concerns on the credibility of the fresh evidence and absence of it been tested under cross-examination.

Therefore, our courts have developed certain conditions to be fulfilled prior to admitting fresh evidence. The Supreme Court has, in *Oman Ekanayake and others v. Ratranhamy*<sup>5</sup>, quoted with approval the decision in *W.A. Ratwatte v. A. Bandara and another*<sup>6</sup> where the Supreme Court adopted the test enunciated by Denning L.J. in *Ladd v. Marshall*<sup>7</sup> in admitting fresh evidence at the stage of appeal. Three conditions have to be fulfilled. They are:

- (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
- (2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it may not be decisive.
- (3) The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

### **Reasonable Diligence**

Whether the evidence in issue could have been obtained by reasonable diligence before the trial depends on the circumstances of each case. A party seeking to lead fresh evidence must satisfy court that the fresh evidence could not have been procured with reasonable diligence. A mere statement to that effect in the application is insufficient. Facts supporting efforts made with reasonable diligence to procure the evidence must be set out in the application.

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<sup>5</sup> (2012) Part II B.L.R. 19

<sup>6</sup> 70 N.L.R. 231

<sup>7</sup> (1954) 3 All E.R. 745

There have been instances where deeds have been sought to be admitted as fresh evidence. In *Rev. Kiralagama Sumanatissa Thero v. Aluwihare and another*<sup>8</sup> the Court of Appeal refused an application to admit two deeds in appeal as it was not shown that this evidence could not have been obtained with reasonable diligence at the trial. However, in *Jandiris et al v. Deve Renta et al*<sup>9</sup> a deed that was not produced at the trial, its absence led the trial judge to question as to how T, a usufructuary mortgagee in 1848, could convey a dominium to M in 1855, was admitted at the stage of appeal. The plaintiff had searched the record in another District Court action and discovered the deed and applied for leave to produce it at the hearing of the appeal. But in *Jayasekera v. Appuhamy and others*<sup>10</sup> the Court of Appeal refused an application of the plaintiff to admit four deeds as fresh evidence as the plaintiff had failed to demonstrate and prove that he could not obtain the deeds relied by him as at the date of trial to be used at the trial, with reasonable diligence. In *Meegama Gurunnanselage Don Sirisena Wijeyakoon v. Indranee Margaret Wijeyakoon*<sup>11</sup> an attempt by the appellant to lead fresh evidence at the stage of appeal in the form of an affidavit of the notary who executed two deeds marked during the trial, which contained errors, was rejected by the Court of Appeal as his evidence could have been led at the trial if reasonable diligence was exercised by the appellant.

The Plaintiff in this application is seeking to admit five (5) documents as fresh evidence. I will deal with each one separately.

The first document is deed no. 5578 dated 1946.05.17. The Plaintiff claims that he was not aware of the existence of this deed during the course of the trial due to the non-availability of the deed. This is false. The Plaintiff in his plaint refers to deed no. 6439 dated 16.4.1975 as an integral part of his pedigree. This was marked as 6 during the trial. The schedule thereto makes specific reference to deed no. 5578 dated 1946.05.17. Furthermore, during cross-examination the attention of the Plaintiff was drawn to the said deed and he was asked whether that deed was tendered to court. He answered in the negative (Appeal Brief page 131). The Plaintiff did not then

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<sup>8</sup> (1985) 1 Sri.L.R. 19

<sup>9</sup> 33 N.L.R. 200

<sup>10</sup> (2012) Part II B.L.R. 291

<sup>11</sup> (1986) 2 C.A.L.R. 378

claim that it was not found despite attempts made to trace it. In the circumstances, I reject the position of the Plaintiff that he was not aware of its existence. It is observed that the Plaintiff filed two lists of witnesses and documents in the District Court. Deed no. 5578 dated 1946.05.17 was not listed in either one of them. In these circumstances, I am of the view that deed no. 5578 dated 1946.05.17 could have been obtained with reasonable diligence for use at the trial which the Plaintiff failed to do.

The second document is a letter dated 15.10.2013 issued by the Registrar of the Land Registry, Kandy. The Plaintiff seeks to admit this document to show that he could not do a complete search as the extracts pertaining to the land had been destroyed. But this letter dated 15.10.2013 has been issued to the Plaintiff in response to a letter dated 09.10.2013 sent by the Plaintiff. All it states is that it is not possible to issue document A 49/293 as it has been cancelled. This shows that the Plaintiff attempted to obtain certain documents in 2013 whereas action was filed in 1991 and judgement delivered on 25<sup>th</sup> May 1997. There is no evidence before court to prove that the Plaintiff sought to trace and obtain a copy of deed no. 5578 dated 1946.05.17 before the conclusion of the trial. In these circumstances, I am of the view that this communication could have been obtained with reasonable diligence for use at the trial which the Plaintiff failed to do.

The third document is a set of folios obtained from the land registry dated 23<sup>rd</sup> January 2015. Here again an attempt has been made to obtain these documents only in 2015 whereas action was filed in 1991 and judgement delivered in 1997. These are public records which could have easily been accessed by the Plaintiff between 1991 and 1997. In these circumstances, I am of the view that this set of folios could have been obtained with reasonable diligence for use at the trial which the Plaintiff failed to do.

The 4<sup>th</sup> document is a copy of the proceedings in Magistrates Court Kandy case no. 29218. Apparently, this pertains to an unauthorized construction on the corpus by the Defendant. The proceedings have been instituted on 26<sup>th</sup> May 1999 after the judgement in this case was delivered in the District Court on 25<sup>th</sup> May 1997. Hence, I am of the view that this document could not have been obtained with reasonable diligence for use at the trial.

The 5<sup>th</sup> document is a copy of a plan dated 27<sup>th</sup> December 1910. This document was in existence for more than 80 years before the case was instituted and the Plaintiff has not placed any material before this court to establish why the fresh evidence could not have been procured with reasonable diligence.

### **Important Influence**

An application to lead fresh evidence at the stage of appeal must also explain how the new evidence will have an important influence on the result of the case. In *Beatrice Dep v. Lalani Meemaduwa*<sup>12</sup> an application to lead as fresh evidence some deeds and documents was rejected as they did not touch the matters at issue on which the judgment was delivered in the trial court.

The Plaintiff's action is a *rei vindicatio* action. It is an established principle that ownership of the property claimed in a *rei vindicatio* action is a fundamental condition to its maintainability<sup>13</sup> and the burden is on the plaintiff to establish the title pleaded and relied on by him.<sup>14</sup> The learned District Judge held that the Plaintiff has failed to fulfill this burden. Accordingly, if any of the fresh evidence is to have an important influence on the result of the case it must deal with the title of the Plaintiff to the corpus. Out of the five documents sought to be admitted as fresh evidence it is only deed no. 5578 dated 1946.05.17 which deals with the question of title. It is a deed whereby the seven children of Vaithalingam Pulle and Rajambal, daughter of Saminathan, sought to identify and possess separately certain parts of properties in which they held shares in common. Rathnasabapathy, son of Vaithalingam Pulle, was given as his share the income from the tenements formerly numbered 47B and 48 presently bearing Nos. 67/2 and 69. The corpus identified in the plaint is the land and building thereon bearing assessment No. 69, Peradeniya Road. In the circumstances, I am of the view that it is only the first document sought to be admitted as fresh evidence namely deed no. 5578 dated 1946.05.17 which will have an important influence on the case.

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<sup>12</sup> (1997) 3 Sri.L.R. 379

<sup>13</sup> Vide *De Silva et al v. Goonetilleke et al* (32 NLR 217), *Pathirana v. Jayasundera* (58 NLR 169), *Mansil v. Devaya* [(1985) 2 Sri.L.R. 46], *Latheef v. Mansoor* [(2010) 2 Sri.L.R. 333]

<sup>14</sup> *Dharmadasa v. Jayasena* (1997) 3 Sri.L.R. 327



**Credible**

Courts would have less hesitation in admitting fresh evidence consisting of a judicial record or a deed or similar evidence which came into existence long before the dispute arose and the chances of fabrication are extremely remote.<sup>15</sup>

Out of the five documents sought to be admitted as fresh evidence, I am satisfied of the credibility of the first to fourth documents.

An application to lead fresh evidence in terms of Section 773 of the Civil Procedure Code must satisfy all three conditions discussed above. But none of the documents sought to be admitted as fresh evidence by the Plaintiff satisfy all three conditions.

For the foregoing reasons, the application of the Plaintiff to lead fresh evidence is refused.

I make no order as to costs of this application.

The appeal will now be listed for argument in due course.

Judge of the Court of Appeal

**M.M.A. Gaffoor J.**

I agree.

Judge of the Court of Appeal

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<sup>15</sup> *Endris De Silva and another v. Arnolis* (33 C.L.W. 39)