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

In the matter of an Appeal under Section 754(1) of the Civil Procedure Code.

C.A. Case No. 171/2000 (F)

D.C. Colombo Case No. 16530/L

Richard Fedrick Maurice Andree
No.04, Benyon Street,
Wevell Heights, Brisbane,
Australia.

By his Attorney,

Warnakulasooriya Gerald Gunawardana
No.192/ 8, Nawala Road,
Nawala.

PLAINTIFF

-Vs-

Tammita Kankanamalage Dona Upendrika Subasinghe (*nee* Dona Upendrika Samarasekara),
"Ketumathie", Sandalankawa.

DEFENDANT

New Lanka Property (Pvt) Limited,
No.601, Nawala Road,
Rajagiriya.

1st ADDED DEFENDANT

Parana Liyanage Dona Samel *alias* Siyadoris
No.601, Nawala Road,
Rajagiriya.
2nd ADDED DEFENDANT

AND NOW BETWEEN

1. New Lanka Property (Pvt) Limited,
No.601, Nawala Road,
Rajagiriya.
1st ADDED DEFENDANT-APPELLANT

2. Parana Liyanage Dona Samel *alias* Siyadoris,
No.601, Nawala Road,
Rajagiriya.
2nd ADDED DEFENDANT-APPELLANT

-Vs-

1. Richard Fedrick Maurice Andree
No.04, Benyon Street,
Wevell Heights, Brisbane,
Australia.

By his Attorney,
Warnakulasooriya Gerald Gunawardana
No.192/ 8, Nawala Road,
Nawala.
PLAINTIFF-RESPONDENT

2. Tammita Kankanamalage Dona Upendrika Subasinghe (*nee* Dona Upendrika Samarasekara),
"Ketumathie", Sandalankawa.
DEFENDANT-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J
COUNSEL	:	Faisz Mustapha, PC with Amarasiri Panditharatne for the Appellants W.D. Weeraratne, for the Plaintiff-Respondent
Decided on	:	10.08.2018

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

This appeal arises out of a *rei vindicatio* action filed by the Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") in the District Court of Colombo originally against the Defendant Respondent. The 1st and 2nd Added Defendant-Appellants intervened in the action and were later added as the 1st and 2nd Added Defendants. The learned Additional District Judge of Colombo held with the Plaintiff in a judgment dated 28.03.2000 and granted the relief prayed for in the amended plaint *to wit:-*

i. a declaration that the Plaintiff is entitled to the land described in the 2nd and 3rd Schedules of the said amended Plaint;

ii. an order for ejectment of the Defendant-Respondent and the 1st and 2nd Added Defendant-Respondents and their servants, agents and all those holding under them;

The Case of the Plaintiff emanating from the Amended Plaint dated 18th November 1994:

The case of the Plaintiff-Respondent was anchored *inter alia* in the following narration of facts:-

i. From 1966 to 1991 he had been living in Australia and that he visited Sri Lanka on 16.06.1991 and went back to Australia on 27.06.1991;

ii. He did not execute Deed No.756 dated 08.12.1989 and he did not have any requirement to execute the said deed;

iii. The signature of the transferor which appears in the said deed is a forgery and has been placed fraudulently while he was residing in Australia. In other words the aforesaid Deed bearing No.756 dated 08.12.1989 is not the act and deed of the Plaintiff-Respondent;

iv. In the circumstances the Defendant-Respondent and the 1st Added-Defendant and/or the 2nd Added-Defendant have no title to the property in suit.

The gravamen of the complaint of the Plaintiff Respondent was that the disputed Deed bearing No.756 dated 08.12.1989 was a fraudulent disposition through which the Defendants namely the Defendant-Respondent, the 1st Added-Defendant and the 2nd Added-Defendant could not have derived any title at all the property in suit.

It has to be pointed out at this stage that even though the Plaintiff averred fraud in paragraph 11 of the amended plaint he never sought the annulment or invalidation of the deed in question. Instead as it is typical of a *rei vindicatio* action he only sought a declaration of title and his prayer in the Amended Plaint was to the following effect:-

i. A declaration that the Respondent is entitled to the land described in the 2nd and 3rd schedules of the said amended Plaint;

ii. Order for eviction of the Defendant-Respondents and their servants, agents and all those holding under them;

iii. Damages in a sum of Rs. 5000/- per month from 01.11.1993 until the Defendant-Appellant and the Added Defendant-Appellants are evicted from the premises.

As opposed to the allegation that the pivotal Deed No.756 dated 08.12.1989 was fraudulent, the case of the 2nd Added-Defendant-Appellant that was encapsulated in its amended answer dated 31.07.1995 gave the chronology of events concerning the devolution of title as follows:-

i. The Plaintiff-Respondent by Deed No.756 dated 08.12.1989 attested by P.H. Dharmawardena Notary Public duly transferred the property in question to one B.J. Gunawardena;

ii. The said B.J. Gunawardena by Deed No.971 dated 01.05.1990 attested by S. Ellawela Notary Public transferred the said property to the 1st Added Defendant-Appellant namely New Lanka Property Development (Pvt) Limited;

iii. The said 1st Added-Defendant Company subdivided the said land into three lots by Plan No.1053 dated 27.09.1990 and transferred the said lots together with Lot 05 in Plan No.1097 to the Defendant-Respondent namely Tammita Kankanamalage Dona Upendrika Subasinghe and as such the Plaintiff-Respondent does not have title to the said land in suit and prayed for the dismissal of the Plaintiffs' action.

Thus, on an overall conspectus of the rival claims of the parties some salient features of the contest emerge: Whilst the Plaintiff alleged in paragraph 11 of the Amended Plaint that he did not place his signature as the transferor to the disputed Deed bearing No.756 dated 08.12.1989, and thus did not pass title to the Defendants, the amended plaint though omitted to pray for a nullification and invalidation of the said Deed, but rather the relief sought by the Plaintiff was grounded on a declaration of title.

If one were to comprehend this *rei vindicatio* action, immanent in the formulation of this claim is the assertion that the Plaintiff did not sign the Deed of Transfer-*vide*: paragraph 11 of the amended plaint. It is not a mere narration of title that the amended plaint recites. It encompasses allegations of fraud against the Defendants and in the circumstances this Court takes the view that the Plaintiff has cast upon himself a double burden of proof namely; the proof of title in regard to the property in suit and fraud in regard to the execution of the Deed bearing No.756 dated 08.12.1989.

The Defendants (the Defendant, the 1st Added Defendant-Appellant and the 2nd Added Defendant-Appellant) alleged that the Plaintiff had parted with his title.

Since the Plaintiff invoked the jurisdiction of Court to make a declaration of title but not fraud which if not proved would take away his title, the learned President's Counsel for the 1st and 2nd Added-Defendant-Appellants raised the Objection that the Plaintiff couldn't seek a declaration of title to the land in question inasmuch as the deed bearing No.756 dated 08.12.1989 was an essential link not only with the chain of title with the Defendant-Appellant but also in the preservation of the title of the Plaintiff-Respondent as he alleged that this deed was null and void *ab initio.*

It has to be stated that the *onus* is undoubtedly on the person who advances a plea of fraud to prove that by cogent evidence (*see* ***Hansraj v. Dehradun M.E.T. Co.,*** A.I.R. 1940 P.C. 98; ***Upendra Mallik v. Jagatmohan Pradhan,*** (1967) 33 Cut. L.T. 621 at p.627).

But the learned Additional District Judge of Colombo has stated in his judgment dated 28.03.2000 that no right of the Plaintiff has been transferred by Deed No. 756 to any other party *(see: 2nd paragraph at page 4 of the judgment and p.173 of the Appeal Brief).*

Certainly this case raises a question of burden of proof in a *rei vindicatio* action and in ***Peeris v. Savunhamy*** 54 N.L.R 207 it was declared that the burden is entirely on the Plaintiff to prove that title is with the Plaintiff and no burden is placed on the Defendant. In ***Pathirana v. Jayasundara*** 58 N.L.R 169 page at 171, H.N.G. Fernando, J. stipulated that the right of ownership must be strictly proved in a *rei vindicatio* action. In the same vein Herath, J. with Abeyesundera, J. agreeing declared in ***Wanigaratne v. Juwanis Appuhami*** 65 N.L.R 161 that the Defendant in a *rei vindicatio* action need not prove anything, still less, his own title. The Plaintiff cannot ask for a declaration of title in his favor merely on the strength that the Defendant's title is poor or not established.

Then the question arises whether the Plaintiff in this case has established his title on a balance of probabilities or preponderance of evidence. This case is however quite different from the common or garden *rei vindicatio* action in that the Plaintiff has also

averred fraud on the part of the Defendants. Even though the Defendants have admitted title in the Plaintiff, the admission relates to his original title before he allegedly parted with his title to the Defendants through the alienation which the Defendants state the Plaintiff effected.

As the aforesaid Indian cases declared a standard of proof for fraud, so did the Sri Lankan Court in 31 CLW page 99 that fraud must be averred and proved beyond reasonable doubt. On the question of burden of proof of fraud Howard, CJ with Canekeratne, J. concurring stated in ***Lakshmanan Chettiar*** v. ***Muttiah Chettiar*** 50 N.L.R 337 that the burden of proving fraud was on the Plaintiff. Fraud must be established beyond reasonable doubt and a finding of fraud cannot be based on suspicion and conjecture.

In ***Kristley (Pvt) Ltd., v. The State Timber Corporation*** (2002) 1 Sri L.R. 225 Mark Fernando, J. stated that a long line of cases support the proposition that forgery should be proved beyond reasonable doubt. Therefore, even though the Defendants have admitted the title of the Plaintiff which was originally had in him there is yet a burden of proving fraud in this *rei vindicatio* action as the Plaintiff has averred in paragraph 11 of the Plaint that fraud vitiates the disputed Deed bearing No.756.

In order to establish that the Plaintiff never executed this deed on 08.12.1989 the Plaintiff testified he never visited Sri Lanka before 1991. He gave evidence that since he left for Australia in 1966 he came back to Sri Lanka only in 1991. In other words his *ipse dixit* in court was that he was never present in Sri Lanka in 1989 to execute the deed which purported to contain his signature. In order to establish this fact he also submitted **P2** a letter issued by the Department of Immigration and Multi-Cultural Affairs, Queensland, Australia which was marked subject to proof. This letter **P2** establishes that the Plaintiff-Respondent departed from Australia on 16.06.1991 and returned to Australia on 13.09.1991. It has to be pointed out that this letter does not conclusively prove that the Plaintiff did not visit Sri Lanka in 1989 the year of the execution of the disputed Deed 756.

The Plaintiff-Respondent also produced his passport, but it had been issued to him in Australia in November 1990. And thus this passport does not reflect his travel history prior to 1990 namely the year 1989 in which the impugned Deed bearing No.756 has been executed. He was posed a question as to why he did not bring his previous passport and his response was that he did not deem it necessary to bring it to Sri Lanka as it had by then lapsed. He reiterated that he could produce it if it was necessary. I must state that he could have produced this old passport even in appeal before this Court. But he chose not to do so. This was a witness who relied on his absence from Sri Lanka to establish that he was never a party to the execution of the Deed in 1989. His non-existence in Sri Lanka in 1989 was crucial as a constituent element of proof that was required of him in this *rei vindicatio* action having regard to the pleadings in which he alleged fraud against the Defendants. His old passport prior to 1991 covering the year of the execution of the disputed Deed in 1989 was pivotal to this case and it was well within his ken whether he came to Sri Lanka or not in the year 1989. He had this evidence which he could as well have produced with ease.

In such a situation in my view the presumption in Section 114 (f) of the Evidence Ordinance would kick in. In terms of the illustration to Section 114 (f) the Court may presume that evidence which could be and is not produced would if produced, be unfavorable to the person who withholds it. This is a rebuttable presumption which remains unrebutted even in appeal. This rebuttable presumption should have been drawn against the Plaintiff by the learned Additional District Judge of Colombo who instead chose to act on the mere *ipse dixit* of the Plaintiff in court that he did not visit Sri Lanka in 1989.

It has to be remembered that in terms of Section 101 of the Evidence Ordinance, 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 exists. The illustration (b) to Section 101 goes as follows:-

"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"

The learned President's Counsel Mr. Faisz Mustapha drew the attention of this Court to Monir on Principles and Digest of the Law of Evidence Vol.II, 1986 Edition p.1081 which states that non-existence of a fact is as much a fact as the existence of a fact. Even under Section 106 of the Evidence Ordinance when any fact which is especially with the knowledge of any person, the burden of proof of that fact is upon that person who has the special knowledge.

In the circumstances I hold that the Plaintiff has not discharged his burden cast upon him by the several sections of the Evidence Ordinance that I have adumbrated above and the learned Additional District Judge of Colombo fell into an error in merely giving credence to the bare assertion of the Plaintiff-Respondent in the witness box. The non-production of the old passport of the Plaintiff which covered the year of 1989 was an item of evidence which would have been definitely probative of the assertion of his absence from Sri Lanka, especially when he was challenged to establish it affirmatively.

However, the learned Additional District Judge shifted the burden of proof to the Defendants in the following manner:-

"නමුත් පැමිණිලිකරු සාක්ෂි දෙමින් කියා සිටියේ ඔහු සතු පැරණි ගමන් බලපත්‍රයද ඕස්ට්‍රේලියාවේ තිබෙන බවත් එය අවලංගු කර ඇති නිසා මෙරටට රැගෙන ආවේ නැති බවත්ය. කෙසේ වෙතත් සාක්ෂි දෙමින් ඔහු පවසා සිටියේ අවශ්‍ය වුවහොත් එය ඉදිරිපත් කළ හැකි බවයි. නමුත් එය ඉදිරිපත්කර නැත. කෙසේ වෙතත් පැමිණිලිකරු පැහැදිලිවම සාක්ෂි දෙමින් ප්‍රකාශ කළේ 1966 වර්ෂයේ ඔහු ඕස්ට්‍රේලියාවට ගිය පසු ඔහුට ස්ථිර රැකියාවක් ලැබුනු බවත් අනතුරුව එම රටේ පදිංචිය සඳහා නිවසක් මිලට ගෙන පවුලේ සාමාජිකයින් සමග පදිංචි වී එහි සේවය කළ බවත් ය. 1991 වර්ෂයේ මෙරටට පැමිණෙන තුරු ඔහු දිවයිනට නොපැමිණි බවටද පැහැදිලිව සාක්ෂි දී ඇත. එම සාක්ෂිය බිඳ හෙලීමට විත්තිය සමත් වී නැත. මේ අනුව ප්‍රශ්ණගත ඔප්පුව ලියා සහතික කල අවස්ථාවේදී පැමිණිලිකරු මෙරටේ නොසිටි බවට තීරණය කරමි."

(However, whilst giving evidence the Plaintiff stated that his old passport was in Australia and he did not bring it to Sri Lanka since it has become in valid. Even so, he testified he could produce the passport if the need arose. But he has not produced it. However, the Plaintiff has quite clearly given evidence that since his migration to Australia in 1966 he had obtained a permanent job and brought a house for himself in which he has been residing with his family members and he never visited Sri Lanka until he came back for the first time in 1991. The defense has not been successful in assailing this evidence. Accordingly I decide that the Plaintiff was not in the country at the time of the execution of the impugned Deed.)

Whilst Sections 101, 106 and 114 (f) of the Evidence Ordinance cast upon the Plaintiff a burden, it is erroneous on the part of the learned Additional District Judge of Colombo to have displaced this burden to the Defendants. It has to be pointed out that the Plaintiff-Respondent has not established his assertion of absence beyond seas as required by Section 101, 103 and 106 of the Evidence Ordinance. The illustration (f) to the Section 114 of the Evidence Ordinance would also compel the Court to draw an adverse inference against the Plaintiff's assertion that he was absent from Sri Lanka in the year 1989. The learned Additional District Judge of Colombo was quite oblivious to the burden of proof stipulated in these sections and misdirected himself in acting upon the bare assertion of the Plaintiff that he was not in Sri Lanka at the time of the execution of the disputed Deed No.756.

Plea of Extinctive Prescription in Appeal

It was also contended on behalf of the Defendant-Appellants that the action is barred by Section 10 of the Prescription Ordinance. According to Section 10 of the Prescription Ordinance if a party asserts that a particular deed is fraudulent and seeks to have it invalidated, such an action must be instituted within 3 years of the execution of the alleged deed.

In ***Ranasinghe v. De Silva*** 78 N.L.R 500 the date of execution of the deed was 28.05.1963. The Plaintiff alleged that he was compelled by threat, fear and undue influence to

execute the deed. The institution of the case was on 06.05.1968 (5 years after the date of execution of the deed). The Defendant pleaded extinctive prescription.

Wimalaratne, J. (with Sirimanne, J. and Gunasekara, J. agreeing) held:-

> *"a cause of action accrued on 28.05.1963. That was the date on which the Plaintiff's rights to the land in question were deprived of as a result of the execution of the deed. The action for relief on that cause of action should, therefore, have been commenced within three years of that date in terms of Section 10 of the Prescription Ordinance."*

The divisional bench of the Supreme Court further held that an action for a declaration that a notarially executed deed is null and void is prescribed within three years of the date of the execution of the deed in terms of Section 10 of the Prescription Ordinance- also see ***Ratnayake v. Mary Nona*** 54 N.L.R 191 for the same proposition in the context of revocation of a deed of gift.

It was argued that the disputed Deed bearing No.756 was executed on 08.12.1989, but if one looks at the original date of filing the action namely December 1993, it was indeed after a lapse of three years from the date of execution. But the Plaintiff alleged that he came to know of the fraud only in 1991 when he came back to Sri Lanka. It has to be recalled that the Plaintiff was challenged on this item of evidence namely he was not in Sri Lanka in 1989 and I have held that this has not been established by the Plaintiff on a balance of probabilities. No doubt, even though the deed was not sought to be invalidated, its invalidity was pivotal to the declaration of title that the Plaintiff had sought and having regard to the axiomatic proposition that this Court can raise an issue in appeal on the question of invalidity of the deed in my view there would be no impediment to determine the validity or otherwise of the deed but there is another question that loomed large in the arguments-namely the case could not have been filed since its institution was later than three years from the date of execution of the deed in 1989.

Prescription can no doubt be established to run from a date when a Plaintiff comes to know of the vitiating element such as fraud. There is authority for the proposition that prescription does not run in the case of concealed fraud until there is knowledge of the fraud or until the party defrauded might by due diligence have come to know of it-*see* ***Keerthisinghe v. Perera*** (1922) 23 N.L.R 279. This mitigation of the strict rule of 3 years from the date of execution is an equitable principle of English law which is part of the law of Ceylon-*see* ***Nagammai Achi v. Lakshmanan Chettiar*** (1957) 58 N.L.R 481 P.C.; 50 N.L.R 337 S.C. Thus when a deed is sought to be impugned for fraud, the cause of action arises when the fraud comes to the knowledge of the party seeking to impugn the deed-*see* ***Fernando v. Peiris*** (1931) 33 N.L.R 1; ***Dias Abeysinghe v. Daniel*** (1959) 57 C.L.W 84.

It must be pointed out that the answer did not contain an averment on extinctive prescription. In fact Mr. W.D. Weeraratne for the Plaintiff has strenuously contended that the plea of time bar was not taken up in the District Court. Even so the learned President's Counsel for the Appellants contended that since prescription in this case was a pure question of law, it could be taken up in appeal.

Prescription was a plea that was abandoned by the Defendants in the original court and since prescription operates subject to a doctrine of waiver, it cannot be taken up in appeal. It has been held that the effect of the limitation statute is merely to limit the time in which an action may be brought and not to extinguish the right and therefore the Court will not take the statute into account unless it is specially pleaded by way of defence-*see* ***Brampy Appuhamy v. Gunasekere*** (1948) 50 N.L.R 253: 1877 Ram.269.

In my view the time bar in this case was a question of mixed fact and law. If the Plaintiff was not called upon to meet a case of prescription in the District Court, he cannot now be visited upon with a plea of prescription in appeal.

However the fact remains that it is the old passport of the Plaintiff covering the year 1989 that would have thrown light on the question whether the Plaintiff came to Sri Lanka or not in 1989. This evidence was not produced and thus it is this failure that has impelled

me to hold that the Plaintiff has not established his case for a *rei vindicatio* action on a balance of probabilities.

The fact that the Plaintiff was never there in Sri Lanka in 1989 was crucial to this case namely the year of execution of the deed. No evidence has been led on this fact in issue. As long as the fact of his non-existence in Sri Lanka or absence from Sri Lanka in 1989 remains unproven on the part of the Plaintiff which is also an adverse inference against him in terms of Section 114 (f) of the Evidence Ordinance, upon the above analysis of the evidence and the law I am driven to the conclusion that the learned Additional District Judge of Colombo fell into an error in misdirecting himself on the above questions of facts and law and in the circumstances I hold that the judgment of the learned Additional District Judge dated 28.03.2000 should be set aside. Accordingly I set aside the judgment dated 28.03.2000 and allow the appeal of the 1st Added-Defendant-Appellant and 2nd Defendant-Appellant.

JUDGE OF THE COURT OF APPEAL