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

Balapuwaduge Athula Henry
Mendis,
No.192,
Egoda Uyana,
Moratuwa.
3rd Plaintiff-Petitioner

CA Case No: CA/RI/82/2012
DC Moratuwa Case No: 30/P

Vs.

1. Thevarathantrige Gunawathie
   Hemalatha Fernando,
   No.192,
   Egoda Uyana,
   Moratuwa.
2. Balapuwaduge Anura Henry
   Mendis,
4. Balapuwaduge Anil Henry
   Mendis,
   All of No.51/43,
   Seevali Mawatha,
   Willorawatta,
   Moratuwa.
   Plaintiff-Respondents

1. Balapuwaduge Nelson Henry Mendis,
2. Balapuwaduge Suneetha Harriet Mendis,
   Both of No.270/1,
   De Soysa Road,
   Moratumulla,
   Moratuwa.
3. Kumaragewattage Chandra Swarnapala Fernando,
   No.270/A, De Soysa Road,
   Moratumulla,
   Moratuwa.
4. Pearl Harriet Mendis, (deceased)

4A. Thelga Henry Victor Peiris,
   No.23/25, 4th Place,
   Nawala,
   Rajagiriya.

5. Sellapperumage Kamal Ranjith Fernando,
   No. 29, 3rd Lane,
   Rawathawatta,
   Moratuwa.

   Defendants-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Upul Fernando for the 3rd Plaintiff-Petitioner.
Shiral Lakthilaka for the 3rd and 5th Defendant-Respondents.

Decided on: 03.10.2018

Samayawardhena, J.

The petitioner who is the 3rd plaintiff in the partition action filed this application dated 21.03.2012 for *restitutio in integrum* thereby seeking to set aside the Judgment of the District Court dated 02.06.2005.

Several Deeds have been produced during the course of the trial. The petitioner seeks to set aside the Judgment on the basis that Deeds marked 3V4 and 3V6 are fraudulent Deeds.

I will first consider the Deed marked 3V4 dated 16.10.1987. No issue had been raised at the trial on this Deed, let alone on the basis that it is a fraudulent Deed.

This Deed has however been marked subject to proof. One of the executants of that Deed is the 4th defendant. The other executant is her mother who was dead at the institution of the action. The 4th defendant, in her evidence, has admitted going to Panadura with her mother to sign the Deed and she admits her signature on the Deed. It appears that her complaint is that the Notary was not there and the contents were not explained. One of the subscribing witnesses to that Deed is the 3rd defendant. He has also identified his signature on the Deed and testified in favour of due execution thereof. In the circumstances of this case, the learned District Judge has disbelieved the 4th defendant's story and held that the Deed has been proved.

On what basis does the petitioner now state that Deed 3V4 is a fraudulent Deed? That is on the basis that the petitioner has now come to know that the duplicate of Deed 3V4 dated 16.10.1987 has been sent to the Land Registry by the Notary (as seen from the document marked B) on 18.09.1990.

According to section 31(26) of the Notaries Ordinance, No.1 of 1907, as amended, the Notary shall send to the Registrar of Lands on or before the fifteenth day of every month the duplicate of every Deed which he has attested during the preceding month. If the Notary fails to observe it or anything which is listed out under section 31(1)-(36), the Notary can be dealt with *inter alia* under the Notaries Ordinance, but it does not make the Deed invalid. *(Vide Asliya Umma v. Thingal Mohamed*[1]*, People's Bank v. Hewawasam*[2]*, Hemathilaka v. Allina*[3]*, Wilisindahamy v. Karunawathi*[4]*)*

Section 33 of the Notaries Ordinance is clear on that point:

> *No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form: Provided that nothing hereinbefore contained shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions of any other written law.*

I hold that the Deed 3V4 cannot be challenged by way of *restitutio in integrum*.

Let me now turn to Deed marked 3V6. Specific issues have been raised at the trial on this Deed and the learned District Judge has concluded that the due execution of the Deed has been proved. This is purely on the basis that the 1st plaintiff has identified her signature and those of the 2nd and 3rd plaintiffs on the Deed.

---

[1] [1999] 2 Sri LR 152
[2] [2000] 2 Sri LR 29
[3] [2003] 2 Sri LR 144
[4] [1980] 2 Sri LR 136

There are four executants to this Deed. They are the 1st-4th plaintiffs. The 1st plaintiff is the mother and the other three are her children. On the third page of the Deed the signatures of 1st-4th plaintiffs can be seen.

Even though the 1st plaintiff in her evidence has admitted the signatures, she has categorically stated that she never knew what she was signing for and it was never signed before a Notary by the name of Ganeshan. The Deed is handwritten in English—a language in which they are illiterate.

The 1st plaintiff has further stated that the 4th plaintiff was at that time a minor and he never signed the Deed, but someone else wrote the 4th defendant's name on the Deed as his (the 4th Defendant's) signature. That part of evidence of the 1st plaintiff has not been contradicted and the learned District Judge has accepted that evidence, but decided that, except the 4th plaintiff, the rights of the 1st-3rd plaintiffs have been transferred to the 3rd defendant on that Deed.

It appears that the learned District Judge has taken the forging of the 4th plaintiff's signature for granted. According to the attestation of the Deed, all four executants including the 4th plaintiff has signed the Deed before the Notary Ganeshan. This itself, in my view, casts serious doubt about the due execution of the Deed.

It is significant to note that the 3rd defendant did not call any other witness to prove the Deed.

Section 68 of the Evidence Ordinance, No.14 of 1895, as amended, enacts:

> *If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.*

What is required under section 68 of the Evidence Ordinance is proof of due execution of the Deed by calling at least one attesting witness.

What is due execution? In terms of section 2 of the Prevention of Frauds Ordinance, No.7 of 1840, as amended, a Deed shall be of no force or avail in law unless the same shall be in writing and signed by the party making the same in the presence of a Notary and two or more witnesses present at the same time and duly attested by such Notary and witnesses.

In *Solicitor General v. Ava Umma*[5], Justice T.S. Fernando enunciated:

> *The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in section 2 of No. 7 of 1840 means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution.*

Has the due execution of the Deed 3V6 been proved by mere identification of the signature of the executant on the Deed, when the alleged executant vehemently states that

---

[5] (1968) 71 NLR 512 at 515-516

notwithstanding it is her signature, she never signed a Deed in the presence of a Notary and two or more witnesses present at the same time who attested the execution? The answer shall obviously be in the negative.

During the trial a witness from the Land Registry has been called to prove that Notary Ganeshan has not carried out his Notary practice at the time of the alleged execution of the Deed No. 2446 marked 3V6. That witness has further stated that the said Notary has only executed Deeds up to Deed No.1383. The learned District Judge has not drawn his attention to this vital piece of evidence.

The immediate reason of the 3rd plaintiff-petitioner to come before this Court by way of *restitutio in integrum* is the recent discovery of the Death Certificate of the said Notary marked A, whereby it is clearly proved that Notary Ganeshan was dead well before eight years of the alleged execution of Deed 3V6. The Deed 3V6 has purportedly been executed by Notary Ganeshan on 02.10.1990, whereas according to the Death Certificate, the said Notary has died on 06.04.1982.

The 3rd defendant-respondent in his statement of objections does not challenge the genuineness of the Death Certificate of the Notary, but attempts to counter it stating that the same Notary, on the same day, after the impugned Deed No.2446, has executed another Deed, No.2447, in favour of the plaintiffs as seen from the Land Registry extracts. In reference to this Deed No.2447, the 3rd defendant, in his evidence has stated that he sold one of his properties to the plaintiffs by that Deed.[6] It is curious to note that the 3rd defendant has never produced such

[6] Page 212 of the brief

a Deed before the trial Court or before this Court, nor have the plaintiffs relied upon such a Deed at any stage of the case.

The certified copy of the Death Certificate of the Notary conclusively proves that there was no due execution of the purported Deed marked 3V6 in terms of section 2 of the Prevention of Frauds Ordinance and document 3V6 is a forgery.

I hold that Deed 3V6 is void *ab initio* and no title passes on to the 3rd defendant on that fraudulent document.

The 3rd defendant appears to be heavily relying on technical objections to defeat the application of the petitioner.

Delay *ipso facto* shall not be a ground to reject an application *in limine* when there are other cogent and compelling grounds staring at the Court demanding justice. This is more so, when there is a manifest fraud proven before Court. *(Biso Manika v. Cyril De Alwis*[7]*, Sebastian Fernando v. Katana Multi-Purpose Co-operative Society Ltd*[8]*, Velun Singho v. Suppiah*[9]*)*

Chief Justice Bertram in *Suppramaniam v. Erampakurukal*[10] citing *Black on Judgments*[11] stated that "*Fraud is not a thing that can stand even when robed in a judgment*". Vide also *Maduluwawe Sobitha Thero v. Joslin.*[12]

In *Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands*[13], Justice Vythialingam[14] and Justice Weeraratne[15] quoted with

---

[7] [1982] 1 Sri LR 368
[8] [1990] 1 Sri LR 342
[9] [2007] 1 Sri LR 370
[10] (1922) 23 NLR 417at 435
[11] Black on Judgments, Vol 1, Section 292-293
[12] [2005] 3 Sri LR 25 at 28
[13] (1974) 80 NLR 1
[14] At page 66

approval the following dicta of Lord Denning in *Lazarus Estates Ltd v. Bearely.*[16]

> *No Judgment of a Court or order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is specially pleaded and proved. But once it is proved it vitiates judgments, contracts, and all transactions whatsoever.*

Let me now briefly address the specific issue whether *restitutio in integrum* lies in the above circumstances of this case. In *Dember v. Abdul Hafeel*[17] Justice Canekeratne observed that:

> *The cases in which application for relief by way of restitution in respect of judgments of original courts have been made in Ceylon can, broadly speaking, be classed under two heads: (a) where a judgement has been obtained by fraud or where there has been a discovery of fresh evidence; (b) where a judgment has been entered of consent and there has been an absence of a real consent such as in cases of fraud, fear, excess of authority and mistake."*

I am satisfied that the present application falls within (a) above.

I will now proceed to address the issue particularly in terms of the Partition Law. Although section 48(3) of the Partition Law enacts that "*The interlocutory decree and the final decree of partition entered in a partition action shall have the final and conclusive effect declared by subsection (1) of this section*", the

---

[15] At page 140
[16] (1956) 1 All ER 341 at 345
[17] (1947) 49 NLR 62 at 66

same section immediately thereafter expressly states that "*The powers of the Court of Appeal by way of revision and restitution in integrum shall not be affected by the provisions of this subsection.*" It is trite law that the powers of revision and *restitutio in integrum* of the Court of Appeal have survived right throughout even without such express provisions as held in the celebrated case of *Somawathie v. Madawela.*[18]

The Final Decree has been entered after the petitioner came before this Court by way of *restitutio in integrum*. There is no necessity to set aside the Judgement of the District Court in its entirety as except the rights of the 3rd defendant, those of others are unaffected by this Judgment of this Court.

The learned District Judge in the Judgment has decided that the 1st plaintiff was entitled to 2.24 perches, and the 2nd-4th plaintiffs each to 0.75 perches before they transferred the said rights to the 3rd defendant by 3V6. There is no dispute about that finding.

As 3V6 has now been made null and void, the plaintiffs shall be restored to the earlier position which they were. Accordingly, the List of Shares shall be amended as follows:

The 1st plaintiff	2.24 P
The 2nd plaintiff	0.75 P
The 3rd plaintiff	0.75 P
The 4th plaintiff	0.75 P
The 1st defendant	4.48 P
3rd defendant	4.47 P
5th defendant	4.36 P

[18] [1983] 2 Sri LR 15

Unallotted	1.98 P
	19.78 P

The Interlocutory Decree shall be amended as above and a fresh commission to prepare a Final Partition Plan shall be issued and thereafter an amended Final Decree to be entered in accordance with law.

The application of the petitioner is partly allowed. The 3rd defendant-respondent shall pay a sum of Rs.50,000/= as costs of this application to the petitioner.

Judge of the Court of Appeal