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

Herath Mudiyanselage Mallika Karunaratne,
Herath Mudiyanselage Malani Karunaratne,
3rd & 4th Defendant-Appellants

CASE NO: CA/1030/2000/F
DC KANDY CASE NO: 11981/P

Vs.

Karasinghe Arachchige Don Chandradasa,
Karasinghe Arachchige Don Podi Mahathmaya,
Plaintiff-Respondents
Bulathsinhalage Mary Cooray Hamine,
121, Udaeriyagama,
Olideniya,
Peradeniya.
Batuwita Arachchige Violet Nona,
Udaeriyagama,
Peradeniya.
1st & 2nd Defendant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Parakrama Agalawatta with Mohan Walpita for the 3rd and 4th Defendant-Appellants.
Rohan Sahabandu, P.C., with Chathurika Elhitigala for the Plaintiff-Respondents.
Jagath Wickramanayake with Migara Doss for the 2nd Defendant-Respondent.

Decided on: 05.10.2018

Samayawardhena, J.

The plaintiffs instituted this action in the District Court of Kandy seeking to partition the land depicted in the Preliminary Plan. After trial, the learned Additional District Judge entered Judgment partitioning the land among the two plaintiffs and the 2nd-4th defendants. Being dissatisfied with this Judgment, only the 3rd and 4th defendants have preferred this appeal.

When this appeal came up before me for argument, learned counsel appearing for the parties agreed to file comprehensive written submissions instead of oral submissions. However, I find that, except on behalf of the 2nd defendant, which I will advert to later, no written submissions have been tendered on behalf of the other parties including the appellants before the given date or at least at the time of writing this Judgment. No motion has been filed seeking extension of time.

When I read the petition of appeal, it is clear that, the only point raised by the appellants in this appeal is that Deed No. 702, which the 1st plaintiff traces part of his title to, and the learned Additional District Judge has accepted as a genuine one, is a fraudulent Deed.

The appellants have in their statement of claim specifically pleaded that the said Deed is a fraudulent one and put that matter in issue at the trial. The plaintiffs' first issue is on the due execution of the said Deed.

How a Deed shall be proved in the eyes of the law is stated in section 68 of the Evidence Ordinance, No. 14 of 1895, as amended:

> *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.*

The 1st plaintiff in favour of whom the Deed has been executed has given evidence at the trial. He has stated in evidence that the Notary and the two subscribing witnesses to that Deed were dead.

If the attesting witnesses to a Deed, which includes the Notary[1], cannot be found, how the Deed can be proved is stated in section 69 of the Evidence Ordinance:

> *If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.*

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[1] *Solicitor General v. Ava Umma* (1968) 71 NLR 512

According to section 69 of the Evidence Ordinance, if no such attesting witness can be found, it must be proved (a) the signature of one of the witnesses and (b) the signature of the executant. The learned Additional District Judge has not adverted to these two mandatory requirements when he came to the finding that the said Deed is a valid Deed.

I carefully went through the evidence of the sole witness for the plaintiffs, who is the 1st plaintiff, to learn that, he, in his testimony, has not identified the signatures of the executant and the attesting witnesses. His evidence on the execution of the Deed is evasive.

It is the position of the plaintiffs that the executant placed her left thumb impression instead of placing her signature on the Deed (as she was used to) because she was ill.

However, it is interesting to note that in the original Deed, which was marked as P1 through the evidence of the 1st plaintiff, the thumb impression of the executant or anything written underneath the thumb impression by the Notary cannot be seen to the naked eye.[2] That is not due to lapse of time because writings of the other parts of the Deed are clear and readable. The position had been the same when the original Deed was marked in evidence at the trial Court.

The 1st plaintiff does not complain of a foul play on non-appearance of the alleged thumb impression of the executant and the endorsement supposedly made by the Notary underneath the thumb impression. The 1st plaintiff has not given any acceptable explanation on that vital matter. Nor has

[2] Page 113 of the Brief.

he taken any steps to get a commission issued to the Examiner of Questioned Documents or any other expert to examine and report on that matter to Court.

Thereafter during the course of the cross-examination of the 4th defendant-appellant by learned counsel for the plaintiffs, a certified photocopy of the duplicate of the Deed has been marked as P2 to say that in that copy, the executant's thumb impression and the endorsement of the Notary that it is the thumb impression of the executant are visible. The 4th defendant-appellant has not accepted that position.

The entire evidence of the 1st plaintiff regarding due execution of the Deed is very unsatisfactory.

The 1st plaintiff in his evidence has stated that he came with the executant, who was his grandmother, to house No.121 to sign the Deed.[3] Admittedly, the Deed has not been signed at the Notary's office. However, the witness does not say that the Notary and the two witnesses also came to the said house and the executant, the two witnesses and the Notary signed the Deed in the presence of one another, all being present together at the same time.

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.

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[3] Page 57 of the Brief.

The 1st plaintiff has also admitted in evidence that the executant—his grandmother, was confined to bed and immobilized due to paralysis at the time of the execution of the Deed.[4] Then it is not clear how and why she was brought to house No.121 for the purpose of execution of the Deed. On the other hand, according to the Deed, house No.121 was where she was residing even though the 1st plaintiff in his evidence stated that he came with the grandmother to house No. 121. It is also noteworthy that the Notary in the attestation has stated that he does not know the executant.

I have no reservation to conclude that the due execution of the Deed marked P1 as contemplated in section 69 of the Evidence Ordinance read with section 2 of the Prevention of Frauds Ordinance has not been proved, and therefore the impugned Deed marked P1 has no force or avail in law.

Let the incumbent District Judge adjust the share allocation as if there was no such Deed and enter Interlocutory Decree accordingly. To that extent, the Judgement of the District Court is set aside and the appeal is allowed with costs.

This leads me to consider the application of learned counsel for the 2nd defendant-respondent made by way of a written submission tendered to this Court after the argument date, without sending copies to the Attorneys-at-Law of the other parties. By that written submission, learned counsel for the 2nd defendant-respondent moves to adjust share allocation in respect of the Deed marked 4V1 and the subsequent Deed marked 4V2, which the learned counsel says has wrongly been decided by the learned Additional District Judge.

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[4] Page 63 of the Brief.

The 2nd defendant-respondent has not filed an appeal against the Judgment of the District Court as she was entitled in law to do—vide sections 754-755 of the Civil Procedure Code.

Nor has the 2nd defendant-respondent filed objections to the decree with seven days' notice in writing of such objection to the registered Attorney for the appellant in terms of section 772 of the Civil Procedure Code which reads as follows:

> *(1) Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his registered attorney seven days' notice in writing of such objection.*
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> *(2) Such objection shall be in the form prescribed in paragraph (e) of section 758.*

In *Solomon v. Mohideen Pathumma*[5] it was decided that:

> *Without filing an objection in terms of section 772 of the Civil Procedure Code a party respondent to an appeal is not entitled to attack any findings of the trial Court that are adverse to him. The respondent must accept that correctness of the decision which has been made against him and on that basis, if the findings help him, try to support the decree.*

[5] (1962) 64 NLR 227

The rigidness of section 772 of the Civil Procedure Code was somewhat relaxed in *Ratwatte v. Goonasekera*[6] where it was held that:

> *Where no cross-appeal has been filed, the plaintiff's failure to give seven days written notice under section 772 of the Civil Procedure Code will not entitle him to a right to take objection to the decree. But 772 of the Civil Procedure Code does not bar the court, in the exercise of its powers to do complete justice between the parties, from permitting objection to the decree even though no notice had been given. The Court of Appeal has inherent jurisdiction to grant or refuse such permission in the interest of justice.*
>
> *A respondent not taking any objection can without filing any cross objections support the decree not only on the grounds decided in his favour but also by urging that the grounds decided against him should have been decided in his favour. He may thus challenge a finding against him although the decree may be in his favour. But a respondent cannot attack the decree in the appellant's favour without filing a cross-appeal or giving notice of objections under section 772 of the Civil Procedure Code.*

Then it is clear that when objections under section 772 are not filed, the Court has the discretion to allow or disallow a respondent to attack the decree. That is a threshold question. I will leave that question for a moment and get on to the next point.

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[6] [1987] 2 Sri LR 260 per Sharvananda CJ

I did not consider the merits of the application of the 2nd defendant-respondent. However, one thing is clear. If the application of the 2nd defendant-respondent is allowed, the appellants are the losers or the affected parties. Then even if the liberal approach suggested in Ratwatte's case is adopted, the application of the 2nd defendant-respondent cannot be allowed as "*a respondent cannot attack the decree in the appellant's favour without filing a cross-appeal or giving notice of objections under section 772 of the Civil Procedure Code.*"

The application of the 2nd defendant-respondent is dismissed.

Judge of the Court of Appeal