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

Benrata Vidanalage Gunasena,
Gunasena Building,
Elpitiya.
PLAINTIFF

C.A. Case No. 303/2000 (F)

D.C. Balapitiya Case No. 1933/L

-Vs-

Bentara Vidanalage Nandasena
alias **Nandapema,**
Pelandagoda, Elpitiya.
DEFENDANT

AND

Benrata Vidanalage Gunasena (Deceased),
Gunasena Building,
Elpitiya.
PLAINTIFF - APPELLANT

Hirimuthugodage Dhanawathie,
No. 551, Madiwela Road,
Thalawathugoda.
SUBSTITUTED - PLAINTIFF - APPELLANT

-Vs-

Bentara Vidanalage Nandasena
alias **Nandapema,**

Pelandagoda, Elpitiya.

at present known as

Benrata Nanda Thero

Now at Sri Pungnaloka Viharaya,

Watareka, Padukka.

DEFENDANT - RESPONDENT

BEFORE	:	**A.H.M.D. NAWAZ, J.**
COUNSEL	:	Bimal Rajapakshe with S. Gunasekara and S.A. Kulasooriya for the Substituted Plaintiff-Appellant. M.D.J. Bandara for the Defendant-Respondent.
Written Submissions on	:	26.03.2014 (Substituted Plaintiff-Appellant) 13.11.2014 (Defendant-Respondent)
Argued on	:	16.09.2015, 11.11.2015 and 24.06.2016
Decided on	:	26.09.2016

A.H.M.D. NAWAZ. J,

The Original Plaintiff-Appellant (hereinafter referred to as "the Plaintiff") instituted this action against the Defendant-Respondent (hereinafter referred to as "the Defendant") seeking in the main a declaration of title to a land called "Kadewatte" with an appurtenant boutique standing thereon, which was more fully described in the schedule to the plaint and ejectment of the Defendant and all those holding under him. The dispute between the Plaintiff and Defendant who are two brothers, as set out by them in their respective pleadings, goes as follows. By the plaint dated 14.09.1992, the Plaintiff averred that he had been in possession of the land as well as the appurtenant boutique since 05.05.1986 on which date the land was transferred to him by a deed of transfer bearing No. 33504, attested by A. Sri Vijayananda, Notary Public. The Plaintiff further averred that the Defendant forcibly entered the land and boutique on 10.04.1991 and disputed the ownership of the Plaintiff to the subject matter of the action. His recourse to the conciliation board of Elpitiya

resulted in a non-settlement which thereafter gave rise to the initiation of action in the District Court of Balapitiya. It bears recalling at this stage that the aforesaid conveyance by deed No. 33504, according to the Plaintiff, was effected by the Defendant himself to the Plaintiff.

The Defendant completely repudiated the conveyance by traversing in his answer that the Deed of Transfer dated 05.05.1986 was fraudulent and he had never signed the deed. So his answer called in question the due execution of the deed classifying it as a case of forgery. Besides this allegation, the Defendant claimed prescriptive title to the land and boutique that stood thereon. He prayed for a declaration that the deed of 05.05.1986 bearing No. 33504 be declared a fraudulent and forged deed and for a dismissal of the plaintiff's action. There was no prayer that the Defendant be declared the owner of the premises, though he had pleaded in the answer acquisitive prescription to the land and boutique. It has to be noted that the Defendant pleaded title to the land by virtue of a deed bearing No. 2049 and dated 07.09.1997. The claim of the Plaintiff is that it is this title that was the transferred to him by deed No. 33504 on 05.05.1986.

Issues at the Trial

Be that as it may, these rival positions taken up by the two brothers crystallized in their issues on 21.09.1995 when the matter was taken up for trial. The Plaintiff raised three issues based on his plaint, all of which have been answered in the negative by the learned District Judge of Balapitiya. Issue No. 1 raised by the Plaintiff pertained to the alleged deed of transfer which bestowed title to the Plaintiff but the learned District Judge held against the Plaintiff on the score.

The vital issue–Issue No. 4 put in by the defendant namely –was the deed bearing No. 33504 fraudulently executed? was answered in the affirmative by the learned District Judge. Whilst answering these issues, the learned District Judge of Balapitya raised another issue–issue No. 6 namely whether the reliefs prayed for by the Defendant in his answer should be allowed if issues raised by the Defendant were answered in the affirmative. Accordingly, having answered the issues raised by the Defendant in the affirmative, the learned District Judge pronounced judgment dated 13.06.2000 dismissing the action instituted by the Plaintiff. It is this judgment that is being impugned before this Court.

Thus the issue before this Court is crystal clear. Was the deed of transfer, alleged by the Plaintiff to have been executed by the Defendant in his favour on 05.05.1986, a

forgery? This was the issue placed by the Defendant before the learned District Judge. The Plaintiff placed before the learned District judge his own fact in issue namely–Did he derive his title to the land and boutique through the deed dated 05.05.1986 and bearing No. 33504?

Who bears the Burden of Proof?

In fact the appeal raises the question of who bears the burden of proof on the respective issues raised by the parties. The respective issues could be legally posited again. Whilst the Plaintiff alleged execution of the deed in his favour, the Defendant pleaded it to be a forgery. It is trite law that a mere assertion of execution of a deed would not suffice. What would amount to a due execution is what is expected of the Plaintiff to establish by a preponderance of evidence in regard to a deed which the Plaintiff alleges vested him with title. The question that arises is what would pass for a due execution. Execution is, when applied to a document, the last act or series of acts which completes it. It might be defined as formal completion. Before a document could be proved, it must be proved to have been **duly executed**.

"Due execution" means:-

a) that the formalities of the law which are mandated for the execution of a document have been complied with;[1]

b) that the signatures of the party or parties who executed the document and of any attesting witnesses must be proved;[2]

The Plaintiff in the case has raised the issue of due execution of the deed that bestowed him with title–*vide* issue No. 1 at page 55 of the appeal brief. Germane to the issue that he derived title to the land and boutique by virtue of the deed bearing No. 33504, the burden of proof of due execution must devolve on the Plaintiff, because it is the Plaintiff who asserted due execution.

Section 101 is quite explicit on the allocation of 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.*

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[1] As to which see Section 2 and 3 (attested documents) of the Prevention of Frauds Ordinance, Section 4-8 (Wills) Section 18 (documents required by law to be in writing); Deeds and Documents (Execution before Public Officers, Registration of Documents Ordinance, Sections 16-18, (Bills of Sale). E.R.S.R. Coomaraswamy's - *Conveyancer and Property Lawyer, Vol. I, pp. 9-30.*

[2] See Section 68 of the Evidence Ordinance for proof of execution of document required by law to be attested.

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.***[3]

I hold that when a Defendant takes up a defence such as forgery or fraud, Section 101 of the Evidence Ordinance will equally apply to him because the Defendant, just as much as the Plaintiff, has to establish his pleaded case. Since the Defendant has taken up a defence of forgery of his signature on the deed bearing No. 33504, which is in the form of an avoidance of the claim, the Defendant would bear the "burden to prove his case" if he were to succeed.

Having the above in mind the next question that arises is whether both the Plaintiff and the Defendant have discharged their respective burdens. I would now proceed to apply the above legal principles to ascertain whether the Plaintiff has first succeeded in establishing his case having regard to the evidence placed by him. I have already stated that the Plaintiff must establish due execution of the deed on a balance of probabilities. I have delineated that *due execution* of the deed encompasses two elements namely whether the formalities as stipulated in Section 2 of the Prevention of Frauds Ordinance (PFO) were complied with and whether the

[3] (1947) 2 All ER 372 at p 374.

parties to the deed or attesting witnesses placed their signatures in the presence of the Notary at the same time.

Whilst there is evidence before this Court that Section 2 of the PFO was complied with in the case, proof of Due Execution of the deed has to be established through the mode specified in Section 68 of the Evidence Ordinance.

Has the Plaintiff Discharged the Burden of due Execution?

The Plaintiff summoned the Notary Public A. Sri Wijayananda and the two subscribing witnesses to the deed-namely Susilawathie and Saranelis -*see* pages 57 and 87 of the brief.

The mode of proof of due execution is spelt out in Section 68 of the Evidence Ordinance.

> ***"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"***

Though one attesting witness could be called to prove the execution of a deed in terms of Section 68 of the Evidence Ordinance, it has to be noted that there were three witnesses inclusive of the notary who were called by the Plaintiff.

Evidence of the Notary

The evidence of the Notary who is not an attorney-at-law begins at page 87. He counts over 40 years' experience in conveyancing. He identified the impugned deed as one that was attested by him and vouched for its genuineness. It was signed by the Defendant whom he knew. The execution took place in his office. Under cross examination the witness testified that the Defendant signed the deed writing his full name *Bentara Vidanalage Nandasena.* The witness explaining further stated that he not only knew the Defendant during school days but would often encounter him in the town. Section 68 enjoins the summoning of an attesting witness. Is the notary an attesting witness?

A Notary as an Attesting Witness

Lord Chancellor, in the English case of ***Burdett v. Spilsbury***[4], interpreted the expression "attesting witness" to mean,

[4] (1843) 10 Cl. & Fin. 340 (8 Eng. Rep. at 800-1)

"The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness".

There is a slew of case law which states that in addition to the two witnesses to a document, the notary who attests such document is also an attesting witness.

In the case of a notary being called upon to prove the execution, two rules laid down from case law must be observed. **(a)** A notary who attests a document in terms of the Prevention of Frauds Ordinance is generally competent to testify under Section 68 of the Evidence Ordinance. **(b)** But he is not so competent if the executant of the document was not known to him. But in the instant case the notary testified to his familiarity with the Defendant and thus qualifies as an attesting witness.

The Prevention of Frauds Ordinance No.7 of 1840 makes validity of a deed on notarial attestation. Section 2 of this Ordinance requires the deed to be signed in the presence of *a licensed notary public and two or more witnesses.* This same differentiation between the notary and the witnesses is contained in subsections (8), (9), (10) and (12) of Section 31 of the Notaries Ordinance. The Evidence Ordinance, in Sections 68 and 69 is, however, silent on the question of any such differentiation and contemplates only the calling of an attesting witness –***Solicitor-General v. Ava Umma.***[5]

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 the Prevention of Frauds Ordinance 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'. In this regard the personal knowledge of the executant or the witnesses by the notary is very important. If the notary knew the person signing as a maker of the document, he is competent equally with either of the attesting witnesses to prove all that the law requires in Section 68, but if he did not know the maker then he is not capable of proving the identity, as pointed out in ***Ramen Chetty v. Assen Naina.***[6] In this case, the Court held that, even on the assumption that the notary is an attesting witness within the meaning of Section 68, the document cannot be proved without the proof of the signature of the executant. In such a case it would be necessary to call one of the other attesting witnesses for proving the identity of the person.

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[5] 71 N.L.R 512
[6] (1892) 1 S.C.R 216

There is no doubt that the notary who attested the deed is an attesting witness and is competent to prove the execution of that deed if the grantor executing it was known to him (not otherwise). It was also held in several cases that evidence, showing, that the persons, bearing the names of attesting witnesses given in the deed signed in that capacity, was sufficient to prove the signatures.

In the case of ***Kiri Banda v. Ukkuwa***[7], which was decided before the enactment of the Evidence Ordinance, Burnside C.J. (with Withers J. agreeing), held that in an instrument falling within Section 2 of the Prevention of Frauds Ordinance, a notary is an attesting witness in precisely the same sense as are the two witnesses who with him are required to attest the execution thereof. Seven years later, in 1899, Lawrie J. in ***Somanathar v. Sinnathamby***[8], stated that, "the later decisions of this Court regard a notary as an attesting witness and (though I am not sure that I quite agree) I am willing to hold that, by proving the signature of the notary, the requirements of the 69th Section of the Evidence Ordinance have been fulfilled.

The above decision falls within the meaning of Section 68 and 69 of the Evidence Ordinance. The above view was followed in ***Seneviratne v. Mendis***[9], where Schneider A.J. held that, "The language of Section 2 of the Ordinance No.7 of 1840 and in particular the words "the execution of such writing, deed or instrument by duly *attested* by such notary and witnesses" to my mind leave no room for doubt or contention that the notary is an attesting witness in precisely the same sense as the other two witnesses mentioned in that section. A notary is an attesting witness and is competent to prove the execution of the deed if the grantor was known to him". It was also held that, evidence showing that the persons bearing the names of attesting witnesses given in the deed signed in that capacity, was sufficient to prove the signatures of those attesting witnesses.

In ***Wijegoonetilleke s. Wijegoonetilleke***[10], (decided on July 6, 1956) Basnayake C.J. held 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.

In the subsequent case of ***Marian v. Jesuthasan***[11], (decided on July 20, 1956) it was held that where a deed executed before a notary is sought to be proved, the notary can be regarded as an attesting witness within the meaning of Section 68 of the

[7] (1892) 1 S.C.R. 216
[8] (1899) 1 Tambyah's Rep. 38 (or Koch's Rep. 16)
[9] (1919) 6 C.W.R. 211; 1 Law Recorder 47
[10] 60 N.L.R. 560
[11] 59 N.L.R. 348

Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant.

The above cases are consistent with the decision in the English case of ***Burdett v. Spilsbury***[12] where it was held that "the party who sees the document executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness". This case and the local cases lay down the proposition that a witness to become an attesting witness, he must not only be present and see the execution but also append his signature to that document, though he did not make a declaration to that effect in the document.

The notary, therefore, to become an attesting witness within the meaning of Sections 67 and 68 of the Evidence Ordinance, must be able to bear witness to the fact that it was the executant who set his signature to the document. It must be noted that for a notary to become an attesting witness he must know either the executant or the attesting witnesses personally.

In my view all these requirements were satisfied by the notary who testified in the case and the question whether the deed bearing No. 33504 was duly executed would appear to have been laid to rest but for the fact that this witness was however posed the question at one stage as to why he chose not to allude to his knowledge in the attestation clause of the deed, if he knew the Defendant. The witness explained that since the witnesses also knew the Defendant, he did not think it necessary to incorporate his knowledge in the attestation. If there was a rule of practice that a notary must refer to his knowledge of the executant in the deed, an omission to do so will not invalidate the deed. A deed of transfer is not invalid merely because the requirements of the Notaries Ordinance were not complied with by the notary public who attested the deed -*see* ***Weeraratne v. Ranmenike (1919) 21 N.L.R 286 at 287-288; Asliya Umma v. Thingal Mohamed (1999) 2 Sri.LR 152 at 157; People's Bank v. Hewawasam (2000) 2 Sri.LR 29 and Pingamage v. Pingamage (2005) 2 Sri.LR 370 at 376.***

Section 31 of the Notaries Ordinance which enacts rules for notaries does not entail an invalidation of the deed if there is a rule to the express or implied effect that a notary must refer to his knowledge of the executant in the attestation and this rule was infringed by the notary. Notaries may though well reflect on Section 31(10) of the Notaries Ordinance, which states that, "He (the Notary) shall not authenticate or

[12] *Supra*

attest any deed or instrument in any case in which both the person executing the same and the attesting witnesses thereto are unknown to him".

So I would conclude that the testimonial trustworthiness of the notary was not shaken by the defence and on the contrary his testimony was buttressed by two other attesting witnesses to the deed–namely Susilawathie and Saranelis –*see* pages 98 and 107 of the appeal brief.

Upon a perusal of the totality of the evidence of these two witnesses, I find that both witnesses stood their ground though they were subjected to cross-examination. In fact Susilawathie stated that she saw the executant of the deed-the Defendant-sign the deed thrice over.

Is one attesting witness sufficient?

I must at this stage observe that Section 68 of the Evidence Ordinance requires that if a document is required by law to be attested, its execution may be proved by calling at least one attesting witness to it. This section does not expressly provide that, where one attesting witness is unable to give evidence of due execution, the other must be called. It may be mentioned, however, that even where one attesting witness is able to give the evidence required, our Courts have expressed the desirability of calling all the attesting witnesses. In ***Arnolis v. MutuMenika***[13], the District Judge held that, as a matter of law it was necessary to call both the attesting witnesses. Bonser C.J., disagreeing with this view, held, (Lawrie J. agreeing) that, "In order to prove the execution of a mortgage bond attested by a notary and two witnesses it is not necessary that the notary and both the attesting witnesses should be called. It may be proved by the evidence of only one witness; *although as a matter of precaution it may be advisable in many cases to call all the attesting witnesses*".

This truism expressed by Bonser C.J has been followed by the Plaintiff in that all three attesting witnesses to the deed were summoned by the Plaintiff and I have no reason to doubt the veracity of these three witnesses as to the genuineness of the due execution.

Evidence for the Defendant

In the teeth of the evidence led on behalf of the Plaintiff, one needs to look at how the case of the Plaintiff was challenged by the Defendant. I have already referred to

[13] 2 N.L.R. 199

issue No. 4 which raised fraud in relation to the deed. Was it a fraudulent deed? This was the issue raised by the Defendant. I have stated in the course of this judgment that whoever asserts a fact must establish the fact and Section 103 of the Evidence Ordinance would place the legal burden of proving fraud on the Defendant, because it is him who has put it in issue.

Has there been a Discharge of that Legal Burden?

When the impugned deed (**P1**) was originally marked, there was no objection raised. It was only later that the learned District Judge allowed the Attorney-at-Law for the Defendant to raise the objection – "subject to proof". This procedure is in my view impermissible-Section 154(3).

Section 154(3) of the Civil Procedure Code which governs this satiation has the following effect:

Every document that is tendered in evidence by the plaintiff must be marked with a distinguishing mark, such as P1, and the document tendered by the defendant also must be marked in the like manner, say D1, and all the documents tendered and marked as such must be signed by the presiding Judge. The document or writing being admitted in evidence, the Court, after marking it with a distinguishing mark or letter by which it should, when necessary, be referred to it throughout the trial, to be read aloud.[14]

> ***Explanation:-***
>
> **If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it.**
>
> **If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the court:-**
>
> **Firstly, whether the document is authentic, in other words, is what the party tendering it represents it to be; and**
>
> **Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.**

[14] Section 154(3) of the Civil Procedure Code.

The latter question in general is a matter of argument only, but the first must be supported by such testimony as the party can adduce. If the court is of opinion that the testimony adduced for this purpose, developed and attested by cross-examination, makes out a *prima facie* case of authenticity and is further of opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.

If, however, the court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document.

So the objection has to be raised at the same time as the document is produced and it cannot be entertained thereafter. If it is not objected to upon production, the only question for the learned District Judge is to ascertain whether the document is forbidden by law.

Forbidden by Law

What is meant by the expression "forbidden by law" in the explanation was considered and construed to mean absolute prohibition and not to include a case where evidence was required not to be received or used unless certain requirements were fulfilled. The words "forbidden by law" does not apply to a case where the document was required not to be received or used unless a certain method of proof had been complied with. For e.g., in the case of proof of a Deed of Transfer, in terms of Section 68 of the Evidence Ordinance, the executant or the notary who attested the said deed or one of the attesting witnesses thereto must be called to give evidence to prove the execution of the deed.

Section 114(1) of the Civil Procedure Code stipulates that, no document shall be placed on the record unless it has been proved or admitted in accordance with the law of evidence for the time being in force.

Though it is not permissible for the Learned District Judge to allow an objection "subject to proof" long after the document has been admitted, it is incumbent upon him to embark upon the inquiry whether or the document is forbidden by law. Where the opposing party fails to object, the trial Judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal -*see* ***Cinemas Ltd. v. Soundararajan***[15].

[15] 1998 (2) Sri L.R. 16

Now that three attesting witnesses had spoken to the due execution of the instrument, the learned District Judge must rule on the question of due execution and though he answered the issue of due execution in the negative, I must say that there has not been an incisive analysis of what constitutes due execution and want of a reasoned judgment premised on erroneous reasoning would go to vitiate the conclusion reached by the learned District Judge. Even if one were to assume without conceding that "subject to proof" raised at a later stage was a challenge to the Plaintiff that he must establish his case, I would conclude that the evidence of the three witnesses establishes on a balance of probabilities that on 05.05.1986, the Defendant attended the office of the Notary and signed the deed in question. In fact I draw in aid Section 67 of the Evidence Ordinance.

Proof of Signature and Handwriting -Section 67 of the Evidence Ordinance

Section 67 does not in any way restrict the kind of proof that must be given. It merely states with reference to documents, as the universal rule in all case, viz, that the party who makes the allegation must prove it. No new rule is laid down as to the mode of roof. The section does not require the writer of a document to be examined as a witness nor does it require the subscribing witnesses to be produced. ***Ali v. Rahman.***[16]

The signature and handwriting may be proved in the following way:-

(a) By the evidence of the party who signed or wrote the document;

(b) By the evidence of someone who saw the executant signing or writing it;

(c) By the evidence of someone who is acquainted with his handwriting, (s.47);

(d) By the evidence of an expert who compares the writing with some other writing known to be that of the signatory;

(e) By the proof of the admission by the writer;

(f) By comparison by the Court under Section 73 of the Ordinance.

No doubt the Court could have acted under Section 73 of the Evidence Ordinance but there is evidence of the three witnesses that they saw the executant sign the deed thus proving the due execution of the deed. An argument was made of the proxy **(V1 at page 79)** given by the Defendant in the case and learned Counsel for the Defendant contended that when one compared the signature on **V1** with the one appearing on the impugned deed, the signatures were different. It is significant to

[16] 21 W.R. 42

note that **V1** was not shown to the notary nor the Plaintiff. If this was the case, this position must be put to the witness who testified that the Defendant wrote his full name *"Bentara Vidanalage Nandasena."*

In view of the clear evidence given by the three attesting witnesses that the Defendant signed the Deed of Transfer, the fact that the defendant's signature with initials that occurs on the proxy does not take away the effect of the convincing evidence given by the witnesses as to the execution of the deed. It has to be remembered that the proxy was given by the Defendant after the case was instituted by the Plaintiff who claimed title on the deed and thus the signature on the proxy is later in point of time and equivocal on the matter –also *see* the response of the Plaintiff at page 79 of the brief when he was confronted with the question of two different signatures.

Another complaint that was made is that when the Counsel for the Defendant posed a question to the Plaintiff in cross-examination whether he was willing to have the issue of signature resolved by the examiner of questioned documents (EQD), the answer was that the Plaintiff did not like that idea. Much was made of this answer. It was sought to be argued that this reply on the part of the Plaintiff shows the veracity of the defendant's version. One cannot hold that view. It is the defendant's burden to establish that the deed was a forgery. One cannot shift this burden to the Plaintiff. If the Defendant deemed it necessary that the court must be aided by the opinion of an expert, it was open to him to make an application to the learned District Judge to have the issue of signature referred to the EQD –*see* the observations of Wimalachandra J. in ***Abeyratne v. Laksiri Fernando***.[17] An answer given by the Plaintiff expressing unwillingness for such an exercise is no excuse for not making an application or failing in an application before the learned District Judge.

Thus I take the view that on totality of evidence led in the case, the Defendant has not discharged his burden of establishing that the deed bearing No. 33504 is a forgery. On the contrary the Plaintiff established on a balance of probabilities his case of due execution of the impugned deed. The learned District Judge has not borne in mind the salient principles that surfaced in the case and reached wrong conclusions in the case and in the circumstances I proceed to set aside his judgment dated 13.06.2000 and allow the appeal.

JUDGE OF THE COURT OF APPEAL

[17] (2004) 1 Sri. L.R. 184