

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

In the matter of an application under Section  
773 and Section 839 of the Civil Procedure  
Code.

C.A. Case No. 713/2000 (F)

D.C. Colombo Case No. 3711/SPL

**Hettiarachchige Dominic Marx Perera,**

No. 67/B/45A, Morawake Watte,

Pahala Bomiriya, Kaduwela.

**PLAINTIFF**

-Vs-

1. **Kuruwita Arachchige Mulin Perera**  
(Deceased),

2. **Milroy Christy Kasichetty,**  
Dalugama, Kelaniya.

3. **National Saving Bank,**  
Galle Road, Collpetty,  
Colombo 03.

**DEFENDANTS**

**AND**

**Hettiarachchige Dominic Marx Perera,**

No. 67/B/45A, Morawake Watte,

Pahala Bomiriya, Kaduwela.

**PLAINTIFF - APPELLANT**

-Vs-

1. Kuruwita Arachchige Mulin Perera  
(Deceased),
2. Milroy Christy Kasichetty,  
Dalugama, Kelaniya.
3. National Saving Bank,  
Galle Road, Collpetty,  
Colombo 03.

**DEFENDANT - RESPONDENTS**

AND NOW BETWEEN

Hettiarachchige Dominic Marx Perera,  
No. 67/B/45A, Morawake Watte,  
Pahala Bomiriya,  
Kaduwela.

**PLAINTIFF - APPELLANT - PETITIONER**

-Vs-

1. Kuruwita Arachchige Mulin Perera  
(Deceased),
- 1A.** Kuruwita Arachchige Jeramious Perera,  
No. 542, Nungamugoda,  
Kelaniya.
- 1B.** Kuruwita Arachchige Violet Perera,  
No. 184, Hospital Junction,  
Akaragama.

IC. Leela Tilakaratne,

No. 636, Sri Vijaya Mawatha,  
Arawwala, Pannipitiya.

ID. Kuruwita Arachchige Sandya Chandani  
Perera,

No. 33, Maheshi Uayana,  
Kahatuduwa, Polgasowita.

IE. Kuruwita Arachchige Thamara Dinadari  
Perera

No. 708, Abillawatte Road,  
Katuwawala Mawatha, Boralesgamuwa.

IF. Kuruwita Arachchige Jayantha Perera,

No. 636, Sri Vijaya Mawatha,  
Arawwala, Pannipitiya.

IG. Kuruwita Arachchige Ranil Santha Kumara  
Perera,

No. 47/12A, Bandaragama-West,  
Bandaragama.

SUBSTITUTED - DEFENDANT -  
RESPONDENT - RESPONDENTS

2. Milroy Christy Kasichetty,

Dalugama, Kelaniya.

3. National Saving Bank,

Galle Road, Collpetty,  
Colombo 03.

DEFENDANT - RESPONDENT -  
RESPONDENTS

BEFORE

:

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

COUNSEL : Anura Gunaratne for the Plaintiff-Appellant-Petitioner.

Yasas De Silva for the 2<sup>nd</sup> Defendant-Respondent.

Sulani Deshadi with Sunil Jayakody for the Substitutes 1<sup>st</sup> to 7<sup>th</sup> Defendant-Respondents.

T. Amarathunga and J. Senarath for the 3<sup>rd</sup> Defendant-Respondents.

Written Submissions on : 31.07.2013 (Substituted 1<sup>st</sup> to 7<sup>th</sup> Defendant-Respondents)

17.09.2015 (Plaintiff-Appellant-Petitioner)

26.10.2015 (2<sup>nd</sup> Defendant-Respondent)

Decided on : 13.02.2017

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

This is an application under Section 773 of the Civil Procedure Code to have admitted in appeal as fresh evidence, a conviction that was secured in the Magistrate's Court of Colombo. This conviction was entered against one *Kuruwita Arachchige Mulin Perera* who was the original 1<sup>st</sup> Defendant (sometimes referred to as "the 1<sup>st</sup> Defendant") in the action which is the subject-matter of this appeal. On a complaint made by the Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") to police, a parallel prosecution had been launched against the original 1<sup>st</sup> Defendant along with two others as co-accused on a charge sheet that leveled the accusation that a deed bearing No. 259 of 26.05.1992 which was allegedly executed by the Plaintiff in favor of the 1<sup>st</sup> Defendant was a forgery. In both the prosecution and the civil trial which is the subject-matter of this appeal, the Plaintiff (the virtual complainant in the prosecution) has pursued the same accusation against the 1<sup>st</sup> Defendant namely she

made the aforesaid fraudulent deed in her favor as if the Plaintiff gifted the 1<sup>st</sup> Defendant the land described in the 1<sup>st</sup> schedule to the plaint.

In other words his contention in both the prosecution and the civil trial has been that his signature on the deed is a forgery and he never executed the aforesaid deed of gift bearing No. 259 of 26.05.1992. At the outset I must state that the prosecution resulted in a conviction against the 1<sup>st</sup> Defendant whilst the civil action by the Plaintiff was dismissed. It is this conviction that is now sought to be adduced in this appeal, which the Plaintiff has preferred against the dismissal of his action.

### **Civil Trial giving rise to this appeal**

The Plaintiff's civil action which has given rise to this appeal prayed for an invalidation of the said deed bearing No. 259. The Plaintiff's issues No. 1 and 2 touching upon that relief could now be set down:

- (1) Did the Plaintiff by Deed No. 259 dated 26.05.1092 attested by G.H. Premasundera, Notary Public, gift the said land to the 1<sup>st</sup> Defendant as stated in her answer?
- (2) Is the deed referred to in the above issue alleged to be attested by G.H. Premasundera, Notary Public, a forgery and/ or a fraudulent deed?

Thus one can observe that Issues No. 1 and 2 specifically raise as facts in issue the question whether the Plaintiff did in fact vest the 1<sup>st</sup> Defendant with lawful title to the property in question. More particularly issue No. 2 alleges forgery or a fraudulent disposition in favor of the 1<sup>st</sup> Defendant. It would appear that the basis on which the Plaintiff instituted this action against the 1<sup>st</sup> Defendant was that the 1<sup>st</sup> Defendant had made a false document with a forged signature of the Plaintiff on the deed and transferred the property which was about 2 roods and 30 perches in extent, to herself. Thereafter she (the 1<sup>st</sup> Defendant) disposed of 10 perches out of the land to the 2<sup>nd</sup> Defendant who subsequently mortgaged it to the 3<sup>rd</sup> Defendant bank.

The Plaintiff closed his case in the District Court on 02.07.1997 and the trial itself concluded on the same day after the 1<sup>st</sup> Defendant had given evidence. In a judgment

dated 21.07.2000, the learned Additional District Judge of Colombo answered the issues against the Plaintiff and dismissed his action. It is from that judgment that the Plaintiff has preferred this appeal to this Court. The merit of the appeal is yet to be gone into.

#### **Fresh Evidence sought to be admitted at the stage of appeal.**

Whilst this appeal was pending before this Court, the Plaintiff-Appellant has made this application under Section 773 of the Civil Procedure Code to have the criminal conviction that had been entered against the 1<sup>st</sup> Defendant in the Magistrate's Court, admitted in appeal. Though the 1<sup>st</sup> Defendant won the day in the District Court of Colombo which has declared the deed bearing No. 259 in her favor valid, she was found guilty of the criminal charges along with two other co-accused on 25.05.1999. As could be seen, this conviction was entered against the 1<sup>st</sup> Defendant, virtually two years after the Plaintiff closed his case in the District Court on 02.07.1997.

The argument advanced on behalf of the Plaintiff is that the order of conviction dated 25.05.1999 was not available to the Plaintiff during the pendency of the civil action which terminated on 02.07.1997. Now that the conviction is available, she should be permitted to have the conviction admitted in appeal.

#### **Events post 25.05.1999 (date of conviction)**

There are other facts that need to be recited about this conviction. Just after the 1<sup>st</sup> Defendant was found guilty and sentenced, she did prefer an appeal to the Provincial High Court against her conviction and sentence and whilst her appeal to the Provincial High Court was pending, she passed away without her appeal being taken up. In view of her demise which was brought to the notice of the Provincial High Court, the Court dismissed the appeal.

The question before this Court is whether her conviction for forgery which was appealed against but not decided upon in appeal could now be utilized as fresh evidence before this Court at the appeal stage. No doubt she passed away even when this civil appeal was pending in this Court and she has since been substituted. The

argument of the Plaintiff-Appellant is that the conviction of the deceased 1<sup>st</sup> Defendant entered on 25.05.1999 remains valid for admission as fresh evidence since it was not set aside by the Provincial High Court. No doubt the propriety of her conviction was not gone into because of the inevitability of her demise that brought about the termination of all appellate proceedings.

### Fresh Evidence

Section 773 of the Civil Procedure Code which enables this Court to admit fresh evidence in appeal provides as follows:-

*“Upon hearing the appeal, it shall be competent to the Court of Appeal to affirm, reverse, correct modify any judgment, decree, or order, according to law, or to pass such judgment, decree or order therein between and as regards the parties, or to give such direction to the Court below or order a new trial or a further hearing upon such terms as the Court of appeal shall think fit, or, if need be, to receive and admit new evidence already taken in the Court of First Instance, touching the matter 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.”<sup>1</sup>*

There were guidelines that authorities laid down for the proper use of discretion given in Section 773 of the Civil Procedure Code.

The general rule is that fresh evidence would not be permitted to be adduced in appeal unless it is of a decisive nature, *Ramasamy v. Fonseka*.<sup>2</sup>

In *Ratwatte v. Bandara*,<sup>3</sup> it was held that ‘reception of fresh evidence in a case at the stage of appeal may be justified if three conditions are fulfilled, viz,

- (i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial,

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<sup>1</sup>Section 773 of the Civil Procedure Code

<sup>2</sup> 62 N.L.R. 90

<sup>3</sup> 70 N.L.R. 231

- (ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive,
- (iii) 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’.

It is often said that the above principles must be followed by the Court of Appeal whenever an application is made to lead fresh evidence at the stage of the appeal in a case. The above guidelines were considered in the case of *Rev. Kiralagama Sumanatissa Thero v. Aluwihare*,<sup>4</sup> and an application to mark two deeds at the hearing of the appeal was rejected. In this case, it was held:

*“Fresh evidence in appeal may be justified if it can be shown that such evidence could not have been obtained with reasonable diligence at the trial. But this was not the case here and the documents were inadmissible”. Per B.E.De Silva J.*

The same view was taken in the case of *Don Sirisena Wijeyakoon v. Margaret Wijeyakoon*<sup>5</sup> when it was held:

*“Reception of fresh evidence in appeal may be justified only if it can be shown that the evidence could not have been obtained with reasonable diligence at the trial.”*

In order to justify the reception of fresh evidence or a new trial three conditions must be fulfilled.

- (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 need not be decisive.
- (3) The evidence must be such as is to be believed or in other words it must be apparently credible although it need not be incontrovertible. -see *Beatrice Dep v. Lalani Meemaduwa*.<sup>6</sup>

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<sup>4</sup> 1985 (1) Sri L.R. 19

<sup>5</sup> 1986 (2) C.A.L.R. 378

<sup>6</sup> 1997 (3) Sri L.R. 379



As opposed to the general provision of Section 773 of the Civil Procedure Code around which the above guidelines have been developed, the specific provision that is germane to the application made by the Plaintiff-Appellant would be Section 41A (2) of Evidence (Amendment) Act, No. 33 of 1998. It is within this specific section that the application for reception of fresh evidence must be considered.

Subsection (2) of Section 41A states:

*“Without prejudice to the provisions of subsection (1), where in any civil proceedings, the question whether any person, whether such person is a party to such civil proceedings or not, has been **convicted of any offence by any court** or court martial in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a judgment or order of such court or court martial recording a conviction of such persons for such offence, **being a judgment or order against which no appeal has been preferred within the appealable period**, or which has been finally affirmed in appeal, **shall be relevant** for the purposes of proving such offence or committed the acts constituting such offence.”*

The “*Court Martial*” is defined in this subsection to mean: “a Court Martial constituted under the Army Act or the Navy Act or the Air Force Act and the expression “conviction” when used in relation to a Court Martial, means a conviction by such Court Martial confirmed in accordance with the provisions of the law under which such Court Martial was constituted.”<sup>7</sup>

Upon a reading of Section 41A (2) of the Evidence Ordinance brought in by the Amendment Act, No. 33 of 1998, it is clear that a conviction of a person for a criminal offence in a court or in a Court Martial, whether such person is a party to the civil action or not, becomes relevant in a civil suit, if the said conviction is a fact in issue in the civil suit, to prove that such person has committed that offence or committed the act constituting the offence.

This statutory formulation to render convictions relevant in a civil suit is in contra distinction to some of the cases in the past which made only those convictions

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<sup>7</sup> Subsection (3) of Evidence (Amendment) Act No 33 of 1998.

entered upon a plea relevant. It is certainly a departure from the long established *cursus curiae* that it is only those convictions upon a plea that would become relevant in a civil suit. Let me recall but some of the cases which insisted on convictions upon a plea.

In the case of *Sinniah Nadarajah v. Ceylon Transport Board* (1978) 79 (II) N.L.R. 48, Wimalaratne J., referred to the observations of Goddard L.J. in *Hollington v. Hewthorn & Co. Ltd.* (1943) K.B. 58, that “a conviction of one of the defendants for careless driving was inadmissible as evidence of his negligence in proceedings for damages on that ground against him and his employer. But ‘had the defendant before the Magistrate **pleaded guilt** or made some admission in giving evidence that would have supported the plaintiff’s case, this could have been proved but not on the result of trial”, and held that, “where the driver of a vehicle is sued along with his employer for the recovery of damages resulting from an accident in which the plaintiff suffered injuries by being knocked down, a plea of guilt tendered by the driver, when charged in the Magistrate’s Court in respect of the same accident, is relevant as an admission made by him and ought to be taken into consideration by the trial judge in the civil suit”.

In the case of *Mahipala and Others v. Martin Singho*, 2006 (2) Sri L.R. 272, the question that arose was, “whether a judgment or conviction in a criminal court is relevant in a case in a civil court in respect of the same matter, and if so, what effect it can have on the consideration of the civil matter”. Following the case of *Sinniah Nadarajah v. Ceylon Transport Board* (*supra*) it was held that the Defendant’s unqualified plea of guilt is most relevant and admissible as evidence of negligence on his part. The plea of guilt in a Criminal Court is admissible in civil proceedings, and when the 1<sup>st</sup> Defendant pleaded guilty to the charges of reckless and negligent driving under Motor Traffic Act, it has legal proof in the legal sense.

In the recent case of *Rosairo v. Basnayake*, 2011 (1) Sri L.R. 34, Abdus Salam J. held that, “The Trial Judge has in her order correctly taken into consideration the evidentiary value of the order of the Magistrate’s Court case- where the defendant had pleaded guilty to the charges of

*negligent driving of the motor car and failing to avoid the accident complained of. A plea of guilt is most relevant and ought to be taken into consideration in assessing the plaintiff's case and further plea of guilt on a charge of failing to avoid an accident by the driver cannot be lightly ignored in considering as to whose negligence it was which caused the accident".*

Though the statutory amendment, brought in by Section 41A (2) of the Amendment Act, No. 33 of 1998, rendered a conviction relevant regardless of whether the conviction was upon a plea or at the end of the trial, not all convictions become relevant *though* by virtue of the Amendment. In other words upon a careful reading of Section 41A (2) of Amendment Act, No. 33 of 1998, it is quite apparent that only two types of convictions are contemplated to be relevant in a civil suit.

#### Two categories of convictions becoming relevant

The provision makes it clear that only two categories of convictions become relevant. The phrase *"being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant"* makes it crystal clear that for a conviction to become relevant, it must be

- (a) a conviction that has not been appealed against (it must be an unappealed conviction) or
- (b) a conviction that has been affirmed in appeal (it must be an affirmed conviction).

What the Plaintiff-Appellant seeks to have admitted is a conviction that was appealed against but not adjudicated upon or affirmed as a result of the demise of 1<sup>st</sup> Defendant. Had the eventuality of the death of the 1<sup>st</sup> Defendant not intervened, there would have been two possibilities. Either the conviction would have been affirmed or it would have been set aside. Such a conviction which was left in limbo cannot fall within either category (a) or (b) contemplated by Section 41A (2). When the 1<sup>st</sup> Defendant (who was the 1<sup>st</sup> accused in the MC prosecution) passed away, her conviction was neither unappealed nor can it be said to have been affirmed in appeal.

Her death cannot invest the conviction of the 1<sup>st</sup> Defendant with the character of an unappealed conviction nor can it be characterized as affirmed conviction.

In the circumstances I conclude that the dismissal of the appeal preferred by the 1<sup>st</sup> Defendant would not render her conviction relevant to be tendered in evidence as that conviction is beyond the pale of Section 41A (2) of the Evidence Ordinance. Accordingly I reject the application of the Plaintiff-Appellant to lead fresh evidence of the conviction of the 1<sup>st</sup> Defendant.

JUDGE OF THE COURT OF APPEAL