

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

Chandralatha Jayaweera,
No. 29, Thihariya,
Kalagedihena.

PLAINTIFF

C.A. Appeal No.827/2000 (F)

D.C. Matale Case No.4359/L

-Vs-

Agnas Silva (Deceased)

DEFENDANT

1. Kodagodage Nimal Siva,
2. Kodagodage Nihal Silva

All from: No. 43, Malwatte Road,
Matale.

Substituted DEFENDANTS

AND

Kodagodge Nihal Silva

No. 43, Malwatte Road,
Matale.

Substituted DEFENDANT-APPELLANT

-Vs-

Chandralatha Jayaweera,

No. 29, Thihariya,

Kalagedihena.

PLAINTIFF - RESPONDENT

Kodagodage Nimal Siva,

No. 43, Malwatte Road,

Matale.

Substituted DEFENDANT-RESPONDENT

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

COUNSEL : Vidura Gunaratne for the Substituted-
Defendant-Appellant
S.A.D.S. Suraweera for the Plaintiff-Respondent

Decided on : 31.05.2016

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

The Plaintiff-Respondent (hereinafter sometimes referred to as “the Plaintiff”) instituted this action against the 1st Defendant Agnes Silva for a declaration of title that the Plaintiff is the owner of the property called “Ponnamada Hena” and “Galpotha Hena” which is morefully described in the schedule to the plaint, for ejection of the Defendant and all those who claimed under her and damages and costs. The plaintiff’s predecessor in title to the said land was one Henry Albert Jayasooriya, who got this land by a final decree entered in a Partition Action No.176/P in the District Court of Matale. The said Jayasooriya by Deed of Gift No.427 dated 23.04.1983 and attested by K.R. Thiagarajah Notary Public, gifted the said land and premises to the Plaintiff.

The plaintiff’s position was that the land in dispute originally belonged to the said Albert Jayasooriya, who invited the original defendant Agnes Silva and her family to

live in the house on the said land. After the death of Jayasooriya, the Plaintiff had allowed the Defendant to live there with her leave and licence, which she terminated by her letter dated 03.08.1990 and requested her to vacate the house and give vacant possession on or before 30.09.1990.

After the institution of this case, the original defendant Agnes Silva had died and her two sons, Nimal Silva and Nihal Silva were substituted in place of the deceased defendant. These substituted defendants challenge the validity of the deed on the ground that when the Deed of Gift was executed, the said Jayasooriya was in the hospital and not mentally fit to execute the said deed, and that the Notary who attested the deed was not entitled to attest the said deed as the place of attestation was out of his place of practice according to his warrant to practice.

At the commencement of the trial on 22.06.1995, no admissions were recorded but 17 issues were raised, six issues were by the Plaintiff and Issues No.7 to 17 by the Defendants. Thereafter the Plaintiff and her witness Deepthi Kumara Jayasundera gave evidence and closed the plaintiff's case. On 19.08.1999 when the defendant's case commenced one Malini Perera, an interpreter working in the High Court of Kandy was called to give evidence. Her evidence was about the notarial licence that had been issued to Notary, Thiagarajah, by the High Court of Kandy. His licence was produced and marked as D2. When the production of this document D2 was objected to by the plaintiff's counsel, defendant's counsel suggested some further issues, which were allowed by the Court. The issues go as follows:-

1. Was the notary who attested Deed No.427 (P2) authorized to practice within Matale District?
2. Was P2 written and executed in Kandy District?
3. Was the Notary permitted to perform his duty only as a Notary within the Matale District?
4. If the above issues were answered in the affirmative, was the Notary legally entitled to execute and attest P2 in the Kandy District?

5. If the above issue is answered in the negative, is the Plaintiff not entitled to the subject-matter of this action?

On the above issues, both parties made submissions and the Court made order allowing the issues to stand as 18 to 20 and allowed the witness Malini Perera's evidence to be led-(See Page 129 of the Brief).

In the course of the evidence of this witness, it was admitted by the parties that the districts of Kandy, Matale and Nuwara-eliya fall within the jurisdiction of the Zonal area of the High Court of Kandy-(See page 129 of the Brief). Even otherwise, it is the judicial zonal area of the High Court and not the District Court area that is considered in this respect.

Section 4A of the Notaries Ordinance states; *“Every warrant issued to a notary under the provisions of section 3 or 4, authorizing him to practice as a notary in any judicial division in which he resides, shall be deemed to authorize him to practise as a notary in the judicial zone in which he resides.”*

This provision makes it patently clear that even if a notary lives in one district, (for instance Matale) but attests a deed in another district (for instance Kandy) and if these two districts are situated within the same judicial zone, he is entitled to practice as such. In the instant case, the Judicial zone of the High Court which issued the warrant to notary Thiagaraja is Kandy, within which Matale and Kandy fall and therefore he is legally entitled to attest the deed in Kandy though he resides in Matale.

As the judicial district of Matale falls within the judicial zone of the High Court of Kandy, the doubt about the area of practice of the Notary who attested P2 has been resolved and therefore the said Notary was competent to practise within the Kandy District and the Deed P2 can be accepted as having been legally attested by the Notary. As such the issues raised numbering 18 to 20 on the legality of the attestation must be answered in favour of the Plaintiff. Though the learned Judge has failed to answer these issues, yet this failure cannot be considered a material defect as the issues engage a question of law.

There is a discrepancy though as to the place of execution. As the evidence shows, the said deed was executed in the Kandy Hospital premises and in the second page of the deed it is stated that, "In witness whereof the said donor do hereunto and to two others of the same tenor and date as these presents set our respective hands at **Matale**" (sic) but in the attestation of the Notary, at page 3, 2nd para, the notary certifies and attests that, "the same was signed by the said executant and also by the said witnesses and by me the said notary in my presence and in the presence of one another all being present together at the same time at **Kandy**".

With regard to the attestation, what is important, in terms of Section 31(20) of the Notaries Ordinance, is the attestation of the Notary. Paragraph (c) to Subsection (20) of section 31 of the Notaries Ordinance requires that the Notary in such attestation shall state "the day, month, and year on which and the place where the said deed or instrument was executed or acknowledged, and the full names of the attesting witness and their residences". Hence, what appears at page 2 of the deed indicating **Matale** as the place of signature need not be considered as it is not a part of the attestation.

Once this matter is resolved, the second question that needs an answer is whether the said Jayasooriya, at the time of the execution of the Deed of Gift No.427, was in sound mind and executed the deed without any compulsion or duress on the part of the Plaintiff. The 2nd Defendant said in his evidence-in-chief that when Jayasooriya fell sick, it was the Plaintiff who took him to hospital and admitted. The said Deed No.427 was executed on 23.04.1983 when Jayasooriya had been in the hospital. At that time he was not in stable mental condition and therefore this deed was not executed by him. This was the allegation made by the 2nd Defendant.

Though Jayasooriya was receiving treatment in the hospital, there was no evidence that he was not in a position to sign or understand what he did. The 2nd Defendant said that Jayasooriya was not in a sound mind or mental condition but this has not been medically established. Jayasooriyas was operated after 3 or 4 days of the execution of the deed and admittedly, after his discharge from the hospital he had

been living with the Defendants at the same house for about 9 months and his death took place there. During this period there is no evidence to show that Jayasooriya was suffering from any mental disorder or any other ailment which made him mentally unsound. In this respect the findings of the learned District Judge can be accepted as correct.

The only party who contests the plaintiff's title is the 2nd Defendant who has, in his evidence clearly stated that the said Jayasooriya was his uncle who was not married and there was no one to look-after him and therefore he invited them to come and live with him and on his invitation they went to live with him. If this evidence is correct, it must be admitted that when the Defendants and their parents went to live with Jayasooriya, there must have been a house in which Jayasooriya had been living. It is common sense that Jayasooriya could not have invited them to live with him without a house. Therefore the evidence of the 2nd Defendant that the house was built by them cannot be accepted.

The 2nd Defendant has admitted that as they went to live on Jayasooriya's invitation, there was a house in which Jayasooriya lived and they also lived there. This evidence clearly indicates that the Defendants were living in the house on the land and their possession was not adverse to but on the leave and licence of Jayasooriya. The defendants' position is that they had lived in the house for over 25 years and thus they had prescribed to the land and premises. But this long possession is not independent but with the leave and licence of the said Jayasooriya.

Therefore, the 2nd defendant cannot claim independent prescriptive title to the land in dispute, and thus in my view the 2nd defendant's claim that he has prescriptive title to the said land holds no water.

The 2nd defendant's evidence was that after Jayasooriya's operation for prostate trouble, the Plaintiff and her husband got him discharged and took him to their house. He lived thereafter for 8 months until he died. All these items of evidence show that there was a close relationship between the Plaintiff and Jayasooriya that must have made him donate the land in dispute to the Plaintiff. The 2nd defendant's

evidence that Jayasooriya did not tell him that he wanted to donate this property to the Plaintiff nor did the Plaintiff tell him that she was going to get this property as a gift from Jayasooriya are immaterial because it is not necessary for the Court to consider that the donor or donee must tell all about their dealings to the Defendants. However, Jayasooriya died on 18.01.1984, and until then there had been no dispute that arose between the Defendants and Jayasooriya over the deed of gift or the fact that they had prescribed to the land independently. The dispute has arisen only after the Plaintiff sent a notice dated 08.08.1990 terminating the leave and licence to the Defendants-See the effect of the doctrine "hire goes before sale"-De Sampayo J, in *Silva v. Silva* 16 N.L.R 315.

The Plaintiff has based her title on the title of Henry Albert Jayasooriya, whose title flows from the final decree in the Partition Action No.176/P in the District Court of Matale. There is no dispute about this fact. The Plaintiff has based her title to the said land on the deed of gift and prescriptive title of Jayasooriya, who was her predecessor in title. As against this, the Defendants have failed to prove independent prescriptive title to the said land. The said Jayasooriya had died on 18.01.1984 and this action has been filed on 22.03.1991. Thus, within 7 years of Jayasooriya's death, the Plaintiff has filed this action.

In the circumstances I hold that the judgment of the learned District Judge has been entered on the correct findings of fact and law and I see no reason to interfere with the judgment. The plaintiff's title by the Deed of Gift No.427 has been satisfactorily proved and that the prescriptive title of her predecessor devolves on her. I therefore hold that the appeal of the substituted 2nd Defendant-Appellant must be dismissed with costs and the judgment of the District Court of Matale be affirmed.

JUDGE OF THE COURT OF APPEAL