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

C.A. Case No.20/1999 (F)
D.C. Kalmunai Case No.2079/L

Mohamedthamby Asiya Umma
of Division 1, Akkaraipattu.
PLAINTIFF

-Vs-

1. Sainulabdeen Seyed Alavi
2. Athambawa Uthumanachi
Both of Division 1, Akkaraipattu.
DEFENDANTS

AND

Athambawa Uthumanachi
Both of Division 1, Akkaraipattu.
2nd DEFENDANT-APPELLANT

-Vs-

1. Mohamedthamby Asiya Umma (Deceased)
of Division 1, Akkaraipattu.
PLAINTIFF-RESPONDENT

1A. Ameer Mohideen Abdul Manaf
No.121, Old Cinema Road,
Akkaraipattu-12.

1B. Ameer **Mohideen Kathisa Beevi,**
No.121, Old Cinema Road,
Akkaraipattu-12.
SUBSTITUTED PLAINTIFF-RESPONDENTS

2. Sainulab**deen Seyed Alavi**
Division 1, Akkaraipattu.
1st DEFENDANT-RESPONDENT

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

COUNSEL : Nizam Kariapper, P.C. with M.I.M. Iynullah and R.M. Irsath for the 2nd Defendant Appellant.
Plaintiff-Respondent absent and unrepresented.

Decided on : 20.06.2018

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

This is a *rei vindication* action by which the Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") sought a declaration of title to a land depicted in the schedule to the plaint dated 02.03.1994, ejectment of the Defendants and all those holding under them and damages in a sum of Rs.500/- per month from 8.3.1994. The 1st and 2nd Defendants were a husband and wife and it is only the 2nd Defendant wife who filed answer traversing the plaintiff's case for a dismissal of the plaint. Even though the 1st Defendant husband did not file an answer, he gave evidence at the trial on behalf of his wife-the 2nd Defendant.

At the conclusion of the trial, the learned District Judge of *Kalmunai* pronounced judgement dated 18.11.1998 allowing the reliefs claimed by the Plaintiff with the exception of her claim for damages which was denied. It is against this judgement that the 2nd

Defendant in the case preferred this appeal and when the appeal of the 2nd Defendant-Appellant (hereinafter sometimes referred to as "the 2nd Defendant") came on for hearing on a number of occasions, neither the Plaintiff-Respondent nor the substituted Plaintiff-Respondents were present, notwithstanding the dispatch of several notices and the learned Counsel for the 2nd Defendant-Appellant has since invited this Court to dispense with oral arguments and determine this matter on written submissions.

Let me first delve into the respective cases averred in the pleadings.

The original Plaintiff-Respondent had averred *inter alia* as follows:-

i) She was the owner of the land in suit by virtue of a Deed bearing No.520 dated 01.06.1969 and in order to obtain a loan of Rs.1000/- from the 1st Defendant-the husband of the 2nd Defendant, she executed a Deed bearing No.18753 and dated 30.10.1970, which was attested by K. Kasipathy-Notary Public.

ii) Though the aforesaid deed was executed in favour of the 1st Defendant, the beneficial interest in the land did not pass and the Plaintiff continued to be in possession.

iii) Eventually the loan was settled by a payment of Rs.40,000/- made to the 1st Defendant who re-conveyed the land to the Plaintiff by a Deed bearing No.1942 on 21.11.1992, which was attested by M.I. Azeez, the Notary Public.

iv) The 2nd Defendant who was the wife of the 1st Defendant had made a claim to the said land and the Primary Court of *Akkaraipattu* in Case No.13890 made order placing the 2nd Defendant in possession with effect from 08.03.1994.

The 2nd Defendant-Appellant filed answer stating inter alia as follows:-

i) The Plaintiff by Deed No.18753 dated 30.10.1970 transferred an allotment of land and handed over possession thereof to the 2nd Defendant.

ii) The 2nd Defendant had possessed the said land for over 24 years on a title adverse to and independent of the Plaintiff and thus acquired prescriptive title.

iii) The Plaintiff relies upon a false deed executed by the estranged husband of the 2nd Defendant, albeit in a drunken stupor, to vindicate title to the land.

Though the respective pleadings substantially brought out the aforesaid averments, some of the issues raised by the parties deviated from the pleadings. When the trial commenced on 22.11.1995, the Plaintiff raised 7 issues, whilst the 2nd Defendant formulated Issues No.8 to 14. The issues could be set down as follows:-

1. Was the Plaintiff the owner of the property described in the schedule to the plaint?
2. Did the Plaintiff obtain a loan of Rs.1000/- from the 1st Defendant and transfer her land in trust to the 1st Defendant on 30.10.1970 by a Deed No.18753 executed by Notary Public Kasipathy?
3. Did the Plaintiff pay the 1st Defendant a sum of Rs.40,000/- and obtain a reconveyance of the land on 21.11.1992 by a Deed bearing No.1942 which was executed by Notary Public M.I. Azeez?
4. Has the Plaintiff secured prescriptive title by being in possession of the land for over 30 years?
5. Has the 2nd Defendant been in unlawful possession of the land since 08.03.1994?
6. Has damage been caused to the Plaintiff as a result of the unlawful possession of the land by the 2nd Defendant? If so, how much is it?
7. If Issues No.1 to 6 are answered in the affirmative, is the Plaintiff entitled to the reliefs prayed for in the plaint?
8. Did ownership pass by virtue of the deeds referred to in paragraphs 2 and 4? (*sic*)
9. Was possession handed over to the 2nd Defendant consequent to the execution of the Deed in 1970?
10. Has the 2nd Defendant been in the possession of the land since 1970?
11. Did the 2nd Defendant give her husband the 1st Defendant a sum of Rs.1000/- in 1970 and ask him to buy the land in her name?

12. Has the 1st Defendant been living in separation from his wife the 2nd Defendant since 1982?

13. Has the 2nd Defendant become the owner of the land by virtue of her possession?

14. If Issues No.8 to 13 are answered in the affirmative, should the plaintiff's action be dismissed with costs?

Thus there are two transfers that figure prominently in this case. The first is a transfer of the subject-matter to the 1st Defendant from the Plaintiff, which took place in 1970. The 2nd transfer was a reconveyance of the subject-matter from the 1st Defendant to the Plaintiff which took place in 1992. The 2nd Defendant-the wife of the 1st Defendant states in her answer that her husband-the 1st Defendant executed the reconveyance when he was in a drunken stupor-*see* paragraph 9 of the answer of the 2nd Defendant dated 21st of September 1994. I would now proceed to consider both these transfers.

The 1st transfer from the Plaintiff to the 1st Defendant

The Plaintiff states that in the year 1970 she had transferred the land to the 1st Defendant on trust in exchange for a loan of Rs.1000/-. This is brought out in Issue No.2 raised by the Plaintiff but this has been answered in the negative by the learned District Judge of *Kalmunai*. Evidence led in the case does not support the issue and I must state that the learned District Judge of *Kalmunai* was quite right in concluding that there was no loan in this case between the Plaintiff and the 1st Defendant.

The land was not given as a security for the so called loan and it would appear that the Plaintiff did not enjoy continuous possession of the land too since the execution of the Deed bearing No.18753 in 1970. The fact that the Primary Court of *Akkaraipattu* placed the 2nd Defendant in possession shows unmistakably that the possession of the land was not found to be with the Plaintiff and even before the District Court, I find that no satisfactory evidence of possession of the land on the part of the Plaintiff has been established despite the passage of legal title to the 1st Defendant by Deed No.18753 dated 30.10.1970. It would appear that the Plaintiff parted both her legal title and beneficial interest in the land when

she executed Deed No.18753 dated 30.10.1970 in favour of the 1st Defendant. Thus Deed No.18753 dated 30.10.1970 was an outright transfer and the 1st Defendant became the absolute owner of the land on 30.10.1970. So the learned District Judge was quite right when he stated that there was no loan transaction that underlay the 1st transfer dated 30.10.1970. As for the 1st Defendant who was the vendee on the Deed bearing No.18753, he testified that the consideration for the purchase was provided by his mother in law.

When one peruses the evidence given by the Plaintiff, one finds her denying the execution of the Deed No.18753 (the first transfer) by herself. She attributed the entire execution to the handy work of her husband who had signed the deed as a witness. But this assertion of the non-execution of the deed or involuntary execution on her part was contradicted by one of the attesting witnesses to the deed-one T.S. Athamlebbe who was summoned by the 2nd Defendant to give evidence. He identified his signature on the deed and testified that the contents of the deed were read over and explained by the Notary K. Kasupathy in the presence of the vendor Asiaumma-the Plaintiff and Seyed Alavi-the 1st Defendant. The witness signed the deed in the presence of the Notary. The presence of the Plaintiff at the time of execution *qua* a vendor is corroborated by this witness and his testimony was not challenged at all by the Plaintiff. This shows that the Plaintiff had executed an outright transfer in favour of the 1st Defendant in 1970. In the circumstances the due execution of the deed of sale in terms of Section 68 of the Evidence Ordinance was placed before Court by the 2nd Defendant and there was no evidence that was placed by the Plaintiff to infer a constructive trust in regard to the 1st transfer and quite rightly Issue No.2 on trust was answered in the negative. Moreover the evidence does not emerge in the case that the Plaintiff possessed this land beyond 1970 notwithstanding the sale of the land. Thus the legal title and beneficial interest in the land had passed to the 1st Defendant in 1970.

Reconveyance of the land to the Plaintiff in 1992

The 1st conveyance vested absolute title in the 1st Defendant. The 2nd transfer, one comes across in the case, is the reconveyance that took place in 1992. So between 1970 and 1992 the 1st Defendant had been the owner of the land. But it is noteworthy that the Plaintiff averred in her plaint that she regained title to the land in 1992 by making a payment of

Rs.40,000/- to the 1st Defendant. The Plaintiff testified that by 1992 the 1st Defendant had been living in *Kinniya* and she went all the way to *Kinniya* from *Akkaraipattu* to negotiate with the 1st Defendant to have the land retransferred. It is consequent to these efforts that the Plaintiff stated in her evidence that the execution of the 2nd deed of transfer in her favour took place in *Akkaraipattu*. Thus the title to the land reverted to her in 1992. The second transfer by way of Deed bearing No.1942 and dated 21st November 1992 was attested by M.I. Azees-Attorney-at-law and it is noteworthy that when the Plaintiff-Respondent produced this deed and marked it as **P1** at the trial on 24.04.1996, there was no objection raised by the 2nd Defendant in regard to its reception.

In this regard, it is pertinent to mention here the comments of Wijeyaratne, J. made in the case of ***Kandiah v. Wiswanathan*** (1991) 1 Sri.LR 269 that, "when an objection is taken to the admissibility of a document, it is desirable that such objection should be recorded immediately before any further evidence goes down". No such objection was taken to the deed which the Plaintiff alleged had re-conveyed the land to her in 1992.

Where a piece of evidence not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation. In the Indian case of ***Shib Chandra v. Gour Chandra*** AIR 1922 Calcutta 160, 68 IC 68 and a host of Indian case law, the view has been taken that, "where evidence had been recorded in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legal enactment, does not apply". So if there is evidence which has been led in contravention of a positive legal enactment, it is an absolute prohibition. No amount of acquiescence, waiver or estoppel will render that evidence admissible in a civil case. But when an item of evidence is adduced in evidence without objection, which is in fact in contravention of a provision of the Evidence Ordinance such as Section 68 which requires a mode of proof, that evidence becomes admissible, because there is acquiescence, waiver or estoppel because of non-objection.

This statement of the law in the Calcutta case is however embodied as a positive enactment in our Code of Civil Procedure in the explanation to Section 154, which finds

no counterpart in the Indian Code. This provision has been construed and acted upon in our Courts over a long period of time, vide ***Silva v. Kindersley*** (1914) 18 N.L.R 85 and ***Siyadoris v. Danoris*** (1941) 42 N.L.R 311. The explanation to Section 154 reads thus:-

> *"If the opposing party does not, on the document being tendered in evidence, object to its being received in evidence, and if the document is not such as is forbidden by law to be received in evidence, the Court should admit it."*

What is meant by the expression "forbidden by law" was considered in the case of ***Siyadoris v. Danoris*** *(supra)* 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.

In ***Silva v. Kindersley*** *(supra)* Pereira, J. with whom De Sampayo A. J. agreed, pointed out that a document not objected to by the opposing party in a civil suit is to be deemed to constitute legally admissible evidence as against the party who is sought to be affected by it. The contention that the testimony of a Superintendent of Surveys was of no value, because the plans and surveys he relied on depended largely for their correctness on a third party's field books, was rejected because those field books had been admitted in evidence in the Court below without objection.

In fact in ***Siyadoris v. Danoris et al*** 42 N.L.R 311 it was held that where a deed has been admitted in evidence without objection at the trial, no objection that it has not been duly proved could be entertained in appeal.

Needless to say, such admission will not give the document any greater force or validity than it has in law, but objections as to the proper method of proof of the document must be taken at that stage, and cannot be entertained after the trial is over. It has to be remembered that if the special method of proof required had been insisted upon, it was possible for the party tendering the document to supply that proof. Section 68 of the Evidence Ordinance alludes to the proper mode of proof of an attested document such as a deed and if there is no objection to its reception, the mode of proof cannot be insisted upon later.

Thus, in civil proceedings it is of paramount importance for the opponent to object to a document if it is inadmissible having regard to the provisions of the Evidence Ordinance. Where he fails to do so, the objections to admissibility cannot be raised for the first time in appeal.

F.N.D. Jayasuriya, J. in the case of *Cinemas Ltd v. Soundarajan* (1998) 2 Sri.LR 16 articulated that the principle and rationale behind this rule is easily understood. Had objection been taken, the party proposing to adduce the document would have tendered to the Court evidence *aliunde* and by the failure to take the objection the opposing party has waived the objection to its admissibility.

Clearly, the deed of transfer **P1** in this case is not a document which is forbidden by law to be received in evidence. Justices Sinnetamby and L.W. de Silva in ***Perera v. Seyed Mohomed*** 58 N.L.R 246 proceeded to distinguish between a document which is inadmissible having regard to the provisions of the Evidence Ordinance and a document which is forbidden by law and their Lordships held that the failure to object by the opponent to certain deeds belonging to strangers to the action which were inadmissible having regard to the provisions of the Evidence Ordinance at the trial, rendered those deeds and documentary evidence admissible evidence in the case and their Lordships were of the considered view that no objection can be taken to them in appeal. F.N.D. Jayasuirya, J. pointed out in ***Cinemas Ltd v. Soundarajan*** *(supra)* that this is a point of difference between criminal proceedings and civil proceedings. In a civil case when a document is tendered, the opposing party should immediately object to the document. 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 to its admission can be taken up in appeal-*see* ***Adaicappa Chettiar v. Thomas Cook and Sons*** 31 N.L.R 385; ***Dhanawathie v. Nandasena*** (2016) 1 Sri.LR 18 at 33 for the expression forbidden by law. It is trite *though* that inadmissible evidence can be objected to in criminal appeals.

So one has to proceed on the basis that the due execution of the Deed bearing No.1942 and dated 21st November 1992 (**P1**) was established at the trial and there are other items of

uncontradicted evidence that go to prove the truth of the execution. In cross-examination it was never suggested to the Plaintiff that P1 was false or fictitious. When the Plaintiff said that she paid a sum of Rs.35,000/- but as consideration a sum of Rs.40,000/- was inserted in the deed, the evidence went unchallenged. When the Plaintiff further stated that the notary M.I. Azeez attested the deed along with his clerk Mubarak, this evidence was accepted without demur. In fact the record indicates that both the 1st Defendant (the vendor on the deed) and the 2nd Defendant (the wife of the 1st Defendant and Appellant) were both represented by Counsel, but the execution and attestation were not assailed at all in cross-examination. In fact the 1st Defendant (the vendor) chose not to cross-examine the Plaintiff. Neither did the 2nd Defendant challenge the Plaintiff on the deed. This conduct at the trial is quite consistent with the answer filed by the 2nd Defendant wherein she had averred that her husband (the 1st Defendant) had signed the deed in a drunken stupor. In other words the vendor's act of signing the deed was admitted in the answer by the 2nd Defendant. But the man who was alleged to have signed the deed under the influence of liquor never put that position of his bacchanalian signing to the Plaintiff.

Failure to cross-examine

There was a total failure on the part of the Defendants to cross-examine the Plaintiff. Neither did they impeach the execution of the deed.

As **Peter Murphy on Evidence**, 8th Ed., p.597-598, comments, there are two direct consequences of a failure to cross-examine a witness. One is purely evidential in that, "failure to cross-examine a witness who has given relevant evidence for the other side is held technically to an acceptance of the witness's evidence in chief." The other is a tactical one but no less important for that. "Where a party's case has not been put to witnesses called for the other side, who might reasonably have been expected to be able to deal with it, that party himself will probably be asked in cross examination why he is giving evidence about matters which were never put in cross examination on his behalf."

Even in his other work, viz. **"A Practical Approach to Evidence"** at page 444, Peter Murphy, Professor of Law South Texas College of Law having considered the effect of

omission to cross-examine a witness on a material point states the same as above. It is, therefore, not open to a party to impugn in a closing speech or otherwise, the unchallenged evidence of a witness called by his opponent or even to seek to explain to the tribunal of fact the reason for the failure to cross-examine.

Accordingly it is counsel's duty, in every case: "*(a)* to challenge every part of a witness's evidence which runs contrary to his own instructions; *(b)* to put to the witness, in terms, any allegation against him which must be made in the proper conduct of the defence; *(c)* to put to the witness counsel's own case, in so far the witness is apparently able to assist with relevant matters or would be so able, given the truth of the counsel's case".

Having not put his position to the Plaintiff, it was only after the closure of the Plaintiff's case, the 1st Defendant came out for the first time with a denial of the execution of the deed. This was done only when the Defendant's case had begun.

The implication of this kind of evidence is that people err inadvertently, that is quite understandable and even pardonable, but what is morally contemptible is the vain attempt, feeble though it be, on the part of the 1st Defendant to seek to knowingly perpetuate a falsehood in order to advance the case of his wife-the 2nd Defendant who was resisting this *rei vindicatio* action. The 1st Defendant even vaingloriously stated that he was not represented when he had legal representation at the trial. So there was no consistency *per se* in the evidence that the 1st Defendant proffered and I am irresistibly drawn to the conclusion that the deed was indeed executed and title passed or reverted to the Plaintiff on 21st November 1992 by **P1**.

So when the title has been proved, the burden is on the 2nd Defendant to establish that her possession is lawful. It is trite law that once the title of the Plaintiff is established in a *rei vindicatio* action, the burden shifts to the Defendant to show that his/her possession is lawful-vide- ***Wanigaratne v. Juwanis Appuhamy*** 65 N.L.R 167.

This burden of showing lawful possession was not discharged at all by the 2nd Defendant. Witnesses Subair and Sulaimalebbe, both summoned by the Plaintiff and Defendants respectively, declared that this land was not in continuous possession of anyone and it had

laid forlorn and bare unattended by any party so as to point to an uninterrupted and undisturbed possession. Subair stated that the Defendants lived about a quarter of a mile away from the land and neither party lived on the land permanently. According to Sulaimalebbe-the witness summoned by the Defendants, it was Alavi-the 1st Defendant who had possession of the land. When the 2nd Defendant was living with the 1st Defendant, she would have had permissive possession under her husband and that possession could not operate to eventuate in prescriptive possession as she could not have adversely possessed the land against her husband. There is evidence that both the husband and wife began to live in separation from 1989 and there is no evidence to suggest that she began to possess the land adversely against the husband who had parted company in 1989. Assuming without conceding that her possession turned adverse in 1989, the action was instituted on 24.03.1994 and therefore the lapse of 5 years, even if she had had undisturbed and uninterrupted possession since 1989, would fall far short of the ten year period required for prescriptive possession. Therefore the title of the Plaintiff re-conveyed and bestowed on her in 1992 remains indefeasible by any other superior title. The learned District Judge of *Kalmunai* arrived at the right decision which I would perforce affirm in appeal.

Accordingly I dismiss the appeal of the 2nd Defendant-Appellant and affirm the judgment of the learned District Judge of *Kalmunai* dated 18.11.1998.

JUDGE OF THE COURT OF APPEAL