

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

In the matter of an application for leave to appeal to the Supreme Court in terms of section 5C 1 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006

Mohamed Naleem Mohomed Ismail,
No. 28, Chettiyar Road, Pandiruppu 01,
Kalmunai.

Plaintiff

SC Appeal 04/2016

SC/HC/CALA391/2014

EP/HCCA/Kalmunai 201A/10(F)

DC Kalmunai Case No. 2534/L

Vs, Samsulebbe Hamithu
No. 426, Main Street,
Maruthamuni.

Defendant

And between

Mohamed Naleem Mohomed Ismail,
No. 28, Chettiyar Road, Pandiruppu 01,
Kalmunai.

Plaintiff- Appellant

Vs, Samsulebbe Hamithu
No. 426, Main Street,
Maruthamuni.

Defendant-Respondent

And now between

Mohamed Naleem Mohomed Ismail,
No. 28, Chettiyar Road, Pandiruppu 01,
Kalmunai.

Plaintiff -Appellant-Appellant

Vs, Samsulebbe Hamithu
No. 426, Main Street,
Maruthamuni.

Defendant - Respondent-Respondent

Before: S.E. Wanasundera PC J

Sisira J. De Abrew J

Vijith K. Malalgoda PC J

Counsel: H. Withanachchi for the Plaintiff -Appellant-Appellant

V. Puvitharan PC with R.R. Ushanthanie, Subhani Kalugamage and Anuya Rasanayakam
for the Defendant - Respondent-Respondent

Argued on: 10.10.2017

Decided on: 02.04.2018

Vijith K. Malalgoda PC J

The Plaintiff-Appellant-Appellant (hereinafter referred to as the Appellant) instituted action before the District Court of Kalmunai seeking inter alia a declaration of title of the land more fully described in the schedule E to the plaint and for ejectment of the Defendant-Respondent-Respondent (hereinafter referred to as the Respondent)

When the said plaint was filed before the District Court of Kalmunai on 18.11.2004 by the Appellant, the Respondent filed his answer on 04.05.2005. The case proceeded to trial on 29 issues, of which 23 were suggested by the Appellant and 06 by the Respondent.

After trial the learned Additional District Judge Kalmunai dismissed the action of the Appellant as well as the claim in reconvention of the Respondent. Being dissatisfied by the said decision, both the Appellant as well as the Respondent preferred two appeals to the Provincial High Court of Civil Appeal of the Eastern Province.

The Provincial High Court of Civil Appeal, by its Judgment dated 02.07.2014 dismissed both Appeals and affirmed the judgment of the District Court. The Appellant preferred a leave to appeal application against the said decision of the Provincial High Court of Civil Appeal. The Supreme Court after considering the submissions made by the both parties, granted leave, on the questions of law raised in sub-paragraphs (a) to (d) and (i) of paragraph 14 of the petition dated 13.08.2014 and an additional ground of Appeal raised on behalf of the Respondent to the effect;

“Even the document marked as P-7 is admitted in evidence, has the Plaintiff proved his title to the land in dispute in view of the transfer effected by deed No. 13486 dated 30.06.1988.”

When going through the issues under which the leave was granted to the Appellant, it appears that the entire case before this court was based on the failure by the Plaintiff to lead in evidence the documents which were produced during the District Court Trial subject to proof.

The plaintiff's action before the District Court of Kalmunai was for the declaration of title, and the plaintiff had relied his title on deed No. 2119, which was marked as P-7. When establishing the title, in a *rei vindicatio* action the Plaintiff should set out his title on the basis on which he claims a declaration of title to the land and the proof required is the standard of strict proof.

The above position was discussed in a series of decisions both in the Court of Appeal and the Supreme Court including the decisions in ***Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167*** and ***Dharmadasa Vs. Jayasena [1997] 3 Sri LR 327.***

In the case of ***P.D.C. Perera Vs. K.J Perera SC Appeal 95/2003*** SC minute dated 08.12.2005 Supreme Court held,

“Thus it would be clear that the plaintiff in a *rei vindicatio* action can base his claim for relief on either of the two alternative grounds namely

- 1) He can claim relief on the ground that he has a valid paper title or,
- 2) He can rely on the ground of simple possession and ouster

As submitted above, the Appellant relied in his title on the deed produced marked P-7 and when the said deed was produced, Respondent had objected for the said deed but, when the Plaintiff (Appellant) closed its case without calling any witness to prove P-7 before the District Court the Defendant (Respondent) did not raise any specific objection for the failure by the Appellant. In this regard the Appellant took up the position that, it was clear from the above conduct of the Respondent that, the Respondent did not intend to pursue the "*pro forma*" objections raised by him and thereby waved such objections.

However as observed above in this judgment, the appellant in this case has claimed relief purely on the basis of paper title, i.e. on the title the appellant claimed through deed No. 2119. He has a duty to prove the document as required by law for a Court of law to act upon such deed. In this regard this court is mindful of the requirement under section 68 of the Evidence Ordinance which reads as follows;

Section 68; If a document is required by law to be attested, it should 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

Section 70 of the Evidence Ordinance which is the only exception to the above rule, referred to an admission recorded with regard to such document as follows;

Section 70; The admission of a party to an attested document or its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested

However in the absence of any written admission recorded at the District Court Trial and an objection recorded when the document was initially produced, it is difficult for this court to ignore the provisions of section 68 of the Evidence Ordinance, even though no specific objection was raised, when the Plaintiff closed his case producing several documents including P-7.

In this regard the appellant heavily relied on the following passage by Samarakoon CJ in the case of ***Sri Lanka Ports Authority V. Jugolinija -Boal East [1981] 1 Sri LR 18***

“If no objection is taken, when at the close of a case documents are read in the evidence, they are evidence for all purposes of the law. This is the ‘*cursus curiae*’ of the original civil courts.”

As further submitted by the Appellant, the above decision was followed by the Supreme Court in the case of ***Balapitiye Gunananda Thero Vs. Thalalle Methananda Thero [1997] II Sri LR 101*** as follows;

“When a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case. This is the *cursus curiae*.”

However, none of the above cases referred to a document which required by law to be attested, and in the said circumstances, provisions in section 68 of the Evidence Ordinance has no applicability to the situations referred to in the said cases.

Section 31 of the Notaries Ordinance required a Notarially executed deed to carry an attestation with two attesting witnesses and in the said circumstances it is necessary to follow the provisions of

section 68 of the Evidence Ordinance, in the absence of an admission under section 70 of the Evidence Ordinance.

During the argument before us the Petitioner further relied on the decision in ***Samarakoon Vs. Gunasekera and Another reported in [2011] I Sri LR 149*** where Amaratunga J observed as follows;

3. “When a document is admitted subject to proof, the party tendering it in evidence is obliged to formally prove it by calling the evidence necessary to prove the document according to law. If such evidence is not called and if no objection is taken to the document when it is read in evidence at the time of closing the case of the party who tendered the document it becomes evidence in the cases.
4. On the other hand if the document is objected to at the time when it is read in evidence before closing the case of the party who tendered the document in evidence, the document cannot be used as evidence for the party tendering it.”

However as observed by this court Amaratunga J was mindful of the requirement under section 68 of the Evidence Ordinance when he concluded that,

“A deed for sale or transfer of land, being a document which is required by law to be attested, has to be proved in the manner set out in section 68 of the Evidence Ordinance by proof that the maker (the vendor) of that document signed it in the presence of witnesses and the notary. If this is not done the document and its contents cannot be used in evidence.”

When the present application was supported before this court for notices, the Respondent too had moved to add an additional ground of Appeal and the attention was drawn by the Respondent to an endorsement made on the Original Deed No. 24680 during the arguments before this court. As

observed by this court there is an endorsement made by Notary Public A.E. Saminnathan to the effect that a transfer deed bearing No. 13486 had been registered on 03.06.1988.

As further observed by this court, the said endorsement had been made by Notary Public A.E. Saminnathan acting under section 31 (33) of the Notaries Ordinance which reads as follows;

Section 31 (33) When a deed transferring any immovable property is executed or acknowledged before a Notary, he shall use his best endeavours to obtain the title deed, if any, of such property, and make an endorsement thereon stating the number and date of the deed executed before him and the nature of the transaction and attach his signature thereto.

During the trial before the District Court the Appellant had filed his pedigree and according to his pedigree, the Appellant relied on a Deed of Transfer by one Ahamed Lebbe Mohomad Haleethu who obtained the title form transfer deed bearing No. 24680, transferred the said property to Samsulebbe Umma Salma by Deed of Transfer No. 6342, who in turn transferred the property to the Appellant by Deed No. 2119 which was produced marked P-7 on which the Appellant had based his entire case. Appellant's pedigree is silent on deed 13486 and according to the entry made by N.P. on the Deed 24680, Deed No. 13486 was attested by him on 30.06.1988. Deed 6342, the deed on which Samsulebbe Ummu Salma, the predecessor in title to Plaintiff had claimed title was attested only on 01.03.1992.

The said deed 13486 and the endorsement on Deed 24680 was put forward to witness Haleethu who is a party to the said deed, had simply denied the same but as observed by this court the Appellant had failed to challenge the position taken up by the Respondent.

It is observed by G.P.S. de Silva CJ in the case of *Dharmadasa Vs. Jayasena [1997] III Sri LR 327 at 330,*

“But the point is that this is a *rei vindicatio* action and the burden is clearly on the Plaintiff to establish the title pleaded and relied on by him.”

When considering all the matters referred to above it is clear that the appellant had failed to establish his title as required by law. In the said circumstances I answer the questions of law raised by the Appellant in negative but refrain from answering the question of law raised by the Respondent since the said challenge by the Respondent had not been properly looked into at the trial.

Appeal is accordingly dismissed but I make no order for costs.

Appeal Dismissed without cost.

Judge of the Supreme Court

S.E. Wanasundera PC J

I agree,

Judge of the Supreme Court

Sisira J. De Abrew J

I agree,

Judge of the Supreme Court

