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

Don Premaratne Wijesinghe,
No. 559, Peradeniya Road,
Kandy.
Plaintiff

SC APPEAL NO: SC/APPEAL/58/2018
SC LA NO: SC/HCCA/LA/388/2016
HCCA/KANDY NO: CP/HCCA/KANDY/63/2013 (FA)
DC MATALE NO: L 5896

Vs.

1. Ekanayake Mudiyanselage Sarath Bandara Ekanayake, Pologolla.
2. District Land Registrar,
   Land Registry, Matale.

Defendants

AND BETWEEN

Don Premaratne Wijesinghe,
No. 559, Peradeniya Road,
Kandy.
Plaintiff-Appellant

Vs.

1. Ekanayake Mudiyanselage Sarath
   Bandara Ekanayake, No. B 2,
   Mahaweliniwasa, Polgolla.
2. District Land Registrar,
   Land Registry, Matale.
   Defendant-Respondents

AND NOW BETWEEN

Don Premaratne Wijesinghe,
No. 559, Peradeniya Road,
Kandy
Plaintiff-Appellant-Appellant

Vs.

1. Ekanayake Mudiyanselage,
   Sarath Bandara Ekanayake,
   No. B 2, Mahaweliniwasa,
   Polgolla.
   Defendant-Respondent-Respondent

Before: P. Padman Surasena, J.
Janak De Silva, J.
Mahinda Samayawardhena, J.

Counsel: J.P. Gamage with Namal Ralapanawa and Nisansala Pathirana for the Plaintiff-Appellant-Appellant.

Harindra Rajapaksha with Subhashini Priyanthika for the Defendant-Respondent-Respondent.

Argued on : 05.05.2022

Written submissions:

by the Plaintiff-Appellant-Appellant on 04.06.2018 and 16.06.2022.

by the Defendant-Respondent-Respondent on 13.09.2018.

Decided on: 19.07.2023

Mahinda Samayawardhena, J.

The plaintiff filed this action against the defendant in the District Court of Matale seeking a declaration of title to the land described in the schedule to the plaint and a declaration that the defendant's title deed No. 1711 is a forgery. Conversely, the defendant sought a declaration of title to the same land and a declaration that the plaintiff's title deed No. 275 is a forgery. At the trial, paragraphs 2-5 of the plaint were recorded as admissions, i.e., Atipola Kiri Banda Karunaratne was the original owner of the land; he transferred his rights by deed No. 1451 to four persons including Heen Banda Atipola; the other three persons later transferred their rights to the said Heen Banda Atipola by deed No. 10601; and Heen Banda Atipola by deed No. 183 dated 01.02.1997 gifted the land to Bandaranayake. Both parties accept that the said deed of gift No. 183 was later revoked by Heen Banda Atipola. The fact that Heen Banda Atipola was at one time the owner of this land was admitted by both parties. The real issue was whether Heen Banda Atipola transferred the land to the plaintiff by deed No. 275 or whether he transferred the land to the defendant by deed No. 1711. In the event the Court decided that the forgery was not proved, the defendant alternatively claimed priority by registration of his deed in the correct folio despite his deed having been executed after the deed of the plaintiff.

However, during the course of leading evidence in the defendant's case, a further issue was raised by the defendant on the basis that by judgment delivered on 10.06.2009 in case No. CA/1152/98 marked V3 (page 542 of the brief), the Court of Appeal had come to the conclusion that the aforementioned deed No. 1451 attested by a notary public, namely T.M.A. Sally, is null and void since the notarial licence of Mr. Sally had not been extended at the time of execution of the deed and therefore both parties to the present case cannot derive title from Heen Banda Atipola.

The Court of Appeal concluded that "*According to the evidence of Malani Perera an official of the High Court of Kandy, the notarial license of T.M.A. Sally who executed the deed No. 1451 of 11.04.1978 had not been extended beyond 22.02.1978. Accordingly Mr. T.M.A. Sally was not a notary public on the date he attested the deed No. 1451 which was marked V1 at the trial.*" But according to the judgment of the District Court marked V8 (page 580 of the brief), witness Malani Perera's evidence is that notary Sally had a valid licence at the time of the execution of deed No. 1451. The evidence is not available in the brief. The Court of Appeal in its judgment has not explained why the finding of the District Court in that regard is wrong. In any event, as I will explain below, even if the notarial licence has not been extended, the notary does not cease to be a notary and the deeds executed during that period do not become invalid *ipso facto*.

The Court of Appeal in the said judgment (page 543) also states that the aforesaid Etipola Kiribanda Karunaratne died on 28.04.1978 leaving a last will whereby this property was bequeathed to Chandrasena Karunaratne who transferred the same to the plaintiff in that case by deed No. 4151 dated 31.12.1984. According to the judgment of the Court of Appeal, the deed had been tendered for the first time to the Court of Appeal. The Court of Appeal has accepted that position despite there

being no indication that the said last will was proved before a court of law and admitted to probate.

Ultimately the Court of Appeal set aside the judgment of the District Court which was in favour of the defendant-respondent in that case on the submissions made by counsel for the defendant-respondent himself. This is very unusual. The Court of Appeal states: "*Upon submission made before this Court by the counsel for the defendant-respondent it is contended that the deed No. 4151 marked as X conveys title to the plaintiff/appellant. And the deed No. 1451 attested by T.M.A. Sally 11.04.1978 conveys no title to the defendant-respondents. Accordingly we allow the appeal and grant the reliefs prayed by the plaintiff-appellant in the amended plaint dated 10.03.1992.*" Unless there is collusion, it is hard to believe that the defendant-respondent, in favour of whom judgment has been entered, would make submissions on appeal in support of their opponent.

The subject matter of this case and the aforesaid Court of Appeal case is the same. The defendant in this case is the substituted defendant in the Court of Appeal case. But the plaintiffs are different. The application for intervention in the Court of Appeal case by the plaintiff in the instant case was refused by the Court of Appeal in view of the objections raised by the plaintiff-appellant and the substituted defendant in the Court of Appeal case, the latter being, as I have already stated, the defendant in this case (*vide* V4 at page 545).

The judgment of the Court of Appeal is not binding on the plaintiff in the instant action *inter alia* because he was not a party to the said (in my view, collusive) appeal.

E.R.S.R. Coomaraswamy in his book *The Law of Evidence*, Vol I, 2nd Edition (1989), at pages 528-529 states that in order to establish a plea of *res judicata*, the following constituents must be established:

(i) the former action must have been a regular action;
(ii) the two actions must be between the same parties or their representatives in interest (privies);
(iii) the previous decision must be what in law is deemed such;
(iv) the particular judicial decision must have been in fact pronounced as alleged;
(v) the previous judgment must be a final judgment;
(vi) the same question or identical causes of action must have been involved in both actions;
(vii) the judicial tribunal pronouncing the decision must have had competent jurisdiction in that behalf;
(viii) the judgment should not have been obtained by fraud or collusion;
(ix) if it is a foreign judgment, it should have been passed in accordance with the principles of natural justice.

The learned author adds that the correctness of the decision is not a relevant consideration.

After a lengthy trial before the District Court on several contentious issues, which commenced on 27.03.2006 and ended on 28.06.2012, spanning over six years, the District Court by judgment dated 23.01.2013 dismissed the plaintiff's action as well as the defendant's cross claim stating that the District Court is bound by the judgment of the Court of Appeal on the doctrine of *stare decisis*. In view of that finding, the District Court did not answer the real issues raised by both parties over which voluminous evidence was led at the trial. The District Court merely

concluded that answering those contentious issues does not arise in view of the Court of Appeal judgment.

On appeal, the High Court of Civil Appeal of Kandy affirmed the judgment of the District Court and dismissed the appeal. The plaintiff is before this Court against the judgment of the High Court. This Court granted leave to appeal on the question whether the High Court and the District Court erred in law in applying the doctrine of *stare decisis* to this case.

The doctrine of *state decisis* was considered in the Full Bench decision of this Court in the case of *Mallika v. Siriwardena and Others* (SC/APPEAL/160/2016, SC Minutes of 02.12.2022). *Stare decisis* is an abbreviation of the Latin phrase *stare decisis et non quieta movere* (to stand by precedent and not to disturb settled points).

Regarding deed No. 1451, the Court of Appeal found it to be a nullity because "*the notarial license of T.M.A. Sally who executed the deed No. 1451 of 11.04.1978 had not been extended beyond 22.02.1978.*" Assuming this is true, this does not make the deed a nullity.

According to section 2 of the Notaries Ordinance No. 1 of 1907 as amended every appointment to the office of notary shall be by warrant granted by the Minister in charge of the subject. According to section 13, it is a punishable offence for a person to practice as a notary without such warrant. Once enrolled as a notary, he shall renew his certificate on a yearly basis. Section 27 sets down the procedure to be followed in granting certificates to practice as a notary on a yearly basis by every Registrar of the High Court holden in every judicial zone. Section 29 provides for appeals for an aggrieved notary whose application for certificate has been refused. What happens if such notary practices as a notary without renewal of the certificate? Section 30 provides the answer: "*If any person shall act as a notary without having obtained such*

certificate as aforesaid, he shall for or in respect of every deed executed or acknowledged before him as such notary, whilst he shall have been without such certificate, be guilty of an offence and be liable to a fine not less than five thousand rupees and not exceeding twenty five thousand rupees." He will have to pay a fine in a sum not less than five thousand rupees and not exceeding twenty five thousand rupees for every deed executed. Until the Increase of Fines Act No. 12 of 2005 was enacted, the fine was a sum not exceeding fifty rupees for every such deed. In terms of section 35, such offence is even compoundable by the Registrar-General. There is no provision in the Notaries Ordinance which makes those deeds invalid.

I must emphasise that the instant appeal is not against the judgment of the Court of Appeal. But consideration of the said Court of Appeal judgment is intensely relevant to decide this appeal. Insofar as the instant appeal is concerned, I hold that the said judgment of the Court of Appeal does not represent the correct position of the law.

The High Court in its judgment cites *Wickramanayake v. Perera* (1932) 34 NLR 168 and states that in that case "*the issue of failure to renew notarial license was discussed and it was held that if a notary had acted as a notary before renewal of his certificate and obtained it later it has no retrospective effect*." I am in agreement with this statement of law. However, in that case the question was not whether the deeds the notary executed during that period were valid or invalid but whether the conviction of the notary for failure to renew the certificate at the correct time was right or wrong. That case is of no assistance to resolve the instant issue.

The District Court in my view should not have allowed the defendant to present a different case after the plaintiff closed his case by raising additional issues on a judgment of a different case to which the plaintiff

was not a party. The District Court whilst answering issue Nos. 31 and 32 admits that the defendant was not a party to that case and therefore the defendant is not bound by the judgment of the Court of Appeal. Thereafter the learned District Judge fell into error by concluding that the District Court is bound by that judgment on the doctrine of *stare decisis*.

> අභියාචනා අධිකරණ තීන්දුවකින් දිසා අධිකරණයේ අනුගමන්‍ය පූර්ව නිදර්ශන නියායට (stare decisis) යටත්ව බැඳී සිටි. එසේම එල්. 3412 හා සී ඒ 1152 අභියාචනාධිකරණ තීන්දුවෙන් පැමිණිලි කරු බැඳි නොමැති නම් 1451 දරණ සලේ මහතාගේ ඔප්පුව වලංගු ඔප්පුවක් බව සනාථ කිරීමට සාක්ෂි කැඳවීමට ඉල්ලා සිටීමට පැමිණිල්ලට අවස්ථාවක් තිබුනි. එසේ ඔහු කර නොමැති බැවින්, 1451 ඔප්පුව වලංගු ඔප්පුවක් බව සනාථ කිරීමට කිසිදු සාක්ෂියක් පැමිණිල්ලෙන් ඉදිරිපත් වී නොමැත. ඒ අනුව අභියාචනාධිකරණ නියෝගය බලාත්මකව පවති.

The District Court held that the plaintiff did not prove deed No. 1451 by calling witnesses. At page 19 of the judgment, the District Court held that in terms of section 31 of the Evidence Ordinance, admissions recorded at the trial are not conclusive. This interpretation is erroneous. There was no necessity to prove deed No. 1451 because it was recorded as a formal admission at the commencement of the trial. Section 31 of the Evidence Ordinance reads as follows: "*Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.*" Section 31 relates to informal admissions. It is section 58 which is applicable to formal admissions in Court. Section 58 reads as follows: "*No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.*"

I answer the question of law on which leave was granted in the affirmative and set aside the judgments of the High Court and the District Court and allow the appeal. In view of the judgment of this Court there is no purpose in directing the High Court to rehear the appeal. As I stated previously, voluminous evidence has been led before the District Court on several issues raised before that Court although the District Court ultimately disregarded the entirety of the evidence on the erroneous basis that the Court of Appeal judgment is binding on it. I direct the incumbent District Judge of Matale to pronounce the judgment afresh on the evidence led and to answer all the issues raised at the trial. Counsel for both parties shall be given an opportunity to file comprehensive written submissions before the matter is fixed for judgment. The plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Janak De Silva, J.
I agree.

Judge of the Supreme Court