

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

*In the matter of an Application for
Leave to Appeal under section 5C
of the High Court of the Provinces
(Special Provisions) (Amendment)
Act No.54 of 2006 read together
with Article 127 of the
Constitution.*

SC Appeal No: 13/2018

SC/HC/LA No. 160/2015
WP/HCCA/COL/ No. 162/2006(F)
DC Colombo Case No: 16354/Land

Faith Soysa.
2A, Torrington Place, Independent
Avenue, Colombo 07.

PLAINTIFF

Wahala Thantrige Dayananda
Rupasoma Perera.
No.15, Siripa Lane, Colombo 5.

SUBSTITUTED PLAINTIFF

-VS-

Brian Michael Francis Muller Pereira.
No.28, Torrington Avenue,
Colombo 7.

DEFENDANT

AND

Brian Michael Francis Muller Pereira.
No.28, Torrington Avenue,
Colombo 7.

DEFENDANT- APPELLANT

-VS-

Wahala Thantrige Dayananda
Rupasoma Perera.

No.15, Siripa Lane, Colombo 5.

**SUBSTITUTED PLAINTIFF-
RESPONDENT (Deceased)**

Honarine Mary Evangeline Cristobel
Rasiah (nee Dias).

No. 2A, Torrington Place,
Independent Avenue,
Colombo 7.

**SUBSTITUTED PLAINTIFF-
RESPONDENT**

AND BETWEEN

Brian Michael Francis Muller Pereira.

No.28, Torrington Avenue,
Colombo 7.

**DEFENDANT- APPELLANT-
PETITIONER**

-VS-

Honarine Mary Evangeline Cristobel
Rasiah (nee Dias).

No. 2A, Torrington Place,
Independent Avenue,
Colombo 7.

**SUBSTITUTED PLAINTIFF-
RESPONDENT- RESPONDENT**

AND NOW BETWEEN

Brian Michael Francis Muller Pereira.
No.28, Torrington Avenue,
Colombo 7.

DEFENDANT- APPELLANT-
APPELLANT

-VS-

Honarine Mary Evangeline Cristobel
Rasiah (nee Dias).

No. 2A, Torrington Place,
Independent Avenue,
Colombo 7.

SUBSTITUTED PLAINTIFF-
RESPONDENT- RESPONDENT

BEFORE : **SISIRA J. DE ABREW, J.,**
S. THURAIRAJA, PC, J. AND
E.A.G.R. AMARASEKERA, J.

COUNSEL : Palitha Kumarasinghe, PC. With Priyantha Alagiyawanna for
Defendant- Appellant- Appellant.
Nihal Jayamanne, PC with Dilhan De Silva for Substituted
Plaintiff- Respondent- Respondent.

ARGUED ON : 16th January 2020.

WRITTEN SUBMISSIONS : Defendant- Appellant- Appellant on the 30th of
January 2020.
Applicant – Respondent – Respondent on the 30th
of January 2020.

DECIDED ON : 28th May 2020.

S. THURAIRAJA, PC, J.

The Defendant- Appellant- Petitioner- Appellant (hereinafter referred to as the 'Defendant- Appellant') preferred this appeal against the Substituted Plaintiff- Respondent- Respondent (hereinafter referred to as the 'Substituted Plaintiff- Respondent') to set aside the Judgment dated 26.03.2015 of the High Court of the Western Province holden in Colombo and to set aside the judgment dated 10.02.2006 of the Learned Additional District Judge of Colombo.

The Plaintiff (now deceased), namely Faith Soysa (hereinafter referred to as the 'Plaintiff') instituted this action and stated in her plaint that, Felix Pereira was the owner of the property (under and by virtue of Deed no.249 dated 17.12.1945 and under and by virtue of Deed no.303 dated 23.03.1946) described in the 1st schedule to the Plaint. He died leaving a Last Will No.387 and the said Will duly proved in the District Court of Colombo in case bearing No.18617/T. Thereafter the Plaintiff and her brother namely Joy Francis Pereira became owners of the property described in the 1st schedule to the Plaint by Deeds No.1338 dated 12.10.1960 and No.1340 dated 05.12.1960 both attested by A.R.N. De Fonseka Notary Public and by being rest and residual of the said Last Will No.387. In lieu of their undivided rights, the Plaintiff and the said Joy Francis Pereira caused the sub division of the property described in the 1st schedule to the Plaint by Plan No. 2298 dated 28.09.1971 made by D.C. Peiris, Licensed Surveyor into two lots. Thereafter, the Plaintiff became the owner of the property bearing Assessment No. 2A and 4 described in the 2nd schedule to the Plaint containing in extent of 27.2 Perches under and by virtue of Deed No.1726 dated 04.10.1971 attested by B.H. Amaradasan Notary Public.

The Defendant- Appellant (who is the son of the said Joy Pereira, the brother of the Plaintiff) claimed an undivided ½ share of the said property described in the 2nd schedule to the Plaint by Deed of Transfer No. 104 dated 20.07.1992 attested by

Ahamed Irfan Zaheed Notary Public executed by the Plaintiff and the same was registered in the Land Registry.

The Plaintiff claimed that, she did not intend to transfer the said undivided $\frac{1}{2}$ share of the said property to the Defendant - Appellant and the said Deed is not an act and deed of the Plaintiff.

The Defendant- Appellant claimed an undivided $\frac{1}{2}$ share of the said property described in the 2nd schedule to the Plaintiff by Deed of Gift No. 105 dated 20.07.1992 attested by Ahamed Irfan Zaheed Notary Public executed by the Plaintiff and the same was registered in the Land Registry.

The Plaintiff claimed that, she did not intend to gift the said undivided $\frac{1}{2}$ share of the said property to the Defendant- Appellant and the said Deed is not an act and deed of the Plaintiff.

The plaintiff stated that, on 7th of July 1992 she had suffered a severe stroke and was entered to Nawaloka Hospital by the Defendant- Appellant under Dr. Puvimanasinghe. Plaintiff was 80 years old as per the diagnostic sheets marked as 'P7'/'V17'. After she was admitted, she was referred to Consultant Neurologist Dr. J.B. Pieris, Consultant Physician by Dr. Puvimanasinghe (V17e). Plaintiff stated that, on 20.07.1992 her nephew Brian Michael Francis Muller Pereira (the Defendant- Appellant) came with four others and took her thumb impression, which she later came to know has been a deed of gift and deed of transfer of her property at Torrington Place, where she reside. Plaintiff prayed that it was not her intention to sell, gift or transfer her property to her nephew Brian Michael Francis Muller Pereira. The Plaintiff made a complaint to the CID against the Defendant- Appellant for fraud.

Then Plaintiff instituted this action in the District Court of Colombo by a plaint dated 30th July 1993 against the Defendant- Appellant *inter alia* praying for;

(a) *For a declaration that,*

(i) *Deed No. 104 (marked 'V6') dated 20.07.1992 attested by Ahamed Irfan Zaheed Notary Public is null and void and has no effect and validity in law.*

(ii) *Deed No. 105 (marked 'V7') dated 20.07.1992 attested by Ahamed Irfan Zaheed Notary Public is null and void and has no effect and validity in law.*

(b) *A declaration that the Plaintiff is the owner of the property described in the 2nd Schedule to the Plaint.*

The Plaintiff as an alternative cause of action to the 1st cause of action had also prayed for;

(a) *A declaration that Deed No. 104 dated 20.07.1992 attested by Ahamed Irfan Zaheed Notary Public is null and void and has no effect and validity in law and the said deed is liable to be set aside on the ground of *leasio enormis*;*

(b) *A declaration that the Plaintiff is the owner of undivided ½ of the property described in the 2nd Schedule to the Plaint.*

At the trial the following witnesses called by the Substituted Plaintiff- Respondent gave evidence,

- (i) Dr. Jayantha Bennet Peiris, Neurologist;
- (ii) Dr. D.H. Victor Perera, Psychiatrist;
- (iii) S.W. Prema De Silva, Administrative Officer of Nawaloka Hospital;
- (iv) K. Kankanamlage Nandawathi, an Attendant;
- (v) Dayananda Rupasoma Perera, the Substituted Plaintiff- Respondent.

At the conclusion of the said evidence, the Substituted Plaintiff- Respondent closed his case reading in evidence and documents were marked as "P1" to "P 10" and the Defendant- Appellant objected to the admitting of documents marked "P1" to "P4" as the said documents had not duly proved by the Substituted Plaintiff- Respondent.

At the trial, the Defendant- Appellant called following witnesses to give evidence.

- (i) The Defendant- Appellant ;
- (ii) Dr. Carl Emanuel Puvimanasingham;
- (iii) S.J. De Alwis, the valuer;
- (iv) Jayaratne Mudannayake, the Manager- City Branch, Bank of Ceylon.

At the conclusion of the said evidence, the Defendant- Appellant closed his case reading in evidence document marked "V1" to "V 27".

At the commencement of the trial the parties admitted the jurisdiction of the Court and the averments in paragraph 2 to 10 and 19 and 20 of the plaint. In paragraphs 2 to 10 of the plaint the plaintiff pleaded her title to the allotment of land in respect of which the impugned deeds have been executed. The main issue for the learned District Judge to decide was whether the Plaintiff was in a proper mental condition to understand the nature and consequences of Deeds 104 and 105.

The learned Additional District Judge answered the issues raised in favour of the Substituted Plaintiff- Respondent and delivered his judgment on 10.02.2006 as prayed in the Plaint. Being aggrieved by the said judgment, Defendant- Appellant preferred a final appeal to the Provincial High Court of the Western Province (High Court). On 26.03.2015 learned Judges of the High Court dismissed the appeal preferred by the Defendant- Appellant with costs and held in favour of the

Substituted Plaintiff- Respondent in relying on contents of Medical Report dated 02.03.1993 produced in evidence marked "P6" by Dr. J.B. Peiris, Neurologist.

Then, Defendant- Appellant appealed to this Court. When this matter was supported on 9th February 2018, leave to appeal was granted on the following questions of law as set out in paragraph 28 of the Petition.

(2) Has the Plaintiff failed to discharge the burden of proof that the plaintiff did not have an intention to dispose of the property to the Petitioner on the basis that the Deed No. (s) 104 and 105 were not her act and deed?

(3) Has the learned High Court Judges erred in law answering Issues 1 to 4 in favour of the Plaintiff did not have mental capacity to execute the Deeds on 17th July 1992 when the Plaintiff's mental capacity is not in any of the issues?

(4) Have the Learned Judges of the High Court erred in law in failing to consider that the plaintiff has not established her case against the petitioner by cogent evidence and on the balance of probabilities?

(5) Have the learned Judges of the High Court erred in law in failing to consider that the plaintiff (deceased) had received the consideration of Rs.6 Million for the said Deed No.104 and as the Plaintiff (deceased) accepted the said consideration and utilize the said consideration, the plaintiff is estopped from denying the validity of execution of the said Deed No. 104 and the Deed of Gift No.105?

(6) Have the learned Judges of the High Court erred in failing to consider that the plaintiff (deceased) itself had contradictory versions and the plaintiff (deceased) had not even pleaded of any absence of mental capacity by the said plaintiff?

(7) Has the plaintiff failed to establish the issues No(s) 1 to 4 by strong and cogent evidence, in the circumstances of this case?

Issues of law allowed by this Court mainly contemplate on what is mentioned below;

1. Whether the Plaintiff failed to prove her case (Issues of Law No 2,4, and 7)
2. Whether the learned High Court Judges erred in taking 'lack of mental capacity of the plaintiff' as a matter raised through issues when it is not so (issue of law no. 3) or failed to consider that such ground was not even averred in the plaint (issue of law No.6) These issues of law appears to have been raised to point out that case was proved on a different stance than that was taken in the plaint which is contrary to Civil Procedure Code and the case must be based on the issues raised at the trial.
3. Whether the Plaintiff is estopped from denying the validity of the deed after accepting and utilizing the consideration.

I carefully perused the evidence of Dr. J.B. Peiris, Consultant Neurologist at pages 127-174 and Dr. H.V. Perera, the Psychiatrist at pages 157-177. Dr. J.B. Peiris submitted his evidence and stated he had treated the plaintiff for Paralysis from 07.07.1992 -24.07.1992 and said alleged deeds were executed on 17th July 1992 during the period of plaintiff's hospital stay. As per submitted evidence at page 157 of the brief which is as follows.

ප්‍ර - මේ රෝගී තැනැත්තියට ඔප්පුවක් අත්සන් කිරීමට හැකි මානසික තත්ත්වයක් තිබුණේ නැහැ?

උ- ඔව්.

ප්‍ර-සාමාන්‍යයෙන් රෝගියාට වැටහීම් වලට මැදිව වගේ අසන දේ කියන්න අපහසුයි ?

උ- ඔව්.

Further, a Report by Dr. J.B. Peiris dated 02.03.1993 was marked as "P6" revealed that the Plaintiff had suffered a stroke involving the partial lobe of the

dominant left cerebral hemisphere (this has been confirmed by the CT scan marked as "P4"). Dr. J.B. Peiris in "P6" specifically stated as follows.

"Documented specific abnormalities detected during her hospital stay included confusion, defective comprehension of the spoken word, disorientation in time and space (nominal dysphasia) inability to find the correct name for objects, dyslexia (inability to read) all related to the pathological involvement seen in the EEG and CT head scan.

I did not consider her to be in a fit condition to comprehend questions, make decisions or express same verbally or in writing during her hospital stay. Her ability to do so was also assessed by Dr. R. Kulanayagam on 20 July 1992 at my request."

Dr. J.B. Peiris carried out another test on 23.07.1992 soon after the execution of alleged deeds marked as "P7a" and as per the said report the Plaintiff was unable to say after several attempts, what year it was, she couldn't say what month or date it was, when she was asked what day it was, she was aware that it was Wednesday and that tomorrow is Thursday. She had been able to recognize a pen, a watch and to show the left little finger. She had not been able to read headlines in a newspaper even letter by letter, she had not been able to say how much 5+5 is.

I perused the report marked "P8" produced by Dr. H.V. Perera, Psychiatrist dated 28.09.1992 after examining the patient and it was stated that the plaintiff's testamentary capacity is impaired. He stated in paragraph 2 of the "P8" as follows.

"Her memory is impaired to past and present events. She does not know her full name or age. She does not know the extent of her bounty nor the claims or strengths of their claims. She is disoriented in time and place."

The evidence of Dr. J.B. Peiris and his report "P6" and his observations in the bed head ticket on the 19.07.1992 and the 23.07.1992 conclusively proves that the

Plaintiff had no *compos mentis*. The report of the Dr. H.V. Perera is also conclusive that even on the 28.09.1992 the Plaintiff had no testamentary capacity.

The evidence recorded at the trial does not carry material to indicate it is a perverse decision. There is no material to show that the plaintiff had physical or mental capacity to instruct the Notary or suggest amendments to what the notary said at the time of the execution and the evidence led indicates that the converse was more probable. Even the defendant's witness says that she nodded her head to the Notary. Though the said witness interprets it as consent, it may be anything. Thus, evidence was sufficient to prove the Substituted Plaintiff- Respondent's case.

It is true that there was no specific issue raised or averment in the plaint highlighting the mental capacity of the deceased plaintiff at the relevant time. What was stressed is whether the deceased plaintiff intended the execution of the deeds. To intend one should have the mental capacity. On the other hand, to express intention one must have the physical ability. As mentioned above there were sufficient material for the learned Additional District Judge to come to his finding as evidence indicate the physical inability as well as mental incapacity more probable.

As per the above, I find that Deed No.104 and 105 are not valid Deeds and are void in the eyes of the law for the reason that the execution of the said Deeds were not the acts and deeds of the Plaintiff and that she had no reason to gift or transfer her property to the Defendant- Appellant. For a valid contract there must be *concensus ad idem*. If one or both of them had no such intention or could not due to some inability to comprehend the transaction or was not capable of entering into such a transaction then there is no contract.

With regard to the proof of the case the Defendant-Appellant argues that the deceased plaintiff was not called to give evidence when she was alive at the beginning of the plaintiff's case. It seems the attempt is to question the validity of the findings of lower courts on the ground that the star witness was not called to state that she did not intend to execute the relevant deed. It appears that Defendant

- Appellant questions calling evidence for corroboration without calling the main witness. Further it raises the question whether the court shall consider the failure to call the star witness when she was available against the plaintiff's case.

However there seems to be no objection at the trial for not calling the deceased Plaintiff first. She was listed as a witness but died before calling her and the substituted Plaintiff who was not a witness to the incident of executing the deeds was called. The intention to call the plaintiff is visible since her name was there in the said list. Thus, she would have not been called due to her death and as such, not calling her as a witness shall not be considered against the plaintiff case. On the other hand, the other witnesses of the plaintiff, specially Dr. J.B. Peiris and the attendant are not mere witnesses call to corroborate. They speak of the factual situation relating to physical and mental condition of the plaintiff at the relevant time. After hearing the both sides, the learned Additional District Judge has come to the conclusion that the executions of impugned deeds were not intended by the plaintiff.

Defendant- Appellant claimed that, sum of Rs. 6,000,000/- was paid for the purported Deed of Transfer. I find that, deposit of a cheque does not validate a transaction since the Plaintiff did not have *compos mentis* to execute the said deeds and it cannot be an expression of her intention. It is my opinion that, such transactions are void and do not become valid because some person had deposited money in Plaintiff's account without her knowledge.

There is no evidence to show that the consideration was deposited in the bank by the deceased plaintiff or with her connivance or knowledge. It appears to be a Joint account. No material to show that the said money was withdrawn and utilized by the plaintiff or on her instruction while knowing it was the consideration for the relevant transfer deed.

In this case the findings are purely on facts. I am not inclined to interfere with the findings of facts arrived at by the trial courts unless they are perverse.

For the above mentioned reasons, I answer the questions of law raised in the negative. I agree with the findings of the learned Judge of the District Court and learned Judges of the High Court and hence I find no reason to interfere with the said judgments. I dismiss the appeal with cost of Rs.100, 000/-.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW, J.

I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKERA, J

I agree.

JUDGE OF THE SUPREME COURT