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

In the matter of an appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 151/2011

SC/HCCA/LA/62/2011

NWP/HCCA/KURU/29A/2009 (F)

DC/CHILAW/25134/Ejectment

Ambagahage Vithorianu Basil Fernando,
C/O Canute Peiris,
Milagahawatta,
Mudukatuwa, Marawiwila.

Plaintiff

Vs.

Ambagahage Leslie Malcom Fernando,
Thalawila,
Marawila.

Defendant

AND BETWEEN

Ambagahage Leslie Malcom Fernando,
Thalawila,
Marawila.

Defendant Appellant

Vs.

Ambagahage Vithorianu Basil Fernando,

C/O Canute Peiris,

Milagahawatta,

Mudukatuwa, Marawiwila.

Plaintiff Respondent

AND NOW BETWEEN

1a. Poruthotage Mary Rose Hysinth Indrani Perera,

1b. Nirmalee Irosha Udayanganee Fernando,

1c. Werjin Ishanka Malshani Fernando,

All of Thalawila,

Marawila.

Substituted Defendant Appellant-Appellants

Vs.

Ponnamperumage Charlot Mary Matilda Fernando,

Milagahawtta,

Mudukatuwa, Marawila.

Substituted Plaintiff Respondent Respondent

BEFORE : PRIYASATH DEP, PC, J. (as he was then)

UPALY ABEYRATHNE, J.

ANIL GOONARATNE, J.

COUNSEL	:	Lashman Perera PC with Anjali Amarasinghe and Thilini Ratnayake for the substituted Defendant Appellant Appellants Dr. Sunil Cooray for the substituted Plaintiff Respondent Respondent
WRITTEN SUBMISSION ON:		03.01.2017 Substituted Defendant Appellant Appellants. 09.01.2012 Plaintiff Respondent Respondents
ARGUED ON	:	22.11.2016
DECIDED ON	:	01.06.2017

UPALY ABEYRATHNE, J.

The Defendant Appellant-Appellant (hereinafter referred to as the Appellant) has preferred this appeal from the judgment of the High Court of Civil Appeal, North Western Province, holden at Kurunegala dated 13th of January 2011. By the said judgment, the High Court has upheld the judgment of the learned District Judge of Chilaw dated 03.11.2008, delivered in favour of the Plaintiff Respondent-Respondent (hereinafter referred to as the Respondent).

When the matter was supported for leave to appeal on 04th October 2011, this court has granted leave on the following questions of law:

1. Does the fact that journal entries 54 and 55 do not show that objection was taken to the documents marked P 1 and P 2 when the

case was closed for the Respondent necessarily preclude the Appellant in the context of a *Rei Vindicatio* action to rely on the alleged infirmities in the manner in which the said documents were proved after they were originally marked 'subject to proof'?

2. Can the *cursus curiae* recognized by our courts to the effect that the party who does not object to documents sought to be read in evidence at the close of a case, prevail in the face of Section 61 and 101 of the Evidence Ordinance, particularly in the absence of express provision to that effect in the Civil Procedure Code?

The Respondent (Plaintiff) has instituted the said action against the Appellant in the District Court of Chilaw, seeking inter alia a declaration of title to the land described in the schedule to the plaint. The Respondent has claimed titled to the land in suit upon a Crown Grant issued in terms of Section 19(4) Land Development Ordinance. He has produced the said Grant at the trial marked P 2. According to P 2 the Grant had been made on 30th of December 1982. Prior to the said Grant P 2, the Respondent had been given a land permit bearing No 14858 dated 29.09.1956 in respect of the same land under the Land Development Ordinance by the Assistant Government Agent of the Puttalam District. Said Land Permit has been produced at the trial marked P 1. According to P 1, the Respondent's father A. A. Austin Fernando had been nominated as the successor of the said land.

The Appellant took up the position that he was in continuous possession of the said land in suit since 1965 and said land permit P 1 and the Grant P 2 were not duly executed and they were forged documents. The Appellant contended before this court that;

- The High Court has failed to consider the burden of proof in relation to *Rei Vindicatio* action,
- The High Court has failed to consider the mandatory provisions of Section 101 of the Evidence Ordinance in relation to an action of *Rei Vindicatio*,
- The Respondent has not produced originals of P1 and P 2,
- The Respondent has not produced certified copies of P1 and P 2,
- The Respondent has produced only photocopies of P 1 and P 2,
- The photocopies of P 1 and P 2 has not been signed by the Grantor,

On the above basis, the Appellant contends that the burden of proof of title and P 1 and P 2 are not forged documents, is on the Respondent and the Respondent has failed to discharged the burden cast on him.

The learned Counsel for the Appellant relied on the following observation made at page 37 in Sabaratnam Vs. Kandavanam 60 NLR 35 in which Weerasooriya J. stated that "I am unable to agree with this submission, for it seems to me that if the failure to object to the reception, in evidence of PI constituted an admission by the 1st and 2nd defendants, the admission did not go beyond conceding that the original duplicate of Deed No. 11385, being in the custody of the Registrar of Lands, was a document of which a certified copy is permitted by law to be given in evidence on the basis that condition (6) of the conditions prescribed under Section 65 of the Evidence Ordinance for the admission of secondary evidence of the contents of an original document had been satisfied in this case. …….. In my opinion all that Section 2 of the Proof of Public Documents Ordinance means is that the production of the copy shall be evidence of the

contents of the original document. But proof of the contents of a document does not amount to proof of its execution, and notwithstanding the production of P I, the burden still lay on the plaintiff to prove the due execution of the original document in terms of the relevant provisions of the Evidence Ordinance."

In the said case, it was held that "the certified copy was not proof of the due execution of the deed, even though it was admitted in evidence at the trial without any objection by the defendants. Although, by section 2 of the Proof of Public Documents Ordinance, the production of a certified copy is evidence of the contents of the original document, it does not amount to proof of the due execution of the original document."

It is clear that, in the said case, their Lordships had dealt with the due execution of a deed. Their Lordships were of the view that the proof of the contents of a document does not amount to proof of its due execution. In the present case before us the documents P 1 and P 2 are not notarialy executed documents. Hence the due execution does not arise for determination of court. Therefore, the dicta of the said case has no relevance to the present case. It is clearly seen that P 1 and P 2 are documents forming the acts of the Sovereign Authority and of Public Officers. Therefore P 1 and P 2 are Public Documents within the meaning of Section 74 of the Evidence Ordinance and hence it can be proved in terms of Section 78 of the Evidence Ordinance.

I have carefully examined the said two documents marked P 1 and P 2. P 1 and P 2 are photocopies of certified photocopies of the originals. P 1 is the said land permit issued under the Land Development Ordinance. P 2 is the grant issued under Section 19(4) of the Land Development Ordinance. P 1 and P 2

contain relevant certifications as required by Section 78 of the Evidence Ordinance. Now the question to be dealt with is whether P 1 and P 2 could be admitted as evidence since the documents are photocopies. The Appellant has alleged that the documents are forged. Accordingly, at the trial he has raised issues No 19 and 20 in line with forgery.

Although the Appellant has made such serious allegation against P 1 and P 2, he has not made any attempt to adduce any evidence in relation to issues No 19 and 20. He has not made any application before trial court to send P 1 and P 2 for examination by the EQD. In this regard, at the hearing of this appeal the learned President Counsel for the Appellant contended that the burden of proof lies on the Respondent and he has to prove that P 1 and P 2 are not forged documents. In paragraph 07 of the written submission, the Appellant has stated that in proving the title of the Respondent, the burden is on the Respondent to prove the title as set out in issues 1 and 2, that, P 1 and P 2 are not forgeries. In this regard, the learned President Counsel heavily relied upon the provisions contained in Section 61 and 101 of the Evidence Ordinance which read thus;

> 61. The contents of documents may be proved either by primary or by secondary evidence.
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> 101. Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of the facts which he asserts, must prove that those facts exists.
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> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

At the trial the Respondent has raised issues No 1 to 15 which have been raised on the basis that the Respondent became entitled to the land in dispute

by P 1 and P 2 and after the death of his father the Appellant entered in to the possession of the said land and causing damages to him. The Respondent has not raised any issue on the basis that P 1 and P 2 were forged documents. The Respondent has sought a declaration of title upon P 1 and P 2. Hence, the Respondent's burden is to prove his legal right over the land in dispute on the existence of the facts which he asserts and to prove those facts exist. The Respondent must set out his title on the basis on which he claims a declaration of title to the land in suit and he must prove that title against the Appellant and nothing more. It is well settled law that the owner of immovable property is entitled, on proof of his title, to a decree in his favour for recovery of property and for ejectment of any person in wrongful occupation. Therefore, it cannot be contended that the burden of proof of alleged forgery as raised by the Appellant, is on the Respondent.

Section 103 of the Evidence Ordinance stipulates that "the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person". In terms of Section 103, since the Appellant has raised issues disputing that P 1 and P 2 is forgery he is the person who wishes the court to believe the existence of that fact. Hence the burden of proof lies on the Appellant to prove the existence of a forgery.

In this regard, it is important to note that in paragraph 16 of the written submission of the Respondent has stated that as the Appellant has been charged with forgery in the Magistrate's Court, whereby the Appellant has caused to enter his name as the nominated successor in P 1, the land permit, the original permit has been taken in to court custody in Magistrate's Court Case No 10289. The Respondent has obtained a certified copy from the Magistrate Court and

produced as P 1. The Appellant, in his written submission has not denied the said facts. In paragraph 11 of his written submission he has stated that "The Plaintiff has marked and tendered a permit and a grant as P 1 and P 2 respectively and both documents are photocopies certified by Registrar of the Magistrate's Court. The Plaintiff never tried to produce originals of the said documents. If originals had been filed of a case in Magistrate's Court of Chilaw by Plaintiff he had the opportunity to summon Registrar without much effort to produce the said originals." This is ample evidence to conclude that the Appellant was aware of the originals of P 1 and P 2 and its whereabouts.

On the other hand, the Respondent contended that at the trial court, the Appellant had not objected to P 1 and P 2 when it was sought to be read in evidence at the close of the case for the Respondent and therefore, the Appellant cannot now raise objection to P 1 and P 2 as said conduct of the Appellant amounts to an admission of P 1 and P 2. It is a well-recognized practice in law that a document which is produced at the trial subject to proof is not objected to when it is read as evidence at the time of closing the case, such document is deemed to have been admitted as evidence of the case by the opposing party.

This practice has been prevalent for well over centaury and can be said to have hardened into a rule of admitting documents as evidence. The maxim CURSUS CURIAE EST LEX CURIAE which means "The practice of the Court is the law of the Court would be most appropriate in a situation as has been presented in the present case before this court. In Halsbury's Laws of England 4th edition Vol 10 at para 703, it is stated that "A court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure

contrary to or inconsistent with rules laid down by statute or adopted by ancient usage".

Broom's' Legal Maxims – 10th Edition – at page 82 sets out the application of the maxim in England. "Every court is the guardian of its own records and master of its own practice" and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience."

In the said circumstances, I see no reason to interfere with the judgment of the High Court of Civil Appeal, holden at Kurunegala, dated 13.01.2011. Accordingly said questions of law is answered in favour of the Respondent. Hence the appeal of the Appellant is dismissed with costs.

Appeal dismissed.

Judge of the Supreme Court

PRIYASATH DEP, PC, J. (then he was)

agree

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court