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 Act No. 54 of 2006.

SC Appeal No. 49/2013
SC (HCCA) Leave to Appeal Application No. 559/2012

HCCA (Avissawella) Case No:

WP/HCCA/AV/516/2008(F)

DC Homagama Case No. 1772/L

Olaboduwage Indralal Ranatunga,
90,
Ranala.
PLAINTIFF

-Vs-

Attanayakage Kanthi Violet Perera,
Alpitiya Mawatha, Betawela,
Ranala.
DEFENDANT

AND THEN BETWEEN

Attanayakage Kanthi Violet Perera,
Alpitiya Mawatha, Betawela,
Ranala.
DEFENDANT-APPELLANT

-Vs-

1. Olaboduwage Indralal Ranatunga,
   (Deceased)
   90, Ranala.
   PLAINTIFF-RESPONDENT

AND NOW BETWEEN

1. Benthara Mapalagama Acharige Shahikala Lakmini Kumari.
2. Benthara Mapalagama Acharige Pawani Perera. (Minor)
3. Benthara Mapalagama Acharige Nethranjali Perera. (Minor)

2/16, 2nd Lane, Batewela,
Ranala.
SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANTS

-Vs-

1. Attanayakage Kanthi Violet Perera, Alpitiya Mawatha, Betawela, Ranala.
DEFENDANT-APPELLANT-RESPONDENT

Before : **P. Padman Surasena J**
Yasantha Kodagoda, PC, J
A.L. Shiran Gooneratne J

Counsel : Mr. Thishya Weragoda with Iresh Seneviratne and Prathap Welikumbura instructed by Ms. Niluka Dissanayake for the Substituted Plaintiff-Respondent-Appellants.

Mr. Nilshantha Sirimanne for the Defendant-Appellant-Respondent

Argued on : 19-07-2023
Decided on : 12-06-2024

P. Padman Surasena J.

The original Plaintiff in this case Olaboduwage Indralal Ranatunga filed Plaint against the Defendant Attanayakege Kanthi Violet Perera praying *inter alia* for the following reliefs:

(i) A declaration that the Plaintiff is the owner of the property more fully described in the 2nd schedule to the Plaint;

(ii) An order for ejectment of the Defendant from the premises;

(iii) An order for damages payable for the alleged illegal occupation of the said premises by the Defendant;

(iv) An enjoining order in the first place and thereafter an interim injunction, to prevent the Defendant from making any development to the land which is more fully depicted in the second schedule to the Plaint which is the subject matter of the Plaintiff's action.

The Plaintiff's case is that the larger land called 'Aliyagedara Watta' more fully described in the first schedule to the Plaint in extent of ten acres and two roods, was owned by one Olivia Surangani Ranasinghe alias Surangani Wijewardena. The said owner Olivia Surangani Ranasinghe had caused the said larger land (Aliyagedara Watta) subdivided into 97 lots, prepared the Plan No. 6100 dated 10-08-1989 and then sold the said plots of land in a public auction. The Plan No. 6100 has been produced with the Plaint marked **P1**.

The Plaintiff has averred in the Plaint that said Olivia Surangani Ranasinghe executed the Power of Attorney No. 1585 dated 6th February 1992, appointing her husband (Olivia Surangani Ranasinghe's husband) Dr. Vijitha Ananda Ranasinghe as the Power of Attorney holder as said Olivia Surangani Ranasinghe went to a foreign country. The Plaintiff has produced the said Power of Attorney with the Plaint marked **P2**.

The Plaintiff claimed that he had purchased the Lot No. 71 depicted in the said Plan No. 6100 on the Deed of Transfer No. 1141 attested on 24-04-1992 by Punchi Bandara Heenkenda Notary Public. This deed (Deed of Transfer No. 1141) has been produced marked **P3**.

The Plaintiff has also averred in the Plaint that the Defendant on or about 22-05-1992, had forcibly entered into his land (Lot No. 71) and constructed a Cadjan hut and then started occupying his land. The Plaintiff states that he had lodged a complaint on 23-05-1992 at Nawagamuwa Police Station. The Plaintiff had produced a copy of the said complaint marked

P4. It is on the above footing that the Plaintiff in his Plaint had prayed for the afore-said reliefs.

The Defendant in her answer had admitted that the larger land was owned by said Olivia Surangani Ranasinghe nee Wijewardena. However, it is the position of the Defendant that the owner of this land, Olivia Surangani Ranasinghe nee Wijewardena had not gone to a foreign country as averred by the Plaintiff but was in Sri Lanka suffering from a mental disease. The Defendant therefore had taken up the position that said Olivia Surangani Ranasinghe nee Wijewardena could not have lawfully granted the Power of Attorney No. 1585 dated 06-02-1992 to her husband Dr. Vijitha Ananda Ranasinghe as she was suffering from a mental disease. It is therefore the Defendant's position that said Dr. Vijitha Ananda Ranasinghe could not have lawfully transferred Lot No. 71 (the land described in the second schedule to the Plaint) to the Plaintiff by Deed of Transfer No. 1141. It is on the above basis that the Defendant, as a claim in reconvention, has prayed *inter alia* for an order to declare that the said Deed No. 1141 is null and void. The Defendant has also taken up the position that one Sebastian Fernando, who is the owner of a Real Estate Agency, had agreed to sell this land to her.

The trial proceeded upon several issues out of which only the following three issues would be relevant for the disposal of this appeal. Those three issues are as follows:

Issue No. 3 of the Plaintiff:
whether Olivia Surangani Ranasinghe was abroad during the pendency of the sale of the plots of land after it was subdivided.

Issue No. 4 of the Plaintiff:
whether Olivia Surangani Ranasinghe had granted the Power of Attorney No. 1585 dated 06-02-1992 appointing Dr. Vijitha Ananda Ranasinghe as her Power of Attorney holder for the purpose of selling the said subdivided plots of land.

Issue No. 12 of the Defendant:
whether the said Power of Attorney had conferred lawful Power of Attorney.

After the conclusion of the trial, the learned District Judge has held in favour of the Plaintiff and granted the prayers of the Plaint by his judgment dated 18-10-2006. Being aggrieved by the said judgment (dated 18-10-2006) pronounced by the learned District Judge, the Defendant appealed to the Provincial High Court of Civil Appeals.

The Provincial High Court of Civil Appeals, after the argument, by its judgment dated 12-11-2012, for the reasons set out therein, had set aside the judgment of the learned District Judge and allowed the appeal with costs. The Provincial High Court of Civil Appeals has also proceeded to dismiss the Plaintiff's action.

It is against the said judgment dated 12-11-2012 of the Provincial High Court of Civil Appeals that the Plaintiff has filed the Leave to Appeal Petition relevant to the instant Appeal in this Court. This Court having heard the submissions of the learned Counsel for both parties, had granted Leave to Appeal on the following questions of law:

(1) *Has the learned Provincial High Court Judge erred in law in holding that the Power of Attorney marked "**P2**" has not been;*

(i) duly executed?

(ii) duly proved according to law?

*(2) Has the learned Provincial High Court Judge misdirected herself in holding that the Deed of Transfer marked as "**P3**" is defective for the reason the details of the Power of Attorney marked "**P2**" has not been included?*

*(3) Has the learned Provincial High Court Judge erred in law in holding that the Deed of Transfer marked as "**P3**" is defective and of no force of law for the reason the details of the Power of Attorney marked "**P2**" has not been included?*

Having regard to the facts and circumstances of this case, it would seem sufficient for me to consider and answer the aforementioned question of law No. 1 for the purpose of disposal of this Appeal.

As has been already mentioned above, the Plaintiff claims title to Lot No. 71 depicted in the said Plan No. 6100 on the basis that he had purchased it through the Deed of Transfer No. 1141 (**P3**) attested on 24-04-1992 by Punchi Bandara Heenkenda Notary Public. It is also the position of the Plaintiff that his predecessor in title, Olivia Surangani Ranasinghe had executed the Power of Attorney No. 1585 dated 6th February 1992 (**P2**), appointing her husband Dr. Vijitha Ananda Ranasinghe as the Power of Attorney holder. Thereafter, it is said Dr. Vijitha Ananda Ranasinghe who had executed the said Deed of Transfer No. 1141.

The Defendant on the other hand takes up the position that the owner of this land, Olivia Surangani Ranasinghe had not gone to a foreign country but was in Sri Lanka suffering from a mental disease. It is therefore the position of the Defendant that said Olivia Surangani Ranasinghe could not have lawfully granted the Power of Attorney No. 1585 (**P2**) dated 06-

02-1992 to her husband Dr. Vijitha Ananda Ranasinghe. It is on that basis that the Defendant argues that said Dr. Vijitha Ananda Ranasinghe could not have lawfully transferred Lot No. 71 to the Plaintiff by Deed of Transfer No. 1141 (**P3**).

Thus, the question I have to resolve now is the issue whether the Plaintiff has proved the due execution of the Power of Attorney marked "P2". To start with, let me at the outset reproduce below, Section 2 of the Powers of Attorney Ordinance which has described Power of Attorney. It is as follows:

> *"power of attorney" shall include any written power or authority other than that given to an attorney-at-law or law agent, given by one person to another to perform any work, do any act, or carry on any trade or business, and executed before two witnesses, or executed before or attested by a notary public or by a Justice of the Peace, Registrar, Deputy Registrar, or by any Judge or Magistrate, or Ambassador, High Commissioner or other diplomatic representative of the Republic of Sri Lanka;"*

Thus, the perusal of the above section clearly shows that it is open for someone to execute a Power of Attorney in one of the ways mentioned in the above section. The Plaintiff's position is that the Power of Attorney No. 1585 (**P2**) is a Power of Attorney executed before, or, attested by, a notary public.

I observe that the Notary Public who attested the Power of Attorney No. 1585 (**P2**) in his attestation has specifically stated that the executant Olivia Surangani Ranasinghe is not known to him. However, the said Notary Public had stated in his attestation that the two witnesses namely, Heenkenda Mudiyanselange Punchibandara Heenkenda Attorney-at-Law and Karande Kankanamge Sanath Chandraratna, are known to him. However, the said Notary Public had not stated in his attestation that the Executant Olivia Surangani Ranasinghe was known to the two witnesses who signed the Power of Attorney.

The said Notary Kaduruwana Gnanasiri who had attested the said Power of Attorney had been called to give evidence on behalf of the Plaintiff. The said Notary has not produced the original copy of the Power of Attorney in court. It is the protocol produced from the custody of the Notary which was marked **P2(ඇ)**. It must be observed that the Defendant had objected to this document at the time of marking it and hence the Plaintiff was allowed to mark this Power of Attorney subject to proof.

It is important to note that the Notary who attested the Power of Attorney in his evidence has categorically stated the following:

1. Both witnesses who signed the Power of Attorney were known to him;
2. The person who granted the Power of Attorney to Dr. Vijitha Ananda Ranasinghe was not known to him and therefore he is unable to ascertain whether it was Olivia Surangani Ranasinghe who indeed signed the Power of Attorney.

In light of the above evidence, it is necessary to examine whether the Plaintiff has proved the Power of Attorney which has been impugned by the Defendant in this case. Section 154 of the Civil Procedure Code which deals with tendering of documents in evidence in the course of a trial would be relevant in this regard. In particular, the explanation given at the end of that section would be relevant in this regard. It is possible to identify this explanation as containing two limbs which could be set down as follows:

Explanation to Section 154 of the Civil Procedure Code.

First Limb

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

Second Limb

If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the court:

Firstly, whether the document is authentic- in other words, is what the party tendering it represents it to be; and

Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.

The latter question in general is matter of argument only, but the first must be supported by such testimony as the party can adduce. If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a prima facie case of authenticity and is further of

opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.

If, however, the court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document. Whether the document is admitted or not it should be marked as soon as any witness makes a statement with regard to it; and if not earlier marked on this account, it must, at least, be marked when the court decides upon admitting it.

According to the first limb of the above provision of law, if Court is to admit a document under that limb, both the requirements mentioned therein must be satisfied. First of those requirements is the absence of any objection by the opposing party. The second is the absence of any legal provision imposing any prohibition for Court to receive such document in evidence. If both these requirements are satisfied, then the court should admit such document. Thus, let me first probe whether the Defendant has objected and if so to what extent it has objected to the said Power of Attorney **<u>P2(ඇ)</u>** being received in evidence.

In this regard, I observe at the outset, that during the course of the Plaintiff's evidence, when the Plaintiff marked and produced the relevant Power of Attorney [**<u>P2(ඇ)</u>**] bearing No. 1585 attested by Notary Public Kaduruwana Gnanasiri, the learned Counsel who appeared for the Defendant in the District Court had informed court that the document **<u>P2(ඇ)</u>** must be marked subject to proof. The following excerpts taken from the record of evidence of the Plaintiff when answering the questions posed to him in the cross examination, would show the extent to which the Plaintiff had objected to the said Power of Attorney **<u>P2(ඇ)</u>** being received in evidence.

<u>හරස් ප්‍රශ්න:-</u>

"…. ප්‍ර: ඔය ඔලිවියා සුරංගනි රණසිංහ කියන අයට පිස්සු නේද?

උ: මම දන්නේ නැහැ.

ප්‍ර: මේ ඔලිවියා රණසිංහ කියන අය 1992 දී කොහේද හිටියේ?

උ: මම ඒක දන්නේ නැහැ.

ප්‍ර: **<u>පැ. 2</u>** කියලා ඇටෝර්නි බලපත්‍රයක් ඉදිරිපත් කලා. එහි සදහන් කරලා තියෙන්නේ 1992.02.06 වෙනි දින කියලා. එදින මේ ඔලිවියා රණසිංහ කියන අය කොහේද හිටියේ?

උ: දන්නේ නැහැ.

ප්‍ර: මේ **<u>පැ. 2</u>** දරණ ඇටෝර්නි බලපත්‍රයේ තියෙනවා නම් ඇය පිට රට හිටියා කියලා ඒක හරිද?

උ: මම දන්නේ නැහැ.[1]

"..... ප්‍ර: ඒ අය මේ කාලය වන විට පිස්සුව හැදිලා පිස්සන් කොටුවේ හිටියේ කියල කිව්වොත් හරිද?

උ: මම දන්නේ නැහැ.

ප්‍ර: තමා දන්නවද ඒ අය 'නෙප්චූන් නර්සින් හොස්පිටල්' එකේ නේවාසිකව ප්‍රතිකාර ගත්ත බව?

උ: මම දැකලා වත් නැහැ.

ප්‍ර: තමාට ඔප්පු අත්සන් කලේ ඔලිවියා රණසිංහ නෙමේ?

උ: එයා ගේ මහත්තයා.

ප්‍ර: මේ ඉඩමේ මුල් අයිතිකරු ඔලිවියා රණසිංහ කියලා තමන් සාක්ෂි දුන්නා නේද?

උ: එහෙම තමයි කතාව තිබුනේ. ඒක හින්ද තමයි කවල් ඉඩමක් වෙලා තියෙන්නේ. .... "[2]

"..... ප්‍ර: ඔලිවියා රණසිංහ පැවරීමක් කලාද?

උ: මම ඒක ගැන දන්නේ නැහැ. ඇටෝර්නි බලපත්‍රය මත තමයි කලේ.

ප්‍ර: ඔලිවියා රණසිංහ කියන අය තමාට පැවරීමක් කලාද?

උ: ඇටෝර්නි බලපත්‍රයෙන් පැවරීම කරලා තියෙන්නේ.

ප්‍ර: ඇටෝර්නි බලපත්‍රයෙන් තමයි පැවරීම කරලා තියෙන්නේ. ඒ පැවරීම කරලා තියෙන්නේ එයා ගේ ස්වාමි පුරුෂයා?

උ: ඔව්

ප්‍ර: පුරුෂයා ඇටෝර්නි බලපත්‍රය අර ගෙන තියෙන්නේ ඇය පිට රට හිටිය පදනම මත?

උ: අපි දන්නේ නැහැ ඒවා

ප්‍ර: තමා නීතිඥ මහතා මාර්ගයෙන් විමසා බැලුවේ නැත්ද? අයිතිකාරිය නෙමේ පවරන්නේ ඇටෝර්නි බලපත්‍රය ලබා ගත්ත කෙනෙක් පවරන්නේ. ඒ නිසා මේ ඇටෝර්නි බලපත්‍රය බල පානවද කියලා විමසා බැලුවේ නැත්ද?

උ: එච්චර කල්පනා කලේ නැහැ. මම විතරක් නෙමේ තව අය ලබා ගත්තා. ....[3]

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[1] Page 124 of the Appeal brief.

[2] Page 125 of the Appeal brief.

[3] Page 129 of the Appeal brief.

"….. ප්‍ර: මම යෝජනා කරනවා ඔලිවියා රණසිංහ කියන අය පොලිසියට පැමිණිල්ලක් කරලා තියෙනවා ඇය කවදාවත් පිට රට ගියේ නැහැ කියලා?

උ: මම දන්නේ නැහැ

> මේ අවස්ථාවේදී විත්තිය විසින් 'X' වශයෙන් විරෝධතා සමග තහනම් නියෝග සමග ගොනු කර ඇති ඔලිවියා රණසිංහ කියන අය ගේ කට උත්තරය සාක්ෂිකරු ගේ අවධානයට යොමු කරයි.

ප්‍ර: ඔලිවියා රණසිංහ කියන අය 71 කියන කොටස කවදාවත් තමන්ට විකිණීමට බලාපොරොත්තු වුනේ නැහැ, ඇය කවදාවත් පිට රට ගියෙත් නැහැ කියලා?

උ: මම ඒ ගැන දන්නේ නැහැ.

ප්‍ර: මම යෝජනා කරනවා ඔලිවියා රණසිංහ කියන අය විටින් විට මානසික රෝහලේ කල්පනාව නැතිව යම් කිසි කාලයක් සිටිය පුද්ගලයෙක් නිසා මේ විකිණීම සම්බන්ධයෙන් කිසිම චේතනාවක් හෝ වටහා ගැනීමක් තිබුනේ නැහැ කියලා?

උ: පොලිසියේ පැමිණිල්ල කරන්නත් කල්පනාව නැතිව එහෙනම් කරන්න ඇත්තේ.

ප්‍ර: තමා ගේ ඔප්පුව අත්සන් කරලා තියෙන්නේ පැ. 2 දරණ ඇටෝර්නි බලපත්‍රය කියලා තියෙන්නේ ඒක දීලා තියෙන්නේ ඇය පිට රට යන නිසා කියලා? …..[4]

"…..ප්‍ර. මම කියා සිටින්නේ ඇය පිට රට යන පරමාර්තයකින් කිසිම දවසක ඇටෝර්නි බලපත්‍රයක් දුන්නේ නැහැ කියලා. ඇය ඔලිවියා රණසිංහ කියන අය ලංකාවේ හිටියේ සෑම විටම?

උ: මම ඒ ගැන දන්නේ නැහැ.

ප්‍ර: මම යෝජනා කරනවා දොස්තර රණසිංහ කියන අය <u>**පැ.3**</u> ඔප්පුව ලිවීමට ඇටෝර්නි බලපත්‍රය උපයෝගී කර ගෙන <u>**පැ. 3**</u> ලිවීමට කිසිම බලයක් තිබුනේ නැහැ කියලා?

උ: මම දන්නේ නැහැ. …."[5]

Thus, it is clear from the above evidence that the Plaintiff had vehemently objected to the said Power of Attorney <u>**P2(අ)**</u> being received in evidence. Therefore, the court cannot admit it under the above-mentioned First Limb of Section 154 of the Civil Procedure Code.

Let me now consider the above-mentioned Second Limb of Section 154 of the Civil Procedure Code. In the Second Limb, one could see that the Section has made a distinction between the proof of authenticity of the document vis-a-vis its admissibility as evidence in a Court of Law. Thus, applying this distinction to the facts of the instant case, two questions that would arise for determination of Court. They could be identified in the following way: whether there is

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[4] Page 130 of the Appeal brief.

[5] Page 131 of the Appeal brief.

proof that the Power of Attorney **P2(ඇ)** is authentic; whether the marking and producing the Power of Attorney **P2(ඇ)** in this instance has rendered it legally admissible evidence against the Defendant. However, if the court is satisfied that either of those questions must be answered in the negative, then the court is obliged under the law to refuse the admission of the document.

According to Section 154 of the Civil Procedure Code, the proof of this fact must be supported by the evidence adduced by the Plaintiff which should have been developed and tested by cross-examination to satisfy Court that it has made out a prima facie case of authenticity for the Court to admit such evidence against the Defendant.

The Power of Attorney **P2(ඇ)** is a document which has been attested before a Notary Public. Section 31 (9) of the Notaries Ordinance[6] has made it mandatory for a Notary to comply with that provision when attesting any deed or instrument. The said Section is as follows;

> S. 31 (9)
>
> Party executing the deed should be known to notary or to two attesting witnesses.
>
> He shall not authenticate or attest any deed or instrument unless the person executing the same be known to him or to at least two of the attesting witnesses thereto; and in the latter case, he shall satisfy himself, before accepting them as witnesses, that they are persons of good repute and that they are well acquainted with the executant and know his proper name, occupation, and residence, and the witnesses shall sign a declaration at the foot of the deed or instrument that they are well acquainted with the executant and know his proper name, occupation, and residence.

However, in the instant case, as has already been mentioned above, the Plaintiff through the Notary's evidence has failed to prove any of the followings namely: the fact that the Executant is known to the Notary; the fact that the two Witnesses are persons of good repute; the fact that they are well acquainted with the Executant and know his proper name, occupation, and residence.

Moreover, according to Section 68 of the Evidence Ordinance, at least one attesting witness is required to give evidence to prove the execution of a document that is required to be attested by law. The said Section of the Evidence Ordinance is as follows:

Section 68

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[6] Prior to its amendments in 2022 and 2024.

"If a document is required by law to be attested, it shall 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."

Although at the first sight, the above provision of law looks very simple, a deeper analysis would raise the issue as to what kind of proof is expected or would be sufficient through such an attesting witness. In this regard, it would be opportune at this juncture to refer to the following two cases.

The first of those cases is the case of L. Marian Vs. S. Jesuthasan et al.[7] The Plaintiff in that case, had instituted a rei vindicatio action. The Defendant in that case had claimed to be the absolute owner of the land on the deed marked D 1 in that case executed by his mother. The Plaintiff in that case had claimed inheritance from the same source. Therefore, the only issue for adjudication by Court was whether the deed D 1 in that case was duly executed. The Defendant gave evidence to the effect that he went with his mother and the attesting witnesses to the notary to get D1 executed. He admitted that one attesting witness was alive and the other dead.

At the hearing of the appeal, it was contended that the notary before whom the deed was executed was an attesting witness within the meaning of Section 68 irrespective of whether he knew the executant or not. It was urged in that case that there was a sufficient compliance with the provisions of Sections 67 and 58 of the Evidence Ordinance as the notary was called to give evidence.

Upon consideration of the above argument, Sinnetamby, J (with Sansoni, J agreeing) had held as follows:

> *"It was contended that the effect of Section 67 read in conjunction with Section 68 rendered it sufficient for proof to be established by calling the notary irrespective of whether he knew the executant or not and proving the signature of the executant by other evidence. This in my view is a fallacy. The signature to a document can be attested without a notary. "To attest" means to "bear witness to a fact" -vide Velupillai v. Sivakamipillai.[8] The notary therefore to become an attesting witness within the meaning of Section 68 of the Evidence Ordinance must be able to bear witness to the fact that it was the executant who set his signature to the document. A document affecting land is executed*

[7] 59 N.L.R. 348 at 349.
[8] (1907) 1 A. C. R. 180.

before a notary to comply with the provisions of Ordinance 7 of 1840 and that fact alone does not make the notary an attesting witness. To become an attesting witness a notary must personally know the executant and be in a position to bear witness to the fact that the signature on the deed executed before him is the signature of the executant.

In the present case the notary says he did not know the executant. No attesting witness has been called and the defendant's evidence even if admitted to the effect that it was his mother who set her thumb impression to D1 would not establish proof of due execution. …".

The second of those cases is the case of _*The Solicitor General*_ *Vs.* _*Ahamadulebbe Ava Umma and four others*_.[9] Although this is a Criminal case, the following dicta of T. S. Fernando, J (with Alles, J agreeing) shows that this Court had re-affirmed the above position. That is reproduced below:

"The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in section 2 of No. 7 of 1840 means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution. If the notary knew the person signing as maker he is competent equally with either of the attesting witnesses to prove all that the law requires in section 68 - if he did not know that person then he is not capable of proving the identity as pointed out in Ramen Chetty v. Assen Naina(supra), and in such a case it would be necessary to call one of the other attesting witnesses for proving the identity of the person. It seems to me that it is for this reason that it is required in section 69 that there must be proof not only that the "attestation of one attesting witness at least is in his handwriting" but also "that the signature of the person executing the document is in the handwriting of that person." If the notary knew the person making the instrument he is quite competent to prove both facts - if he did not know the person then there should be other evidence" .[10]

In the case at hand before me, there are two persons who have signed the Power of Attorney (**_P2_**), as witnesses. They are Heenkenda Mudiyanselage Punchi Bandara Heenkenda and

[9] 71 N L R 512.
[10] At page 516.

Karande Kankanamge Sanath Chandraratna. Heenkenda Mudiyanselage Punchi Bandara Heenkenda, who is said to have signed as a witness to the Power of Attorney is also the Notary Public who is said to have attested the Deed of Transfer (**P3**). Although the Plaintiff had called the said witness (Heenkenda Mudiyanselage Punchi Bandara Heenkenda), to give evidence on his behalf, it is significant that, during his oral testimony, the said witness (Heenkenda Mudiyanselage Punchi Bandara Heenkenda), did not give any evidence with regard to the execution of the said Power of Attorney (**P2**), but only gave evidence in respect of the execution of the Deed of Transfer (**P3**). Indeed, the learned Counsel who had appeared for the Plaintiff had not asked a single question from this witness as to whether or not he stood and signed as a witness to the execution of the said Power of Attorney (**P2**). Accordingly, the said Heenkenda Mudiyanselage Punchi Bandara Heenkenda's evidence is not of any use or relevance to prove the due execution of the impugned Power of Attorney. The Plaintiff did not call the only other person who is said to have signed as a witness to the said Power of Attorney (Karande Kankanamge Sanath Chandraratna) to give evidence in this case on his behalf. Therefore, I have to conclude that the Plaintiff has not established that said Olivia Suranganie Ranasinghe had signed and executed the purported Power of Attorney (**P2**) which the Defendant has impugned in this case.

One may argue that Section 2 of the Powers of Attorney Ordinance has not made it mandatory for a Power of Attorney to be necessarily executed before, or, attested by, a Notary Public. Such an argument may also trigger an argument that the Power of Attorney (**P2**) could be proved as if it was 'unattested' in terms of Section 72 of the Evidence Ordinance. In such a scenario, Section 67 of the Evidence Ordinance which is as follows, would apply.

> *"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."*

However, in the instant case, neither the Plaintiff, nor any of the witnesses called by him to give evidence on his behalf, has established the fact that it was said Olivia Suranganie Ranasinghe who had executed the said Power of Attorney (**P2**). Thus, even in terms of Section 72 of the Evidence Ordinance, the Power of Attorney (**P2**) would still remain not proved.

I have shown above how the Defendant has attacked the evidence of the Plaintiff in cross-examination. Moreover, when the Plaintiff closed his case, the learned Counsel for the

Defendant had informed court that the said document **P2(ඈ)** had not been proved in terms of the Evidence Ordinance. Even after the said objection, the Plaintiff did not do anything to address that issue. Thus, despite the above objections, i.e., after the learned Counsel for the Defendant had objected first at the time of marking the said document and secondly at the time of it being read in evidence at the close of the Plaintiff's case, the Plaintiff had continued to take no step to prove the authenticity of the Power of Attorney marked **P2(ඈ)**.

Thus, for the above reasons, I reject the position of the Plaintiff that he has established a prima facie proof of authenticity and admissibility of the Power of Attorney marked **P2(ඈ)**. I hold that the Plaintiff has failed to prove either the authenticity of the Power of Attorney **P2(ඈ)** or its due execution.

In these circumstances, I answer the afore-mentioned question of law No.1 in the negative. The foregoing conclusion inevitably leads to the second conclusion that Dr. Vijitha Ananda Ranasinghe has not lawfully transferred Lot No. 71 to the Plaintiff by Deed of Transfer No. 1141 (**P3**). Therefore, I proceed to affirm the judgment dated 12-11-2011 pronounced by the Provincial High Court of Civil Appeals and dismiss this Appeal with costs.

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA PC, J.

I agree.

JUDGE OF THE SUPREME COURT

A. L. SHIRAN GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT