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

1. Weerappuli Gamage Gamini
   Ranaweera,
   No. 415/18,
   High-Level Road,
   Delkanda,
   Nugegoda.
   Plaintiff

SC APPEAL NO: SC/APPEAL/56/2020
HCCA GALLE NO: SP/HCCA/GA/22/2013(F)
DC GALLE NO: 14617/L

Vs.

1. Matharage Davith Singho,
   Aluth Ihala,
   Mapalagama.
   Defendant

AND BETWEEN

1. Matharage Davith Singho,
   (Deceased)
   Aluth Ihala,
   Mapalagama.
   Defendant-Appellant

1A. Matharage Dharmasiri,
1B. Matharage Mahinda,
1C. Matharage Premawathi,
1D. Matharage
Shiriyawathie,
All of Dehigodawatta,
Aluth Ihala,
Mapalagama.
1E. Matharage Ariyawathie
of Bambarawana,
Mattaka.
1F. Matarage Seetha of
Gorakagashuduwa,
Mapalagama.
1G. Matarage Renuka of
Akuresse Gedara,
Etahawilwatta,
Mapalagama
Substituted Defendants-
Appellants

Vs.

1. Weerappuli Gamage Gamini
Ranaweera,
No. 415/18,
High-Level Road,
Delkanda,
Nugegoda.
Plaintiff- Respondent

AND NOW BETWEEN

1. Weerappuli Gamage Gamini
Ranaweera,
No. 415/18,
High-Level Road,
Delkanda,
Nugegoda.
Plaintiff-Respondent- Appellant

Vs.

1A. Matharage Dharmasiri,
1B. Matharage Mahinda,
1C. Matharage Premawathi,
1D. Matharage Shiriyawathie,
All of Dehigodawatta,
Aluth Ihala,
Mapalagama.
1E. Matharage Ariyawathie
of Bambarawana,
Mattaka.
1F. Matarage Seetha of
Gorakagashuduwa,
Mapalagama.
1G. Matarage Renuka of
Akuresse Gedara,
Etahawilwatta,
Mapalagama.
Substituted Defendants-
Appellants-Respondents

Before: Murdu N.B. Fernando, P.C., J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Hilary Livera for the Plaintiff-Respondent-Appellant.
Vishwa de Livera Tennakoon for the 1A Substituted Defendant-Appellant-Respondent.

Written submissions:

by the Plaintiff-Respondent-Appellant on 29.07.2020

Argued on : 10.01.2022

Decided on: 20.05.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court seeking a declaration of title to and ejectment of the defendant from the land in suit. The defendant filed answer seeking dismissal of the action. At the trial, the defendant raised an issue claiming prescriptive title to the land. After the conclusion of the trial, the District Court entered judgment for the plaintiff. On appeal, the High Court of Civil Appeal set aside the judgment of the District Court on the basis that the plaintiff failed to establish legal title to the land. The High Court arrived at this conclusion by making a comparison between the original title deed of the plaintiff (deed No. 1986) marked P6 and a photocopy of the same deed marked V1. This Court granted leave to appeal to the plaintiff on the following two questions of law:

(a) Did the learned Judges of the High Court err in law in concluding that the deed bearing No. 1986 does not fulfil the due requirements of section 2 of the Prevention of Frauds Ordinance?

(b) Did the learned Judges of the High Court misdirect themselves in evaluating the evidence and concluding that the attesting witnesses have not given evidence when the record bears out that one attesting witness had in fact given evidence?

The short question to be decided in this appeal is whether deed No. 1986 has been properly executed in terms of section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840, as amended. The said section insofar as relevant to the present purposes reads as follows:

> *No sale, purchase, transfer, assignment, or mortgage of land or other immovable property…shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses.*

To prove due execution of a deed, this section requires proof of four matters:

(a) the deed was signed by the executant

(b) it was signed in the presence of a licensed notary public and two or more witnesses

(c) the notary public and the witnesses were present at the same time

(d) the execution of the deed was duly attested by the notary and the witnesses

It may be relevant to note that under section 2 of the Prevention of Frauds Ordinance, the document shall be signed by the executant in the presence of the notary and the two witnesses present at the same time. However, the section does not expressly state that the document shall also be signed by the two witnesses and the notary in the presence of the executant at the same time.

Execution and attestation are two different things: the former by the maker/executant and the latter by the notary and the witnesses.

Attestation is two-fold: due attestation by the notary and the witnesses as stated in section 2 of the Prevention of Frauds Ordinance, and formal attestation by the notary as stated in section 31 of the Notaries Ordinance, No. 1 of 1907, as amended.

In the execution of deeds, the requirements under section 2 of the Prevention of Frauds Ordinance are mandatory, and non-compliance renders a deed invalid. Conversely, non-compliance with the Rules made for notaries set out in section 31 of the Notaries Ordinance does not invalidate a deed as expressly provided for in section 33 of the Notaries Ordinance, which reads as follows:

> *No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form:*

> *Provided that nothing hereinbefore contained shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions of any other written law.*

(*Weeraratne v. Ranmenike (1919) 21 NLR 286, Asliya Umma v. Thingal Mohamed [1999] 2 Sri LR 152, Wijeyaratne v. Somawathie [2002] 1 Sri LR 93, Pingamage v. Pingamage [2005] 2 Sri LR 370*)

What constitutes the attestation and the form of attestation are set out in sections 31(20) and 31(21) of the Notaries Ordinance; this is the formal attestation appended by the notary at the end of the deed. This is different from attesting a deed by the notary and witnesses as contemplated in section 2 of the Prevention of Frauds Ordinance. If the formal attestation of a deed is defective, the notary can be prosecuted under the Notaries Ordinance, but the deed's validity is unaffected.

In *Thiyagarasa v. Arunodayam [1987] 2 Sri LR 184*, the deed on its face had the date 14th January 1973 as the date of execution. According to the plaintiff, the actual date of execution was 7th October 1972. The District Court held that the deed was not properly executed. On appeal, G.P.S. De Silva J. (later C.J.) held at 188-189:

> *Once it is established that the requirements of section 2 of the Prevention of Frauds Ordinance relating to the execution of the deed have been complied with, the mere fact that the notary has inserted a false or wrong date of its execution does not render the deed void. The lapse on the part of the notary does not touch the validity of the deed but may render the notary liable to be prosecuted for contravention of the provisions of the Notaries Ordinance. This seems reasonable*

> *and just for the parties to the transaction have no control over the acts of the notary who is a professional man. I am therefore of the opinion that P3 is valid and effective to transfer the legal title to the property and is not bad for want of due execution.*

The Court quoted with approval the following statement of law found in *The Conveyancer and Property Lawyer* (1948) Vol. 1 Part 1 by E.R.S.R. Coomaraswamy at page 94:

> *The formal attestation by the notary is not part of the deed but it is the duty of the notary to append it.*

What is compulsory is compliance with the provisions of section 2 of the Prevention of Frauds Ordinance; non-compliance with the other provisions of the Prevention of Frauds Ordinance or the Notaries Ordinance does not *ipso facto* make the deed invalid.

It was held in *Weeraratne v. Ranmenike (1919) 21 NLR 286* that the requirement under section 16 (now section 15) of the Prevention of Frauds Ordinance that a deed shall be executed in duplicate was only a duty imposed on the notary and was not intended to invalidate the deed in the event of non-compliance. De Sampayo J. held at 287-288:

> *It is clear to my mind that this clause merely imposed a duty on the notary, and was not intended to invalidate deeds where the notary might have failed to observe the direction therein contained. It is well settled that a notary's failure to observe his duties with regard to formalities which are not essential to due execution, so far as the parties are concerned, does not vitiate a deed. For instance, the absence of the attestation clause does not render a deed invalid. D.C.*

> *Kandy, 19,866 (Austin's Rep. 113); D.C. Negombo, 574 (Grenier (1874), p.39). Similarly, I think the failure on the part of the notary to have a deed executed in duplicate does not affect its operation as a deed. The case D.C. Kandy, 22.401 (Austin's Rep. 139) is an authority on this point. I therefore think that the decision of the Commissioner in this case is erroneous.*

Let me now turn to the word "attest" as contemplated in section 2 of the Prevention of Frauds Ordinance. Following the ordinary dictionary meaning of "attest" which is "to bear witness to", a person who sees the document signed by the executant is a witness to it; if he subscribes as a witness, he becomes an attesting witness. *Black's Law Dictionary* (11th edition) defines "attesting witness" as "someone who vouches for the authenticity of another's signature by signing an instrument that the other has signed."

A word of caution: although section 2 of the Prevention of Frauds Ordinance does not require the witnesses and the notary to attest the deed before the executant, this section requires the execution of the deed to be "duly attested" by the notary and the two witnesses.

The word "duly" here is not without significance. How is a deed considered to be duly attested? In this context, section 2 of the Prevention of Frauds Ordinance needs to be read with section 31(12) of the Notaries Ordinance which runs as follows:

> *[The notary] shall not authenticate or attest any deed or instrument unless the person executing the same and the witnesses shall have signed the same in his presence and in*

> *the presence of one another, and unless he shall have signed the same in the presence of the executant and of the attesting witnesses.*

Although compliance with the Rules contained in section 31 is not mandatory as explained above, it was held in *Emalia Fernando v. Caroline Fernando (1958) 59 NLR 341* that an instrument which is required by section 2 of the Prevention of Frauds Ordinance to be notarially attested must be signed by the notary and the witnesses at the same time as the maker and in his presence. This conclusion was reached giving due regard to the expression "duly attested" found in section 2 of the Prevention of Frauds Ordinance. I am in complete agreement with this interpretation, for otherwise the Prevention of Frauds Ordinance which was enacted to prevent fraud can be misused to cover fraud on the basis that section 2 of the Prevention of Frauds Ordinance does not require the notary and witnesses to sign the deed before the executant in the presence of one another. At page 344 Basnayake C.J. held:

> *Learned counsel for the appellant contended that the requirement of the Notaries Ordinance in regard to the attestation of documents is not relevant to a consideration of the true meaning of the section. I am unable to agree that the provisions of the Notaries Ordinance are irrelevant to a consideration of the meaning of section 2 of the Prevention of Frauds Ordinance. I think in giving effect to the word "duly" we should take into account provisions of law which regulate the execution of documents required to be notarially attested. Section 30(12) of the Notaries Ordinance provides that a notary "shall not authenticate or attest any deed or*

> *instrument unless the person executing the same and the witnesses shall have signed the same in his presence and in the presence of one another, and unless he shall have signed the same in the presence of the executant and of the attesting witnesses." Section 30(20) requires the notary to state in his attestation that the deed was signed by the party making it and the witnesses in his presence and in the presence of one another. The view I have expressed above is in accord with the decision of this Court in the case of Punchi Baba v. Ekanayake (4 S.C. C. 119), in which this Court expressed the view that section 2 of the Prevention of Frauds Ordinance required that the notary and the witnesses should sign in the presence of the maker and at the same time and that a deed not so signed was not valid.*

P6 is the original title deed of the plaintiff and V1 is the photocopy of that deed tendered by the plaintiff with the plaint in support of an application for an interim injunction. The contention of the defendant, which was accepted by the High Court, is that: V1 did not contain the signature of the second attesting witness; the signature of the second attesting witness appearing in P6 had been placed after the execution of the deed; therefore the plaintiff's title deed had not been duly executed.

It is significant to note that the defendant did not raise an issue on due execution of the deed either at the beginning of the trial or during the course of the trial. When the original deed P6 was marked through the plaintiff, the defendant moved that it be marked subject to proof. When the plaintiff closed his case reading in evidence the marked documents including P6, the defendant did not maintain that it had not been proved, thereby

indirectly conceding that the objection was no longer a live objection.

How can a deed be proved?

Section 68 of the Evidence Ordinance reads as follows:

> *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.*

The plaintiff called as witnesses the notary and the first attesting witness to the deed, and they confirmed that the donor, the donee, the first attesting witness, the second attesting witness and the notary were all present at the same time and signed the deed in that order. When they were confronted with V1, they stated that they saw V1 for the first time in the witness box. The following finding of the High Court is not correct:

> *When there is a dispute or challenging a document with regard to the due execution, the notary alone is not sufficient to give evidence. At least one attesting witness should give evidence. In this case attesting witnesses have not given evidence and no explanation is given for it.*

Although the High Court came to the finding that no attesting witness was called to give evidence on the execution of P6 and no explanation was provided for such failure, in fact, two attesting witnesses were called to prove P6: one was the notary and the other was the first attesting witness.

There is no dispute that Anoma Ranaweera, the wife of the donee who signed as the first witness to the deed and whose evidence has been overlooked by the High Court, is an attesting witness. The decision of the High Court would have been different if the Court had drawn its attention to the evidence of this attesting witness.

The notary is as much an attesting witness as the two witnesses themselves within the meaning of section 68 of the Evidence Ordinance. (*Wijegoonetileke v. Wijegoonetileke [1956] 60 NLR 560, The Solicitor General v. Ahamadulebbe Ava Umma (1968) 71 NLR 512 at 515-516, Thiyagarasa v. Arunodayam [1987] 2 Sri LR 184, Wijewardena v. Ellawala [1991] 2 Sri LR 14 at 35*)

In *Marian v. Jesuthasan (1956) 59 NLR 348* it was held:

> *Where a deed executed before a notary is sought to be proved, the notary can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant.*

In *Marian*'s case, the execution of the deed by the executant was in issue but only the notary who did not personally know the executant gave evidence to prove the deed. It is in that context the Court held that the notary was not an attesting witness. This should not be understood to mean that a notary can never be an attesting witness unless he knows the executant personally. For instance, in the case at hand, whether or not the notary knew the executant is beside the point as the deed is challenged on the sole ground that the second attesting witness did not sign the deed.

Even if the notary did not know the executant personally, he can still be an attesting witness but proof of execution of the deed is incomplete on his evidence alone. If the notary does not know the executant, he must know the witnesses and the witnesses must know the executant. In that eventuality, at least one of the two attesting witnesses needs to be called to prove due execution.

Sections 31(9) and 31(10) of the Notaries Ordinance are relevant in this regard.

> *31(9) 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.*
>
> *31(10) He shall not authenticate or attest any deed or instrument in any case in which both the person executing the same and the attesting witnesses thereto are unknown to him.*

To sum up, the notary is a competent witness to prove attestation, and if he knows the executant, he is a competent witness to prove attestation and execution, both of which are the *sine qua non* of proving due execution. This was lucidly explained by T.S.

Fernando J. in *The Solicitor General v. Ahamadulebbe Ava Umma (1968) 71 NLR 512 at 516*:

> *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 (1909) 1 Curr. L.R. 257, 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.*

In the instant case the notary stated in his evidence that he knew the executant and the other witnesses personally as the donee was his classmate, the donor is the donee's aunt, the first witness is the donee's wife, and the second witness is his (the notary's) clerk. The question in this case is not whether the executant

signed the deed but whether the second witness was present (together with the others) at the time of the deed being signed by the executant and duly attested.

This in my view has been proved by marking the original deed as P6 and calling the notary and the first witness to the deed as witnesses in the plaintiff's case. The High Court, without considering the aforementioned evidence, relied on a photocopy of the deed (which had been tendered by the plaintiff with the plaint for another purpose) to reject the original deed. The High Court at page 8 of the impugned judgment states "*even though it is a true copy, it has the Land Registry seal and the inference the court can draw is that the document marked P6 has been sent to the Land Registry without the signature of one attesting witness*."

The standard of proof of due execution of a deed is on a balance of probabilities. It is in my view unjust on the part of the appellate Court to hold against the plaintiff on "inferences" when there was no issue raised in the District Court on the due execution of the deed, when P6 was not objected to at the closure of the plaintiff's case as a deed which had not been proved, when the deed was proved by calling two attesting witnesses, and when the defendant or the District Court did not insist that the plaintiff produce the duplicate and/or protocol of the deed to further verify the matter.

The case of *Baronchy Appu v. Poidohamy (1901) 2 Brown's Reports 221* relied upon by the High Court to say that in addition to the notary another witness should have been called has no applicability to the facts of the instant case. The headnote of this case reads as follows:

> *[W]hen it is alleged that a person signed a blank sheet of paper which was subsequently filled up in the form of a deed and impeached as fraudulent by such person, the execution of such document ought to be proved, not by calling the notary who attested it, but by calling at least one of the witnesses thereto.*

The statement of law enunciated in the above case is correct on the unique facts of that case where the deed was challenged on the basis that the notary obtained the signatures on blank papers. The challenge in the instant case is different and, in any event, in the instant case, the notary and another attesting witness have given evidence on due execution.

The *ratio decidendi* in a decision must be understood in light of the unique facts and circumstances of that particular case. Unless the two situations are similar, judicial precedents need not be mechanically applied merely because the subject area is the same.

Moreover, the course of action adopted by the High Court is against the basic principles of proof of documents as envisaged in the Evidence Ordinance. Documents must be proved by primary evidence except in the limited instances where secondary evidence is permitted: sections 64 and 65 of the Evidence Ordinance, section 162 of the Civil Procedure Code. It is not possible to defeat primary evidence by secondary evidence (other than in exceptional situations), although *vice versa* is possible.

For the aforesaid reasons, I answer the two questions of law in the affirmative. The judgment of the High Court of Civil Appeal is

set aside and the judgment of the District Court is restored. The appeal is allowed with costs both here and in the Court below.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court