

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

In the matter of an Application in the Supreme Court of Democratic Socialist Republic of Sri Lanka for special leave under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C Appeal 02/2021

S.C Application No: SC/SPL/LA/63/2017

Court of Appeal No: CA 713/2000(F)

D.C Colombo :3711/SLP

Hettiarachchige Dominic Marx Perera,
No. 276/B/45/A,
Morawake Watta, Pahalabomiriya,
Kaduwela.

Plaintiff

Vs.

1) Kuruwita Arachchige Mulin Perera
(Deceased)

2) Milroy Christy Kasichetty,
Dalugama,
Kalaniya

3) National Savings Bank
Galle Road, Collpetty,
Colombo 03

Defendants

~And Between

Hettiarachchige Dominic Marx Perera,
No. 276/B/45/A,
Morawake Watta, Pahalabomiriya,
Kaduwela

Plaintiff- Appellant

Vs

1) Kuruwita Arachchige Mulin Perera
(Deceased)

1A) Kuruwita Arachchige Jeramious Perera
No. 542, Nugamugoda,
Kalaniya

1B) Kuruwita Arachchige Violet Perera,
No. 184, Hospital Junction,
Akaegama

1C) Leela Thilakaratne,
No. 636, Sri Vijaya Mawatha,
Arawwala, Pannipitiya

1D) Kuruwita Arachchige Sandya Chandani
Perera,
No. 33 Maheshi Uyana,
Kahathuduwa,
Polgasowita

1E) Kuruwita Arachchige Thamara Dinadari
Perera,
No. 708, Ambillawatta Road,
Katuwawala Mawatha,
Boralasgamuwa

1F) Kuruwita Arachchige Jayalatha Perera,
No. 638, Sri Vijaya Mawatha,
Arawwala, Pannipitiya

1G) Kuruwita Arachchige Ranil Sanath Kumara
Perera,
No 47/12A, Bandaragama – West,
Bandaragama

Substituted Defendant – Respondents

2) Milroy Christy Kaischetty,
Dalugama, Kalaniya

3) National Savings Bank,
Galle Road, Collpetty,
Colombo 03

Defendant – Respondents

-And Between

Hettiarachchige Dominic Marx Perera,
No.276/B/45/A,

Morawake Watta, Pahalabomiriya,
Kaduwela

Plaintiff – Appellant – Petitioner

Vs.

1) Kuruwita Arachchige Mulin Perera
(Deceased)

1A) Kuruwita Arachchige Jeramious Perera,
No. 542, Nungamugoda,
Kalaniya

1A1) Jayasooriya Kuranage Mary Maglin Daisy
Perera,
No. 542, Nungamugoda,
Kalaniya

1B) Kuruwita Arachchige Violet Perera,
No. 184, Hospital Junction,
Akaegama.

1C) Leela Thilakarathne,
No.636, Sri Vijaya Mawatha,
Arawwala, Pannipitiya

1D) Kuruwita Arachchige Sandya Chandani
Perera,
No. 33, Maheshi Uyana,

Kahathuduwa, Polgasowita

1E) Kuruwita Arachchige Thamara Dinadari
Perera,

No.708, Ambillawatta Road,

Katuwawala Mawatha,

Boralasgamuwa

1F)Kuruwita Arachchige Jayalatha Perera,

No.638, Sri Vijaya Mawatha,

Arawwala, Pannipitiya

1G) Kuruwita Arachchige Ranil Sanath Kumara
Perera,

No. 47/12A, Bandaragama – West,

Bandaragama

**Substituted Defendant - Respondents -
Respondents**

-And Now Between-

Hettiarachchige Dominic Marx Perera

No. 276/B/45/A,

Morawake Watta, Pahalabomiriya,

Kaduwela

Plaintiff – Appellant - Petitioner – Appellant

Vs.

1) Kuruwita Arachchige Mulin Perera
(Deceased)

1A) Kuruwita Arachchige Jeramious Perera
(Deceased),

No. 542, Nungamugoda,

Kalaniya

1A1) Jayasoorya Kuranage Mary Magilin Daisy
Perera,

No.542, Nungamugoda,

Kalaniya

1B) Kuruwita Arachchige Violet Perera
(Deceased).

No. 184, Hospital Junction,

Akaegama

1B1)Haputhanthige Don Thilitha Dorin,

No.184, Hospital Junction.

Akegama

**Party sought to be substituted as 1B1 substituted
Defendant – Respondent – Respondent –
Respondent**

1C) Leela Thilakarathne,

No.636, Sri Vijaya Mawatha,

Arawwala,

Pannipitiya

1D)Kuruwita Arachchige Sandya Chandani
Perera,

No.33 Maheshi Uyana,

Kahathuduwa,

Polgasowita

1E)Kuruwita Arachchige Thamara Dinadari
Perera,

No.708, Ambillawatta Road,

Katuwawala Mawatha,

Boralasgamuwa

1F)Kuruwita Arachchige Jayalatha Perera,

No.638, Sri Vikaya Mawatha,

Arawwala,

Pannipitiya

1G)Kuruwita Arachchige Ranil Sanatha
Kuamara Perera,

No.47/12A, Bandaragama – West,

Bandaraga,

**Substituted Defendant Respondent –
Respondent – Respondents**

2) Milroy Christy Kasichetty,

Dalugama, Kalaniya

3)National Savings Bank

Galle Road, Collpetty,
Colombo 03

**Defendant – Respondent – Respondent –
Respondents**

BEFORE: Buwaneka Aluwihare, P.C, J.
Kumudini Wickremasinghe, J.
Janak De Silva, J.

COUNSEL: Anura Gunaratne for the Plaintiff – Appellant – Petitioner – Appellant
Yasas Silva for the 2nd Defendant – Respondent – Respondent

ARGUED ON: 13.03.2023.

WRITTEN SUBMISSIONS: Plaintiff – Appellant – Petitioner – Petitioner on
19.04.2023 and 23.06.2021
2nd Defendant – Respondent – Respondent on 06.10.2022

DECIDED ON: 31.10.2023.

Judgement

Aluwihare, PC, J.

The instant Appeal is a result of protracted litigation culminating in a series of legal proceedings. The Plaintiff – Appellant – Petitioner – Appellant (hereinafter referred to as the Plaintiff) filed action No. 3711/Special in the District Court of Colombo against the original 1st Defendant – Respondent – Respondent – Respondent, the said *Kuruwita Arachchige Mulin Perera* (hereinafter the 1st Defendant) and against the 1st and 2nd Defendant – Respondent – Respondent – Respondents (hereinafter referred to as the 2nd and 3rd Defendants respectively) on 11.05.1993 and sought *inter alia*;

- 1) A declaration that deed No. 259 of 26th May 1992 is null and void/not a legally valid deed and/or a fraudulent deed
- 2) A declaration that the 1st Defendant does not have a legally valid title to the land depicted in the First Schedule to the Plaint
- 3) The transfer of the land depicted in the 2nd Schedule of the Plaint by the 1st Defendant to the 2nd Defendant was not valid
- 4) The mortgage of the land in the 2nd Schedule, by the 2nd Defendant to the 3rd Defendant bank is not legally valid
- 5) A declaration that the Plaintiff is the legal owner of the Corpus by virtue of deed No. 363 of 13th February 1988

The Plaintiff also made a complaint to the Colombo Fraud Investigation Bureau and parallel proceedings were initiated before the Magistrate Court, during the pendency of the action in the District Court against the original 1st Defendant and two other co-accused, who were the witnesses to the said deed. The charge was that the deed bearing No. 259 executed on 26.05.1992 was a forgery, which was allegedly executed in favour of the 1st Defendant by the Plaintiff Appellant. In the District Court and Magistrate Court (as the virtual complainant), the Plaintiff has contended that the 1st Defendant had fraudulently executed deed No. 259 and the Corpus described in the 1st Schedule to the Plaint in the District Court as a gift of transfer. Thereafter, the 1st Defendant transferred

the land to the 2nd Defendant, who subsequently mortgaged the land to the 3rd Defendant Bank.

The Plaintiff concluded his case on 02.07.1997 at the District Court and the Learned Judge of the District Court by judgement dated 21.07.2000 dismissed the action of the Plaintiff. However, on 25.05.1999 the Magistrate Court entered a conviction against the 1st Defendant and the two other co-accused on the basis that deed No. 259 was fraudulently executed. This evidence was not available for the Learned Judge of the District Court. It is also pertinent that the 1st Defendant preferred an appeal to the Provincial High Court against the conviction of the Magistrate Court, but during the pendency of the appeal, the 1st Defendant passed away. The other two co-accused did not challenge the conviction entered by the Magistrate's Court.

The Plaintiff preferred an appeal from the judgement of the District Court to the Court of Appeal on 18.09.2000. Certain attempts to reach a settlement between the parties and the death of the parties delayed the matter for numerous years but on 18.03.2014 the Plaintiff informed Court that he intends to introduce fresh evidence, namely the conviction of the 1st Defendant in the Magistrate Court by way of an application under Section 773 of the Civil Procedure Code. Accordingly, by way of Petition and affidavit, the Plaintiff on 18th July 2014 made a formal application to have fresh evidence adduced. The Court of Appeal having considered the said application, by Order dated 13.02.2017 dismissed the application of the Plaintiff to adduce fresh evidence. Thereafter, the Plaintiff sought Special Leave to Appeal from this Court. This Court granted special leave on 11.01.2021 on the questions of law referred to in paragraphs 16(c) and (d) of the Petition of the Plaintiff dated 17.10.2017, which are as follows;

c) Did the Learned Judges of Court of Appeal has totally disregarded the fact that the conviction of the 2nd accused (2nd Defendant) and 3rd accused stands since there was no appeal?

d) Did the Learned Judges of Court of Appeal interpreted section 41 A1 of the Evidence Ordinance (Amended Act No. 33 of 1998) incorrectly?

It appears that due to inadvertence the formulation of the questions of law appears to be incorrect. There was no conviction against the 2nd Defendant nor was the 2nd Defendant a party before the Magistrate Court proceedings, the conviction was against the 1st Defendant and Bentara Mudumanthrige Ranjith (1st witness to deed No. 259) and Kankanamge Padmadasa (2nd witness to deed No. 259). Further, Section 41A (1) of the Evidence Ordinance, relates to relevancy of a conviction in an action for defamation, hence, the relevant section of the instant Appeal should be Section 41A (2). Also, the parties in their written submission had made no mention of Section 41A (1), therefore, for the purpose of this appeal, the questions of law reformulated to the extent necessary in order to address the issues raised in the appeal and they are as follows;

- 1) Did the Learned Judges of the Court of Appeal disregard the fact that the conviction of 2nd accused, and 3rd accused stands since there was no appeal?
- 2) Did the Learned Judge of the Court of Appeal interpret Section 41A (2) of the Evidence Ordinance (Amended Act No. 33 of 1998) incorrectly?

I wish to commence by addressing the second question of law as formulated above.

Question of Law 02: Did the Learned Judge of the Court of Appeal interpret Section 41A (2) of the Evidence Ordinance (Amended Act No. 33 of 1998) incorrectly?

Section 773 of the Civil Procedure Code enables the Court of Appeal to admit fresh evidence in appeal and provides as follows;

“Upon hearing the appeal, it shall be competent to the Court of Appeal to affirm, reverse, correct or modify any judgment, decree, or order, according to law, or to pass such judgment, decree or order therein between and as regards the parties, or to give such direction to the court below, or to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit, or, if need be, to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the court of first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial.” [Emphasis added]

A similar power is granted by Article 139(2) of the Constitution to the Court of Appeal. These statutory and Constitutional Provisions permit the Court of Appeal to admit fresh evidence subsequent to a trial. However, to ensure the finality of litigation, the Courts are cautious in abducting fresh evidence. Another reason is stated by Lord Hodson in *Ladd v Marshall* [1954] 3 All ER 745 at p. 751, and he cited with approval the dicta of Lord Loreburn LC in *Brown v Dean* [1910] A.C 373 and held as follows;

“When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds”

On the other hand, however, if fresh evidence that is to be adduced would make a material difference to the case already decided, and the justice demands, in view of the court to permit fresh evidence, then adducing fresh evidence should be permitted to avoid a miscarriage of justice. The principles to be applied in adducing fresh evidence are namely those enunciated by Lord Denning in *Ladd v Marshall* [supra] at p. 748 where the court held that;

“The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.”

These principles were adopted by the Court in *Beatrice Dep v Lalani Meemaduwa* [1997] 3 Sri L.R 379 and subsequently affirmed in a series of decisions. Therefore, in order to adduce fresh evidence, three conditions must be satisfied, which are as follows;

- (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

- (2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it may not be decisive.
- (3) The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible.

Reasonable Diligence

The first criterion requires the Appellant to satisfy the Court that the evidence could not have been obtained with reasonable diligence for use at the trial. Our system is one of adversarial, the litigant must present before the Court with the evidence to prove his or her case to satisfy the evidentiary burden embodied in the provisions of Chapter IX of the Evidence Ordinance as applicable. Fresh evidence will not be admitted merely because the result of the first trial was or may have been occasioned by the unsuccessful party's inattention, or due to an innocent mistake. The opposing party has no duty to atone for the litigant's mistakes, and the blame falls squarely on the shoulders of the errand litigant.

In the instant Appeal, however, it is apparent that the evidence was not available, as the Plaintiff concluded his case on 02.07.1997 and the convictions against the 1st Defendant, namely for forgery and the other two co-accused were entered on 25.05.1999, in the Magistrate Court. Therefore, I am of the opinion the first condition referred to above, is satisfied.

Influence of the Evidence

The Amendment to the Evidence Ordinance by Act No. 33 of 1998, made a conviction in a Criminal Court a relevant fact in a Civil Court. A conviction is admissible evidence in a civil suit where the fact that he (the person who is so convicted) has committed the acts constituting the offence is a fact in issue.

The 1st Defendant and the co-accused were convicted in the Magistrate Court [in case No. 59322/1 (**marked F 1**)] of the following charges;

- a) Falsely representing a person unknown to the complaint as Hettiarachchige Dominic Marx Perera and endeavored to deceive one Gamini Harischandra Premasundra

Notary Public thereby committed the offence of cheating under Section 400 of the Penal Code

b) Making a false document which was dead No. 259 and thereby committed the offence of forgery, punishable under Section 454 of the Penal Code

In my opinion, this evidence would have influenced the result of the case since the authenticity of deed No.259 is central to the Plaintiff's case. The Plaintiff sought a declaration in the District Court that deed No. 259 of 26.05.1992 was fraudulently executed by the 1st Defendant and she along with the two other co-accused were convicted in the Magistrate Court. I am further of the view that the offence for which the 1st Defendant was convicted, and the subject matter complained of by the Plaintiff in the District Court are the same, therefore, would have an important influence if not direct, on the outcome of the case.

Credibility of the Evidence

Needless to say, a judgement of a competent Court would be credible evidence. A competent Court would enter judgment after careful evaluation of the facts and relevant legal principles. Moreover, a criminal conviction, as in the instant Appeal, would carry a higher burden of proof and would be a credible item of evidence in a subsequent civil proceeding if the judgement is relevant.

In my view, the conjunctive criteria provided above are satisfied by the Plaintiff. The Court of Appeal, however, held that once the 1st Defendant passed away the Appeal was left in "limbo" and Section 41A (2) of the Evidence Ordinance has no application. the Court of Appeal held that;

"The provision makes it clear that only two categories of convictions become relevant. The phrase "being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant" makes it crystal clear that for a conviction to become relevant, it must be

(a) a conviction that has not been appealed against (it must be an unappealed conviction)
or

(b) a conviction that has been affirmed in appeal (it must be an affirmed conviction)"

The Court of Appeal held further that;

“What the Plaintiff-Appellant seeks to have admitted is a conviction that appealed against but not adjudicated upon or affirmed as a result of the demise of 1st Defendant. Had the eventuality of the death of the 1st Defendant not intervened, there would have been two possibilities. Either the conviction would have been affirmed or it would have been set aside. Such a conviction which was left in limbo cannot fall within either category (a) or (b) contemplated by Section 41A (2). When the 1st Defendant (who was the 1st accused in the MC prosecution) passed away, her conviction was neither unappealed nor can it be said to have been affirmed in appeal.”

I do agree with the observation of his Lordship that Section 41A (2) contemplates two categories of convictions, but in my opinion, once the 1st Defendant passed away, the appeal was abated. The appeal cannot be left in a state of “limbo.” The legal principles in this regard are aptly summarized in reference to several Indian authorities by Her Ladyship Chief Justice Dr. Shirani Bandaranayake in *Gamarallage Karunawathie of Mahena, Warakapola v. Godayalage Piyasena of Boyagama, Ambanpitiya* S.C. Appeal No.09A/2010 (S.C Minutes 05.12.2011). However, the judgement was declared *per in curium* in *Bulathsinhala Arachchige Indrani Mallika v. Bulathsinhala Arachchige Siriwardane of Dummalasooriya* SC Appeal 160/2016 (SC minutes 02.12.2022) as the decision was made without considering the applicable provisions of the Partition Act. Although the ratio in *Gamaralalage Karunawathie* (supra) may not be applicable to partition actions, I am of the view, however, that the decision in *Gamaralalage Karunawathie* (supra) is sound law as far as the instant case is concerned. It was held in *Gamaralalage Karunawathie* (supra) at p.8 as follows;

“Reference was made to the decision in State of Punjab v Nathu Ram (Supra) in Swaran Singh Puran Singh and another v Ramditta Badhwa (dead) and others (AIR 1969 Punjab & Haryana 216). In Swaran Singh (Supra), the decision in Nathu Ram (Supra) was clearly analyzed and the Court had laid down the following proposition on the basis of the decision given in Nathu Ram (Supra):

- 1. On the death of a respondent, an appeal abates only against the deceased, but not against the other surviving respondents;*
- 2. in certain circumstances an appeal on its abatement against the deceased respondent cannot proceed even against the surviving respondents and in those cases the Appellate Court is bound to refuse to proceed further with the appeal and must, therefore dismiss it;*

3. the question whether a Court can deal with such matters or not will depend on the facts and circumstances of each case, and no exhaustive statement can be made about those circumstances;

4. the abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also as a necessary corollary that the Appellate Court cannot in any way modify that decree directly or indirectly.”

In my opinion with the death of the 1st Defendant, the appeal in the Provincial High Court abated and once the appeal abated the conviction in the Magistrate Court against the 1st Defendant became final. Therefore, the conviction of the 1st Defendant falls under abovementioned first limb. A contrary interpretation would be quite illogical. For example, in similar parallel proceedings, a defendant may appeal against a conviction to the Provincial High Court and subsequently withdraw the appeal. When civil proceedings are brought against the defendant and an attempt is made to lead evidence concerning the conviction, the defendant may argue that the appeal was in “limbo”, therefore, the conviction is not admissible. On this basis, I am of the opinion that the Court of Appeal erred in interpreting Section 41A (2) of the Evidence Ordinance.

Question of Law 01: Did the Learned Judges of the Court of Appeal disregard the fact that the conviction of 2nd accused and 3rd accused stands since there was no appeal?

As mentioned in *Gamarallage Karunawathie of Mahena, Warakapola v. Godayalage Piyasena of Boyagama, Ambanpitiya* [supra], on the death of a respondent, the appeal only abates against the deceased but not against the surviving respondents but, as the 1st and 2nd defendants in the Magistrate Court did not appeal against the conviction, the conviction remains final. However, it would not be necessary to consider this question of law in view of the opinion expressed by this Court in respect of the question of law No. 02.

Conclusion

In view of the conclusions arrived at by this court on the question of law No.1 on which Special Leave was granted, I answer the said question of law in the affirmative and accordingly the Order of the Court of Appeal dated 13th February 2017 is set aside. In the instant case the Plaintiff [Appellant] should be permitted to produce the evidence in

relation to the conviction of the 1st Defendant for forgery before the Court of Appeal in terms of Section 773 of the Civil Procedure Code and the Court of Appeal is directed to consider the appeal (in case No.CA/713/2000/F) of the Plaintiff on its merits inclusive of the fresh evidence permitted by this court.

Appeal allowed.

JUDGE OF THE SUPREME COURT

Kumudini Wickramasinghe, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT