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

In the matter of an Appeal with Special Leave to Appeal granted by Supreme Court under Section 5C (i) of the High Court of the Provinces (Special Provinces) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

S.C. Appeal No. 44/2012

SC.(HC) CALA Application No. 68/11
WP/HCCA/Mt./36/04(F)
DC. Moratuwa No. 335/L

Padmal Ariyasiri Mendis,
No.29, Moratumulla Road South,
Moratuwa.

Plaintiff

Vs.

Vijith Abraham de Silva,
No. 13, Peduru Mawatha,
Moratumulla, Moratuwa.

And

Vijith Abraham de Silva,
No. 13, Peduru Mawatha,
Moratumulla, Moratuwa

Defendant-Appellant

Vs.

Padmal Ariyasiri Mendis,
No.29, Moratumulla Road South,
Moratuwa.

Plaintiff-Respondent

And Now Between

Vijith Abraham de Silva,
No. 13, Peduru Mawatha,
Moratumulla, Moratuwa

Defendant-Appellant-Petitioner-Appellant

Vs.

Padmal Ariyasiri Mendis, **(Deceased)**
No.610B, Halgahadeniya Road,
Gothatuwa.

Plaintiff - Respondent Respondent -Respondent

Sarukkali Patabedige Claris de Silva,
of No. 610B, Halgahadeniya Road,
Gothatuwa.

Substituted Plaintiff-Respondent-Respondent- Respondent

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BEFORE : **Eva Wanasundera, PC. J**

Buwaneka Aluwihare, PC.J. &

Upaly Abeyrathne, J.

COUNSEL : Faisz Musthapha, PC. with Hemasiri Withanachchi and Ashiq Hassim for the Defendant-Appellant-Petitioner-Appellant.

Ranjan Goonaratne with Sampath Perera and Rasika Dissanayake for the Plaintiff-Respondent-Respondent-Respondent.

ARGUED ON : **21.09.2015**

DECIDED ON : **14.12.2015**

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Eva Wanasundera, PC.J.

This Court granted Leave to Appeal in this matter on 22.02.2012 on 10 questions of law. They are as follows:-

1. Did the Provincial High Court Civil Appeal err holding that the Deed of Gift bearing No. 1551 dated 09.05.1990 marked P2, was void?

2. Have the Honourable High Court Judges failed to properly consider whether the said Power of Attorney bearing No. 376 authorized, permitted and empowered the said Lindamulage Srimathie Miriam Silva to gift the premises which was the subject matter of the action?

3. Did the Honourable High Court Judges misdirect themselves in failing to consider that in action bearing No. 704/L of the District Court of Panadura, the said Merlyn Sylvia Fernando, (the Petitioner's vendor) fraudulently, wrongfully and unlawfully failed and neglect to warrant and defend the title acquired by her and conveyed to the Petitioner?

4. Did the Honourable High Court Judges err in holding that the judgment and decree entered in the said case bearing No. 704/L operated as res judicata against the Petitioner in as much as the said judgment and decree are vitiated by fraud?

5. Did the Learned District Judge and the Learned Judges of the High Court misdirect themselves in failing to consider that the Respondent's claim to have the said deed bearing No. 976 dated 24.09.1991 and produced marked P4 was not maintainable in as much as the action has been instituted nine years after the execution of the said deed and as such was prescribed?

6. Did the Learned Judges of the High Court err in failing to consider that the Respondent had acquiesced in, and/or ratified, the execution of the said deed

of gift and the transfer to the Petitioner and as such was estopped from seeking the reliefs prayed for in the plaint?

7. In any event, did the Learned Judges of the High Court err in not granting the Petitioner adequate compensation for the improvements effected by him?

8. Did the Honourable High Court Judges failed to consider in the circumstances of this case that the Respondent had held out that the said Srimathie Mirium Silva had authority to gift the premises in suit?

9. Has the Court dealt with the fact that the Defendant is a bona fide purchaser?

10. Has the issue of prescription been pleaded?

The subject matter is a land within the Municipal Council limits of Moratuwa of an extent of two roods and 33 perches (A0 R2 P33) with a house thereon and a cultivation of 137 teak trees. The Plaintiff-Respondent-Respondent (hereinafter referred to as the 'Plaintiff'') who is now deceased was the owner of this land and premises. He went abroad on employment giving a general Power of Attorney to his wife Miriam Srimathie Silva in 1984. Incidentally he had two children by this marriage. He visited home from time to time and returned to the island on 16.08.1990 to stay. While he was away, Mirium Silva used the Power of Attorney and gifted the land to Miriam Silva's mother Sylvia Fernando. When the Plaintiff came to know about this gift of his land to the mother-in-law, he questioned his wife as to why she did so when they had two children to receive their properties. The Plaintiff then filed action No. 704/L in the District Court of Panadura on 27.09.1991 against his wife and mother-in-law seeking a declaration of the said deed of gift No. 1551 to be null and void. By this time the husband and wife were estranged due to the wife's action of gifting this property to the mother-in-law. In the meantime the mother-in-law Sylvia Fernando sold the said property to the Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant) Vijith Abraham de Silva, who was known to the Plaintiff also as a timber merchant. The said sale was by deed No. 976 dated 24.09.1991 which was only 3 days before the District Court action No. 704/L was filed by the husband, Plaintiff. In deed No. 976 the vendor was Merlyn Sylvia Fernando and as one witness, the wife of the Plaintiff, Miriam

Srimathie Silva had signed. The Plaintiff claimed that the teak trees that he had planted, worth over 10 ½ lakhs of rupees was about to be felled by the Defendant and the house thereon had been already demolished by the Defendant. The Defendant claimed that he planted teak seedlings/or saplings which had cost him Rs.40,000/- and also claimed the cost of improvements done to the property.

The first question to be decided in this case **is whether the Plaintiff's wife Mirium Srimathie Silva acted within her powers in having gifted the property to her mother, under the Power of Attorney given to her by her husband, the Plaintiff.** The Plaintiff argued that she had acted beyond the powers given in terms of the Power of Attorney. The Defendant argued that she had acted within the terms of the Power of Attorney and the general words appearing in the Power of Attorney conferred unlimited authority to manage all the affairs of the Plaintiff husband while he was away.

The Plaintiff had given evidence in the case. He had prayed for deed No. 1551 to be declared null and void, for ejectment of the Defendant and those under him and to recover possession of the same.

The Plaintiff gave a general Power of Attorney to his wife Miriam Srimathie Silva. It reads that she is empowered **"to sell and dispose of or to mortgage or hypothecate or to demise and lease ……. convey by way of exchange** …… ". There is no empowerment given "to gift the property". However she gifted the property to her mother by way of a deed of gift dated 09.05.1990 and numbered as 1551. The Defendant argued that the Power of Attorney No. 376 dated 12.07.1984 states that the principal is "desirous of appointing a fit and proper person as my Attorney to manage and transact all my business and affairs in the said Sri Lanka" and therefore gifting the property comes under "all my business and affairs". It was argued that then the Power of Attorney holder is entitled to act under the general clause which reads-

> "Generally to do execute and perform all such further and other acts, deeds, matters and thing whatsoever which my attorney shall think necessary or proper to be done in and about or concerning the business, estates, lands, houses, debts or affairs as fully and effectually to all intents and purposes as I might or could do if I am personally present and did the same in my proper person it being

my intend and desire that all matters and things respecting the same shall be under the full management, control and direction of my said attorney ".

The Defendant's position was that the specific powers conferred in the clause "to sell and dispose of ……" does not detract from the general powers conferred by this clause. In short the Defendant argued that the general clause over powers the specific clause.

Court observes that it **is settled law in the country that the Power of Attorney should be construed strictly.** In ***Adaichappa Vs. Cook 31 NLR 385,*** it was held that "The Power of Attorney should be construed per se and not with reference to the other powers of Attorney contained in the instrument, namely the Power of Attorney."

In ***Marshal Vs. Seneviratne 36 NLR 369,*** also it was held that "the authority given by the Power of Attorney is an express authority to be found not by implication but of the terms of power appointing the Attorney. Once a person is aware that the man is dealing with acts under a power of attorney, it is at his peril not to know the extent and limits of that power."

In ***Bastianpillai Vs. Anna Fernando 54 NLR 113*** it was held that "a Power of Attorney must be construed strictly and that the special terms in the recitals controlled the general words in the operative part".

Bowstead on Agency 1st Edition Article 36 at page 59 states that "general words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging special powers when necessary, and only when necessary, for that purpose."

In the case of ***Harper Vs. Godsell (1870) LR 5QB 422 at 427***, Blackburn,J. said "the special terms of the 1st part of the power prevent the general words from having an unrestricted general effect. The meaning of the general words is cut down by the context in accordance with the ordinary rule of ejusdem generis"

In all these cases it was held that the specific powers conferred should be construed in the light of the intention of the principal who grants the power of attorney.

I am firmly of the view that the general words couched into clauses in this particular general power of attorney cannot in anyway be construed to disturb the specific clauses relevant to 'property' contained therein. The intention of the principal has to be gathered from the clauses in any Power of Attorney whether it is a special Power of Attorney or whether it is a general Power of Attorney. The intention of the husband could never have been to grant authority for the wife to donate or gift his properties to anyone else leave alone his mother-in-law.

Having gifted the property to the mother of the Power of Attorney holder, when the husband came to know the same and questioned her as to why she gifted, what was the next step taken by the Power of Attorney holder? She and her mother got together and sold the land to the Defendant soon afterwards. The mother signed as vendor and the daughter signed as witness to the deed of transfer in favour of the Defendant. The bad intention of the Power of Attorney holder can be seen by her actions after she acted under the Power of Attorney. I am of the opinion that one has to view the intention of not only the grantor of the Power of Attorney but also the intention of the grantee the holder of the Power of Attorney. Any person gives a Power of Attorney to another having full faith and trust on that person. The Plaintiff trusted his wife. He could never have dreamt of the wife gifting his hard –earned properties to anybody of his wife's choice. Supposing the wife sold the land to her mother, it would have been different because the Power of Attorney specifically mentions that she can sell, because the money she receives from the sale should go to the husband the grantor of the Power of Attorney**. It cannot be surmised that the intention of any Power of Attorney grantor is to give authority to "Gift" the properties to any person**. That is the very reason that such a word is not included in a general Power of Attorney. No sensible person would ever grant a Power of Attorney to anybody if the general clauses are interpreted to give authority to gift the properties.

The intention of the grantor can be gathered from the specific words used in the Power of Attorney. The intention of the grantee can be gathered by the actions of the grantee before acting on the Power of Attorney and after acting on the Power of Attorney. In this case it can be seen that Miriam Srimathie Silva's intention was to get the benefits

of the husband ‘s property for herself and her mother. The Power of Attorney holder has willfully acted wrongly in this matter, taking undue advantage of the fact that her husband had given her the power of attorney in trust.

Furthermore, I would like to consider other aspects of this matter since it would serve to answer the questions of law which were allowed at the inception of this case before this court.

The Plaintiff had filed action in the District Court of Panadura under case No. 704/L, long before he filed this case, i.e as soon as he came to know of this deed of gift giving his own property to his mother in law by his wife , using the power of attorney given by him to his wife. He had prayed that the deed of gift bearing No. 1551 dated 09.05.1990 be declared null and void. He made his wife Miriam and her mother Sylvia parties to that action. They filed proxy as the first and second defendants in that case and filed answer as well on 23.11.1992. Issues were also raised but on the first date of the trial, the Attorney at Law for them submitted to court that she had no instructions. The District Judge however put off the case for trial for a second date and even on that date, the lawyer submitted that she had no instructions from the defendants. Then it was fixed for exparte trial. Exparte trial was taken up on another date and court granted relief as prayed for by the Plaintiff and decreed that deed 1551 was null and void on 26.03.1997.

Counsel for the Defendant Appellant Petitioner in this case argued that case number 704/L was a collusive action and the Vendor of the Petitioner Sylvia Fernando neglected to defend the title acquired by her and that it amounted to collusive action with the Plaintiff and it was fraud. Proceedings in 704/L as aforesaid confirm that it was not fraud or collusive action but that the mother and daughter gave up contesting only at the trial stage. The mother and daughter had rushed to sell the said land to the Defendant at about the same time the case was filed, thereby passed title to another and got some money.

At the commencement of this case before the District Court on 23.05.2002, it was admitted by the Defendant that the writ of execution to eject the persons on the land was rejected by court on 15.12.2001 on the ground that the proper parties were not

named in that application for writ. Therefore, the fact that there was a decree entered in 704/L to the effect that deed 1551 was null and void remains in tact. As such, it stands in the way of any claims by the Defendant in any court action he contests with regard to the land he has bought. I am of the view that it operates as res judicata against the Defendant Petitioner with regard to paper title to the land in question, even though he was not a party to that action since title does not pass to anyone beyond the owner who owned the land prior to the deed which was declared null and void. It is apparent that the Defendant Petitioner was in possession from 24.09.1991 but the moment that deed number 1551 was declared null and void on 26.03.1997 in case 704/L, the Defendant Petitioner looses his source of title. Hence, from 26.03.1997 the Defendant Petitioner had only occupied the land without any title.

The District Court action pertinent to this Appeal was filed on 13.06.2001 under number 335/L and by that time the Defendant knew that he had no paper title to stay on the land even though the Plaintiff had failed in taking out writ of execution to evict him. Nevertheless, the Defendant had failed to specifically plead prescription and/or to raise a specific issue on prescription in the District Court. The District Judge had analysed the situation well and had rejected the argument on prescription.

The present District Court case number 335/L is a re vindication action praying for a declaration that the Plaintiff is the owner of the property and for ejectment of the Defendant from the land and premises. The Plaintiff proved his title with good evidence and got relief as prayed for, against the Defendant. The Defendant had failed to bring good evidence to show that he was a bona fide purchaser and that he had improved the land as he claimed in his answer. The Civil Appellate High Court affirmed the judgment of the District Court.

In the said circumstances, I hold that the deed No. 1551 is void *ab-initio* and therefore the title does not pass from the Plaintiff to any other person. Therefore deed which was executed thereafter, i.e. deed No. 976 is also void *ab-initio.* The Defendant does not get any title to the land. I fail to see that there was evidence to prove that the Defendant was a bona fide purchaser either. The Defendant was granted Rs.40,000/- by the District Judge, on evidence proven as the cost of baby teak plants planted by him on

the said land, and it was affirmed by the Civil Appellate High Court, as nothing more was proved by him with any evidence before the District Court.

Accordingly, I answer all the questions of law enumerated at the beginning in favour of the Plaintiff-Respondent-Respondent. I affirm the judgment of the Civil Appellate High Court and the District Court and hold further that the Substituted Plaintiff-Respondent-Respondent-Respondent is now entitled to receive the benefits of the said judgments delivered in favour of the Plaintiff- Respondent- Respondent.

This appeal is dismissed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC.J.

I agree.

Judge of the Supreme Court

Upaly Abeyrathne, J.

I agree.

Judge of the Supreme Court