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

In the matter of an Appeal

Dadallage Mervin Silva
No.239/1, Wijewardana Mawatha,
Pasyala Road, Meerigama.

Plaintiff

SC Appeal 45/2010
SC/HC/CA/LA 178/2009
WP/HCCA/GPH/70/2001Final
DC Gampaha Case No.38028/L

Vs-

1. Dadallage Anil Shantha Samarasinghe
   Walawwatte, Meerigama.

2. Mohamed Rosaid Misthihar
   No.5, Masjid Mawatha,Kaleliya

Defendants

AND

Dadallage Anil Shantha Samarasinghe
Walawwatte, Meerigama.

1st Defendant-Appellant

Vs

Dadallage Mervin Silva
No.239/1, Wijewardana Mawatha,
Pasyala Road, Meerigama.

Plaintiff-Respondent

Mohamed Rosaid Misthihar
No.5, Masjid Mawatha,Kaleliya

2nd Defendant-Respondent

AND BETWEEN

Dadallage Anil Shantha Samarasinghe
Walawwatte, Meerigama.

1st Defendant-Appellant-Appellant

Vs

Dadallage Mervin Silva
No.239/1, Wijewardana Mawatha,
Pasyala Road, Meerigama.

Plaintiff-Respondent-Respondent

Mohamed Rosaid Misthihar
No.5, Masjid Mawatha,Kaleliya

2nd Defendant-Respondent-Respondent

Before: Sisira J de Abrew J
L.T.B.Dehideniya J &
P.Padman Surasena J

Counsel: Rohan Sahabandu PC with Hasitha Amarasinghe for the 1st Defendant-Appellant-Appellant
Manohara de Silva PC for the Plaintiff-Respondent-Respondent

Written submission
tendered on : 29.7.2010 and 22.5.2019 by the 1st Defendant-Appellant-Appellant
9.9.2010 and 24.5.2019 by the Plaintiff-Respondent-Respondent
Argued on : 10.5.2019

Decided on: 11.6.2019

Sisira J. de Abrew, J
The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action against the Defendants in this case for a declaration of title that he is the lawful owner of the land in question,

The learned District Judge by his judgment dated 30.8.2001, held in favour of the Plaintiff-Respondent. Being aggrieved by the said judgment, the 1st Defendant-Appellant-Appellant (hereinafter referred to as the 1st Defendant-Appellant) appealed to the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court by their judgment dated 3.7.2009, affirmed the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the 1st Defendant-Appellant has appealed to this court. This court by its order dated 26.5.2010, granted leave to appeal on the following question of law.

Did the Hon.Judges of the Civil Appellate High Court of Gampaha err in law as well as on facts in holding that the Deed bearing No.127 dated 23.8.1990 attested by N.K.de Soysa Notary Public and marked as P2 had been duly proved in law?

The Plaintiff-Respondent at the trial took up the position that Hector Silva by Deed No.127 (marked P2) dated 23.8.1990 attested by N.K.de Soysa Notary

Public had transferred the land in question to his brothers and sisters and that brothers and sisters of Hector Silva by Deeds Nos. 3017 dated 26.3.1994, 3027 dated 18.4.1994 and 3031 dated 24.4.1994 attested by V.K.Senanayake Notary Public transferred the land in question to Plaintiff-Respondent. Therefore, for the Plaintiff-Respondent to get title to the land, the above mentioned deed No.127 should be a genuine document and it must be proved in accordance with the procedure set out in section 68 of the Evidence Ordinance.

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."*

It has to be noted here that the Notary Public who attested Deed No.127 and the two attesting witnesses of the sad deed were not called as witnesses. Therefore it is undisputed that the above mentioned Deed No.127 was not proved in accordance with the procedure set out in Section 68 of the Evidence Ordinance.

Although the Deed No.127 marked P2 at the trial was produced by the Plaintiff-Respondent subject to proof, the1st Defendant-Appellant at the close of the case of the Plaintiff-Respondent, did not object to the said Deed No.127. The learned District Judge considered the Deed No.127 marked P2 as evidence at the trial. Learned President's Counsel for the 1st Defendant-Appellant contended that although the 1st Defendant-Appellant did not object

to the Deed No.127 marked P2 at the close of the Plaintiff-Respondent's case, it could not have been considered as evidence since it was not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. The learned Judges of the Civil Appellate High Court however considered the principle enunciated in Sri Lanka Ports Authority and Another Vs Jugolinja Boal-East [1981] 1SLR 18 and decided that since the Deed No.127 marked P2 was not objected to at the close of the Plaintiff-Respondent's case, it can be considered as evidence. In the case of Sri Lanka Ports Authority and Another Vs Jugolinja Boal-East (supra) this court decided as follows.

> *"If no objection is taken, when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the curses curiae of the original civil courts."*

In Balapitiya Gunananda Thero Vs Talalle Methananda Thero [1997] 2 SLR101this court held as follows.

> *"Where a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case. This is the curses curiae."*

Learned President's Counsel for the Plaintiff-Respondent took up the same position in his submission. Then the most important question that must be considered in this case is when Deed No 127 which was marked subject to proof was not objected at the close of the Plaintiff-Respondent's case whether it can be considered in evidence when it was not proved in accordance with the procedure set out as section 68 of the Evidence Ordinance. In finding an

answer to this question, I would consider Robins Vs Grogan 43 NLR 269 wherein Howard CJ held as follows.

> *"A document cannot be used in evidence, unless its genuineness has been either admitted or established by proof, which should be given before the document is accepted by Court."*

Therefore it is seen that although a document is produced in court with or without objection, it cannot be used as evidence if it is not proved. If the principle enunciated in the case of Sri Lanka Ports Authority and Another Vs Jugolinja Boal-East (supra) is accepted in respect of deeds, even a fraudulent deed marked subject to proof can be used as evidence if it is not objected by the opposing party at the close of the case of the party which produced it. In such a situation, one can argue that courts will have to disregard section 68 of the Evidence Ordinance. I do not think that the principle enunciated in the case of Sri Lanka Ports Authority and Another Vs Jugolinja Boal-East (supra) extends to such a situation. Whether the opposing party takes up an objection or not to a deed which is sought to be produced, the courts will have to follow the procedure laid down in law. In this connection I would like to consider the judicial decision in the case of Samarakoon Vs Gunasekara [2011] 1SLR 149 wherein this court observed the following facts.

> *"In order to prove the Plaintiff's title to the property which is the subject matter of the action, he produced at the trial the notarially executed deeds marked P3 to P6 which were marked subject to proof. No witnesses were called at the trial on behalf of the Plaintiff to prove the said deeds. At the end of the Plaintiffs case, when the Plaintiff's Counsel read in evidence the deeds produced in evidence marked P3 to P6, the defence had made an*

application to Court to exclude those documents which were not properly proved. The learned District Judge held that the documents P3 to P6 had not been properly proved and accordingly, that the Plaintiff had failed to prove his title to the land in question.

The Plaintiff appealed against the decision of the District Judge to the High Court. The High Court reversed the District Judge's finding on the basis that when a deed had been duly signed and executed it must be presumed that it had been properly executed."

His Lordship Justice Amaratunga (with whom Ratnayake J and Ekanayake agreed) held as follows.

The High Court in total disregard of the specific and stringent provisions of Section 68 of the Evidence Ordinance had relied on an obiter dictum made in a case where due execution was challenged, to reverse the decision of the District Judge.

In terms of Section 2 of the Prevention of Frauds Ordinance a sale or transfer of land has to be in writing signed by two or more witnesses before a notary, duly attested by the notary and the witnesses. If this is not done the document and its contents cannot be used in evidence.

His Lordship Justice Amaratunga at page 151 further held as follows.

A deed for the sale or transfer of land, being a document which is required by law to be attested, has to be proved in the manner set out in section 68 of the Evidence Ordinance by proof that the maker (the

vendor) of that document signed it in the presence of witnesses and the notary. If this is not done the document and its contents cannot be used in evidence.

Considering all the above matters, I hold that when a document which is required to be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance is produced in evidence subject to proof but not objected to at the close of the case of the party which produced it, such a document cannot be used as evidence by courts if it is not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. I further hold that failure on the part of a party to object to a document during the trial does not permit court to use the document as evidence if the document which should be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance has not been proved. I would like to note that the acts performed or not performed by parties in the course of a trial do not remove the rules governing the proof of documents.

In the present case, the Deed No.127 marked P2 has been produced in evidence subject to proof but was not objected to at the close of the Plaintiff-Respondent's case. The said deed was not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. Therefore the said the Deed No.127 marked P2 at the trial could not have been used as evidence by the trial court. The trial court has used the said Deed No.127 marked P2 as evidence and the learned Judges of the Civil Appellate High Court have affirmed the judgment of the learned District Judge. For the above reasons, I hold that the learned District Judge was in error when he used the

Deed No.127 marked P2 as evidence and the learned Judges of the Civil Appellate High Court were also wrong when they affirmed the judgment of the learned District Judge.

For the above reasons, I answer the above question of law in the affirmative and set aside the judgment of the Judges of the Civil Appellate High Court dated 3.7.2009 and the judgment of the learned District Judge dated 30.8.2001. Since I set aside the judgments of both courts below, I dismiss the action of the Plaintiff-Respondent. The learned District Judge is directed to enter decree in accordance with this judgment.

Judgments of the District Court and the Civil Appellate High Court set aside.

Judge of the Supreme Court.

L.T.B. Dehideniya J

I agree.

Judge of the Supreme Court.

P.Padman Surasena J

I agree.

Judge of the Supreme Court.