IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA.

In the matter of an application for leave to appeal under S.5C of the High Court of the Provinces (Special Provisions) Act No, 19 of 1990, as amended by Act No. 54 of 2006, against judgment dated 31/01/2012 of the Provincial High Court of the Western Province in Case No.WP/HCCA/GPH/CALA/48/2012 DC Gampaha Case No.1457/L.

SC/Appeal/146/12

SC/HCLA no 89/2012

CaseNo.WP/HCCA/LA89/2012

DC GampahaCaseNo.1457/L

Koswatte Gamage Jayanath
Kulasiriwardena,
"Weerasiri"
Pinwatte, Waturagama.

Plaintiff

Vs.

1. Jayasinghe Arachchige Ranjanie Jayasinghe

2. Ellapperuma Arachchige
Shashi Jana Aadarshi
Ellapperuma Arachchi.

3. Ellapperuma Arachchige
Dayananji Sudakshana
Ellaperuma Arachchi

4. Ellaperuma Arachchige
Dananja Nilashen Ellaperuma
Arachchi

All of No.73/3 , Indigolla,
Gampaha

Defendants

Koswatte Gamage Jayanath
Kulasiriwardena,
"Weerasiri"
Pinwatte, Waturagama.

Plaintiff-Petitioner

Vs.

1. Jayasinghe Arachchige Ranjanie
Jayasinghe

2. Ellapperuma Arachchige
Shashi Jana Aadarshi
Ellapperuma Arachchi.

3. Ellapperuma Arachchige
Dayananji Sudakshana
Ellaperuma Arachchi

4. Ellaperuma Arachchige
Dananja Nilashen Ellaperuma
Arachchi

All of No.73/3 , Indigolla,
Gampaha

Defendant- Respondents

AND NOW BETWEEN

Koswatte Gamage Jayanath
Kulasiriwardena,
"Weerasiri"
Pinwatte, Waturagama.

Plaintiff-Petitioner-Petitioner

Vs.

1. Jayasinghe Arachchige Ranjanie
Jayasinghe

2. Ellapperuma Arachchige
   Shashi Jana Aadarshi
   Ellapperuma Arachchi.

3. Ellapperuma Arachchige
   Dayananji Sudakshana
   Ellaperuma Arachchi

4. Ellaperuma Arachchige
   Dananja Nilashen Ellaperuma
   Arachchi

All of No.73/3 , Indigolla,
Gampaha

<u>Defendant- Respondent-
Respondents</u>

BEFORE:- Eva Wanasundera P.C J

Buwaneka Aluwiliare P.C J

K.T. Chitrasiri J

COUNSEL:- Dr. Sunil Cooray with Ms. Sudarshani Cooray for Plaintiff Petitioner- Petitioner- Appellant.

Dinesh de Alwis with K.Perera instructed by Janaki Sandakelum for 1st to -41h Defendants-Respondents-Respondents

ARGUED ON: - 03 -02-2016

DECIDED ON:- 17-02-2016

ALUWIHARE PC J.

The Plaintiff-Petitioner-Petitioner-Appellant (hereinafter referred to as the Appellant) instituted action in the District Court of Gampaha for declaration of title, ejectment and damages against the Defendant- Respondent Respondents (hereinafter referred to as the Respondents). When the matter was taken up for trial before the learned District judge, in the course of the Appellant's testimony, a listed document, a statement purported to have been made by the 1st Respondent to the police, was sought to be marked and produced on behalf of the Appellant. This was objected to on behalf of the Respondent. The objection so raised was upheld by the learned District Judge and being aggrieved by the said order the Appellant sought leave to appeal from the High Court of Civil Appeals (hereinafter the High Court). The High Court granted leave in

the first instance. After the hearing of the appeal, the High Court upheld the earlier order of the learned District judge and accordingly dismissed the appeal.

The Appellant being aggrieved by the said judgement of the High Court sought leave from this court and leave was granted on the following questions of law set out in sub paragraphs (a), (b) and (c) of paragraph 9 of the Petition of the Appellant dated 09th March 2012 which are reproduced below, verbatim:

(a) Did the Provincial High Court err and misunderstood the decided case of Sivarathnam and others Vs. Dissanayeke and others which was cited by the Petitioner in support of his argument:

(b) Did the Provincial High Court err in deciding that the court has to be satisfied of the fact that the author of the said police statement, has made the statement, which is not the case in marking an admission as against the maker (author) during the course of evidence and in terms of the evidence ordinance;

(c) Did the provincial High Court err in holding that the Petitioner has the opportunity to call the police at a later stage to prove the said statement which will not prohibit the Petitioner from marking the said statement as against the 1st Defendant-Respondent, irrespective of the fact that it is admitted to be made by her or not;

Upon scrutinising the respective orders made by both the learned District judge and the High Court, I find that each court has refused the Appellant permission to mark the impugned statement for

different reasons. Thus, for clarity I wish to refer to the nature of the objection raised against admitting the impugned statement.

In the course of the Appellant's evidence in the District Court, a series of title deeds were marked and produced subject to proof. The Appellant also testified that over their dispute in relation to the corpus, the parties came to the police station and the Respondents (witness has spoken in plural terms) made a statement to the police in the presence of the Appellant and that he could identify the statement so made. At this point objection was taken that the Appellant is not entitled to mark and produce the document (the statement made to the police by the 1st Respondent) as the Appellant was not the author of the document.

Having considered the objection, the learned District judge held that the witness, not being its author, could not testify as to the contents of the document and also that the impugned statement was not a listed document.

The statement in question however was a document that had been listed by the plaintiff. The impugned statement being a statement made to and reduced to writing by a police officer, would attract Section 91 of the Evidence Ordinance, which expressly states no evidence shall be given in proof of such matter except the document itself. Thereby Section 91 of the Evidence Ordinance excludes oral evidence in relation to proof of a document that comes within its ambit. Statements made to the police officers are required by law to be reduced to writing. Although it may not be strictly relevant in the context of the issues before us in this case, a line of decisions which has now settled the law, excludes oral evidence with regard to the discovery of facts in consequence of statements that come within the ambit of Section 27 of the Evidence Ordinance. The exclusion of oral evidence is based on

the prohibition referred to above, under Section 91 of the Evidence Ordinance.

In view of the foregoing, I am of the view that, the reasoning of the learned District Judge, that the document could not be permitted to be marked and produced through the witness for the reason that he cannot comment on the contents, is not the correct legal position.

When considering the Respondent's objection the court should also have addressed its mind to the two questions raised in Section 154(3) of the Civil Procedure Code before giving a ruling, the questions being;

(a) Firstly, Whether the document is authentic

(b) Secondly, whether it constitutes legally admissible evidence.

The order of the learned District judge has not received the close attention of Section 154 of the Civil Procedure Code it should have received, before the court gave its ruling. I hold that the said order of the learned District Judge cannot stand for the aforesaid reasons.

The High Court on the other hand concurred with the decision of the learned District judge but for different reasons.

I feel it would be pertinent at stage, for this court to dwell on the difference between Admissions as defined in Section 17 of the Evidence Ordinance and admissions recorded by the contesting parties in a case. Commenting on recording of admissions by parties, Abdul Majeed in his book, A Commentary on Civil Procedure Code and Civil Law in Sri Lanka at page 459 states,*"When a case is taken up for trial and before the issues are framed, if there are any admissions in the pleadings of the parties, those admissions must be recorded as 'admissions". The recording of the admitted facts is not in accordance with any provisions of*

the Civil Procedure Code. However, the recording of admissions has become a long established practice in civil trials."

In arriving at their decision, the High Court of Civil Appeals has clearly failed to appreciate the vital difference.

This is apparent from the observation made by the High Court, in its judgement which reads "*the author of the impugned document, though it has been listed, is not the Plaintiff. It is important to be noted that it becomes an admission once the author admit that he has made the said statement."*

A statement falling within the meaning of Section 17 of the Evidence Ordinance is an evidentiary fact, and would be relevant and may be proved against the person who made the statement in terms of Section 21 of the Evidence Ordinance.

Admissions recorded by the parties in any proceeding, are not the same as Admissions contemplated in section 17 of the Evidence Ordinance, but are "admitted facts" within the meaning of Section 58 of the Evidence Ordinance. Section 17 of the Evidence ordinance defines Admissions and Confessions and is a provision governing relevancy. Section 17 (1) read with Section 21 of the Evidence Ordinance merely permits a "statement" to be admitted as evidence if that "statement" falls within the definition of an Admission in terms of section 17 of the Evidence Ordinance. That is to say the trial judge is required to evaluate the item of evidence so adduced under section 21 and consider the probative value that should be attached to it. It is entirely at the discretion of the judge to decide whether or not to act upon the Admission as an item of evidence, having given due consideration to the statement.

On the other hand, admissions recorded by contesting parties to any proceeding fall within the ambit of Section 58 of the Evidence Ordinance, a provision governing proof and has no bearing on the issue of relevancy.

Section 58 of the Evidence Ordinance says, "no *fact* need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing..." Thus, there is no duty cast on the court to consider either the credibility or the probative value of such facts but is required to treat such facts as "proved facts".

In the instant case when the matter was taken up for trial before the District judge, a statement purported to have been made by the 1st Respondent to the police, was sought to be adduced as evidence on the basis that the impugned statement qualifies as an Admission in terms of Section 17 of the Evidence Ordinance and therefore would be relevant and admissible under section 21 of the Ordinance.

When the impugned statement in this instance was sought to be adduced as an Admission the court was required to give its mind to two aspects before proceeding to admit the statement,

(a) As the impugned statement is one reduced to writing the court is required to consider whether admitting the document is obnoxious to the provisions governing admission of documents (mode of proof)

(b) Secondly court is required to give its mind as to whether the impugned statement suggests any inference as to any fact in issue *or* relevant fact and if so, whether the statement is relevant under section 17 read with Section 21 of the Evidence Ordinance. (Relevancy)

If the statement is relevant and admissible, then the court has no discretion, but to admit it. The court, however, is at liberty to consider the probative value of the contents upon evaluation and decide either to act on them or to reject it.

In the present case, both the District court as well as the High Court of Civil Appeals refused to have the impugned statement marked and produced on the first aspect referred to above, that is the mode of proof. As such this court wishes to confine itself only to consider whether the District Court and the High Court of Civil Appeals erred in refusing to have the statement marked and produced through the Appellant when he was giving evidence.

Although this court is not required to consider the relevancy of the impugned statement, but only the mode of proof, for the sake of completion, I wish, briefly to address the aspect of relevancy as well.

The High Court appears to have relied heavily on the decision of Sivarathnam Vs. Dissanayake & others, 2004 1 S.L.R pg. 145, in deciding the issue of admissibility of the impugned statement.

In the case of Sivarathnam vs. Dissanayake & others a party made an attempt to equate a statement (an affidavit) made by a party to the case, which presumably would have been relevant in terms of Section 21 of the Evidence Ordinance, to that of an admission by the parties within the meaning of Section 58 of the Evidence Ordinance.

His Lordship justice Amaratunga having discussed the issue, made his pronouncement with precision and clarity and a passage from that judgement is reproduced below-;

"At any time before the hearing of' the action, the parties are at liberty to admit in writing any fact to be determined at the trial (Section 58 of the Evidence Ordinance). Such admissions are also formal admissions made outside Court. At the commencement of the trial the parties may state to court the facts they admit and then such admissions are recorded by Court. Even in the course of the trial such admissions e.g. genuineness of documents, may be made. All admissions described above are formal admissions. Section 58 of the Evidence Ordinance enacts that 'NO fact need be proved in any proceedings which the parties thereto or their agents agree to admit at the hearing, or, which before the hearing, they agree to admit by any writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.: .....

It appears to me that this leave to appeal application has been made on the assumption that the learned judge's ruling has the effect of wiping out the evidentiary value of the admission made in the defendant's affidavit. But the learned judge's ruling does not have such far reaching effects. The effect of the ruling is only confined to the refusal to take the admission into consideration for the purpose of recording admissions. The ruling does not debar the plaintiffs from using the contents of the affidavit according to the rules of evidence. They are entitled, if they are so advised, to formally mark the affidavit in evidence at the trial through the justice of the Peace who attested it. They may also use the affidavit as a former statement to impeach the testimony of the defendants at the time they give evidence at the trial. Therefore, if the affidavit is used at the trial in accordance with the law of evidence, the trial Judge will decide the weight to be attached to the admission in deciding the issues raised in the action, bearing in mind that "admissions are not conclusive proof of the matters admitted, but they may operate as estoppels " (section 31 of the *Evidence* Ordinance) *or that*

the affidavit contains material relevant to the weight to be attached to The evidence of The persons who had made those admissions,"

In the case referred to, the issue arose as a result of the District judge refusing to record a fact contained in an affidavit filed relating to the action before the court, as an admission recorded at the commencement of the trial.

The decision in the case of Sivarathnam *et.el*, referred to above has no relevance to the issues in this case as the issue before this court is whether the procedure adopted by the plaintiff in producing the impugned statement is obnoxious to the provisions relating to mode of proof of documentary evidence.

At this point I wish to refer to the provisions in the Code of Civil Procedure relating to reception of documents in civil cases.

For ease of reference the relevant parts of the Section 154 of the Code are reproduced below-

> 154. (1) **Every document** or writing, which a party intends to use as evidence against his opponent ***must be formally tendered by him in the course of proving his case at the time when its contents of purport are first immediately spoken to by a witness.*** (Emphasis added), If it is an original document already filed in the record of some action, or the deposition of a witness made therein, it must previously be procured from that record by means of, and under an order from, the court. If it is a portion of the pleadings, or a decree or order of court made in another action, it shall not generally be removed therefrom, but a certified copy thereof shall be used in evidence instead,

Explanation to Section 154 lays down the procedure that should be adopted by courts when a document is tendered in evidence and the explanation reads thus:-

Explanation

> 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,
>
> *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 a 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, at least, be marked when the court decides upon admitting it.

Section 154 (1) clearly requires that if a party intends to use any document as evidence, it must be formally tendered, when its contents or purport is first immediately spoken to by a witness. Neither the District Court nor the High Court adverted to this provision. The said Section also stipulates that, whether the document is admitted or not, it should be marked as soon as any witness makes a statement with regard to it. As the Respondents have objected to the admission of the impugned statement, the court is then required to address the issue of authenticity and whether the contents would constitute legally admissible evidence as I have referred to earlier in this judgment. It must be noted that none of the courts have given its mind to this requirement either. Furthermore the Appellant has testified to the effect that he has knowledge of the impugned statement as he was present when the 1st Respondent made the statement at the Gampaha police station and the Appellant has cited the Officer -in-Charge of the said police station as a witness.

Having considered the foregoing, I hold that the High Court had erred on the questions set out in sub - paragraph (a), (b) and (c) of Paragraph 9 of the Petition.

Accordingly, I make order setting aside both orders, the order of the High Court dated 31-January -2012 and the order of the learned District Judge dated 13-09-2011. This court is not in a position to make a determination with regard to the admissibility of the impugned statement as the full facts are not before us. Thus, I direct the District Court to consider afresh the application made in respect of the document that

was sought to be marked in evidence by the Appellant and the objection raised on behalf of the Respondent and decide the issue applying the criteria laid down in Section 154 of the Civil Procedure Code. Both parties are free to present their respective positions afresh, before the court.

The appeal is allowed with costs.

JUDGE OF THE SUPREME COURT.

Eva Wanasundera P.C J.

I agree.

JUDGE OF THE SUPREME COURT.

K.T Chitrasiri J.

1 agree.

JUDGE OF TI 1E SUPREME COURT.