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

In the matter of an application for Special Leave to Appeal to the Supreme Court from a Judgement of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka.

Francis Samarawickrema of
Wilegoda,
Kalutara North.

Plaintiff-Respondent-Appellant

SC Appeal No. 7/2004
SC Special L/A No. 111/2003
CA No. 388/93 (f)
DC Kalutara No. 2443/L

-Vs-

1. Dona Enatto Hilda Jayasinghe

2. Don Stephen Jayasinghe, both of
No. 260,
Wilegoda,
Kalutara North.

Defendants-Appellants-Respondents

BEFORE : S. N. Silva, P.C., C.J.,
Shiranee Tilakawardane, J., &
Saleem Marsoof, P.C., J.

Counsel : Mr. S. C. B. Walgampaya, P.C., and
Mr. L.K.J. Perera for Appellant.

Ms. Maureen Seneviratne, P.C., and
Mr. S.A.D.S. Suraweera for Respondents

Argued on : 24th October 2005, 21st June 2006, 4th July 2006, 21st September 2006 and 4th July 2007.

Written Submissions : Appellant - 12th October 2007
Respondent - 14th November 2007

Decided on : 7th May 2009

MARSOOF, J.

This appeal is a sequel to the decision of the Court of Appeal of Sri Lanka dated 3rd May 1982 in C.A. Appeal No. 469/78 (F) and reported as *Hilda Jayasinghe v. Francis Samarawickrema* [1982] 1 Sri LR 249. Both appeals arose from an action instituted in the District Court of Kalutara by the Plaintiff-Respondent-Appellant (hereinafter referred to as "the Appellant" on 24th November 1976, against the 1st and 2nd Defendant-Appellant-Respondents, the 3rd Defendant (who is the mother of the 1st and 2nd Respondents, and who died pending the trial) and the 4th Defendant, Yasantha Ajith Kahatapitiya (who was the minor son of Mr. L.G. Kahatapitiya, Attorney at law and Notary Public) seeking a declaration of title to the land described in the schedule to the plaint and for ejectment and damages. The subject matter of the action is a land called "Pokunuwattekattiya" in extent 11.94 perches and situated at Wilegoda in Kalutara North, which is admittedly the ancestral and residential property of the 1st and 2nd Defendant-Appellant-Respondents (hereinafter referred to as "the Respondents") and the original 3rd Defendant.

In his plaint, the Appellant pleaded that the Respondents and the 3rd Defendant, sold to him the said land upon Deed No. 4880 dated 24th March 1976 (P4), attested by Mr. L. G. Kahatapitiya, Notary Public for a consideration of Rs. 8,000/- and though they were paid the money on the day they executed the said deed, they have failed to deliver possession of the land and are in wrongful possession thereof. By way of answer it was pleaded that the said land belonged to the Respondents and their mother the 3rd Defendant; that upon Deed No. 4753 dated 12th August 1975 (P2), attested by Mr. L. G. Kahatapitiya, Notary Public the said land was sold to the 4th Defendant Yasantha Ajith Kahatapitiya, for a consideration of Rs. 3,500.00, subject to the right to obtain a re-conveyance of the same within three years; that about seven months after the execution of the said Deed P2, the signature of the Respondents and the 3rd Defendant was obtained on three blank papers by the said notary purportedly to assign the rights upon Deed No. 4753 (P2) to the Appellant and that it was never their intention to transfer the land to the Appellant outright, and that the Appellant has perpetrated a fraud in having a deed of transfer executed; that Deed No. 4880 (P4) ought therefore to be set aside, and the Appellant's action dismissed with costs.

The case first went to trial on 1st March 1978, and the only witnesses for the Appellant, who did not himself get into the witness box, were the surveyor E. D. P. K. Premaratne and Mr. L. G. Kahatapitiya, Notary Public. The 1st and 2nd Defendants-Appellants-Respondents testified on their own behalf, but did not call any other witnesses. A number of documents too were produced and marked in evidence. On 13th November 1978, the learned District Judge pronounced judgment for the Appellant as prayed for in the plaint.

Aggrieved by the said decision of the District Court,, the Respondents appealed to the Court of Appeal, which by its judgment dated 3rd May 1982, delivered by H.D. Tambiah, J. (with Parinda Ranasinghe, J. concurring) and reported as *Hilda Jayasinghe v. Francis Samarawickrame,* [1982] 1 Sri LR 249, decided to set aside the decision of the District Court, in what I would, for convenience, call the first trial, and remitted the case for re-trial primarily on the ground that the learned District Judge had misdirected himself on

two vital factual matters highlighted in pages 355 and 356 of the said judgment, and that the learned District Judge had considered the *due execution* of the impugned deeds P3 and P4 as being proved despite the fact that apart from the notary neither of the two attesting witnesses had given evidence at the trial.

The second trial, which commenced on 20th October 1983 and was heard by several successive judges, did not yield a different result from the first, and the District Court by its judgment dated 16th June 1993 once again held in favour of the Appellant as prayed for in the plaint. The Respondents appealed against this decision to the Court of Appeal, which by its judgment dated 9th May 2003, reversed the decision of the District Court and while dismissing the action filed by the Appellant also granted the Respondents relief as prayed for in their answer and set aside deed No. 4880 (P4).

On 27th January 2004 this Court granted special leave to appeal against the said judgment of the Court of Appeal dated 9th May 2003 on the following substantial questions:

A. Did the Court of Appeal err in holding that P4 was fraudulently executed when the same has not been proved with the high degree of proof required to prove fraud?

B. Did the Court of Appeal err in law in not considering the evidence of the notary in terms of Section 33 of the Evidence Ordinance, when the said evidence was part of the record?

Proof of Due Execution

As the Court of Appeal has rightly observed in both of its judgments in this case, proof of due execution of Deed No. 4879 (P3) dated 24th March 1976 by which Yasantha Ajith Kahatapitiya purported to re-convey title to the Respondents and the original 3rd Defendant, and Deed No. 4880 (P4) by which the latter purported to convey their title to the Appellant (hereinafter referred to as the "impugned deeds"), is essential for the Appellant to succeed in his case against the Respondents in what is essentially a *rei vindicatio* action in which the Appellant claims title to the property in suit purely on the faith of the said deeds. The view of the Court of Appeal in the first appeal reported as *Hilda Jayasinghe v. Francis Samarawickrame* [1982] 1 Sri LR 249 was that since the Respondents alleged that the notary Mr. Kahatapitiya had *fraudulently* obtained their signatures and the thumb impression of the 3rd Defendant on blank papers which he subsequently used to prepare the said deed P4 without any consideration passing, the circumstances of the case required that one of the two attesting witnesses be called to give evidence, to prove due attestation of the deed.

In the course of his judgment, Tambiah, J. examined Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 and Section 68 of the Evidence Ordinance No. 14 of 1895 in the light of decisions such as *Kirihanda v. Ukkuwa* [1892] 1 S.C.R. 216, *Somanather v. Sinnetamby* [1899] 1 Tambiah 38, and *Seneviratne v. Mendis* 6 C.W.R. 211 and concluded that as a general rule, the notary before whom a deed is executed is an attesting witness, and is competent to prove the due execution of the deed, provided the grantor was personally known to him. However, His Lordship noted at page 359 of his judgment, following the decision of Lawrie, A.C.J. and Moncreiff, J. in *Baronchy Appu v. Poidohamy* 2 Browns's Reports 221, that-

> "…..where the execution of a deed is challenged *on the ground that it had been signed before it was written*, then, where at least one of the two attesting witnesses is alive, the evidence of the notary alone, even where he knew the executant, is not sufficient; at least one of the two attesting witnesses should also be called." (*emphasis added*).

Applying this principle to the circumstances of the case, Tambiah, J. held that since it is alleged that the signatures of the Respondents and the original 3rd Defendant had been obtained on blank papers, and the attesting witnesses are alive, the case is incomplete without at least one of them being called to give evidence regarding the execution of the deed. The Court of Appeal decided to send the case back for fresh trial, mainly in view of the fact that the trial judge had misdirected himself on certain factual matters and only the notary had testified to prove the due execution of the impugned deeds.

However, it is relevant to note that when the appeal was argued before the Court of Appeal, an application was made on behalf of the Respondents to admit fresh evidence touching the conduct of Mr. Kahatapitiya as a notary. The new evidence related to five cases filed in the Magistrate's Court of Kalutara, bearing numbers 32243, 43613, 43614, 7320 and 7321 against Mr. Kahatapitiya charging him with certain offences under the Notaries Ordinance, No. 1 of 1907. In the first of these cases, the offence was alleged to have been committed prior to the conclusion of his testimony in the first trial before the District Court, but the prosecution before the Magistrates Court resulted in the conviction of Mr. Kahatapitiya and the imposition of a fine after he concluded the said testimony. In the other four cases, Mr. Kahatapitiya was charged, convicted and fined for offences alleged to have been committed by him after he concluded his testimony at the first trial on 1st March 1978.

The offences of which Mr. Kahatapitiya was convicted and fined arose from his alleged failure to send duplicates of deeds, executed and attested by him, to the Registrar of Lands, Kalutara. When questioned by learned Counsel for the Respondents in the course of his cross-examination in the District Court, Mr. Kahatapitiya had admitted that there were certain cases pending against him in the Magistrates Court. It would appear from the judgement of the Court of Appeal in *Hilda Jayasinghe v. Francis Samarawickrema* [1982] 1 Sri LR 249, particularly from pages 359 to 360 thereof that the said Court took into consideration the said convictions as "further circumstances" that justified the admission of these items of new evidence in a fresh trial. Tambiah, J. observed at page 360 of the judgement that-

> "We allowed the application of learned Attorney for the defendants-appellants [present Respondents] to admit this new evidence. These items of evidence could have an important bearing on the credibility of Mr Kahatapitiya, particularly because the conduct of Kahatapitiya which is being impugned in this case, is also his conduct as a notary. It is only fair, and justice requires, that Mr Kahatapitiya be afforded an opportunity to explain his conduct and the circumstances in which he came to be charged and fined in these cases."

Fresh trial commenced on 20th October 1983, and although some issues were raised on that day and amended on a later date and some witnesses had testified, with judges changing and parties not agreeing to adopt even the issues that had been raised

previously, 23 fresh issues were raised before a new judge who commenced trial *de novo* on 9th May 1988. In the proceedings that followed, the surveyor Premaratne, the Appellant himself, Upamalika Wijesuriya, then attached to the Land Registry, Kalutara and Dharmasena, who was one of the attesting witnesses to the impugned deeds, were called to testify on behalf of the Appellant *inter alia* to establish due execution of the impugned deeds.

It is important to note that in the course of the second trial it was reported to court that the notary Mr. Kahatapitiya had died on 25th February 1985, and his death certificate was produced in court by the Appellant marked P6. The application made on behalf of the Appellant to read into the record, under Section 33 of the Evidence Ordinance, the testimony given by Mr. Kahatapitiya in the course of the first trial, was refused by the District Court. At the second trial, the two Respondents testified on their own behalf and marked in evidence several documents, but they did not call any other witnesses. As already noted, the second trial also ended in the same way as the first, and by the judgment delivered on 16th June 1993, the learned District Judge held that the due execution of the impugned deeds has been proved, and entered judgment for the Appellant as prayed for.

The Respondents appealed to the Court of Appeal from the said judgement of the learned District Judge. The Court of Appeal, by its judgment dated 9th May 2003, held that the due execution of impugned deeds had not been proved, set aside the decision of the learned District Judge and directed the District Court to enter judgment in favor of the Respondents as prayed for in their answer. It is against this decision of the Court of Appeal dated 9th May 2003 that this Court has granted special leave to appeal on the two questions which have been set out at the commencement of this judgment.

Adoption of Evidence under Section 33

It is convenient to examine at the outset the second of the two questions on which special leave to appeal has been granted by this Court, namely, did the Court of Appeal err in law in not considering the evidence of the notary in terms of Section 33 of the Evidence Ordinance, when the said evidence was part of the record? On 4th July 1988, after the conclusion of the evidence of surveyor Premaratne, who was the first witness called by the Appellant, an application was made to adopt the evidence of notary Mr. Kahatapitiya which had been recorded in the course of the first trial, under Section 33 of the Evidence Ordinance, on the basis that Mr. Kahatapitiya had since died. Upon objection been taken by the Respondents to this application, learned District Judge made order on 20th September 1988 (pages 486 to 493 of the Appeal Brief) that the said evidence cannot be adopted as the Court of Appeal, when setting aside the decision of the District Court in the first trial, had contemplated that the evidence of Mr. Kahatapitiya would be led afresh to enable him to clarify certain doubts as to his credibility and integrity arising from his convictions in the aforementioned cases. The learned District Judge observed as follows in the course of the said order, at page 492:

> "lygmsgsh uy;d ush hEfuka wNshdpkdOdlrKfha wNsm%dh bgq l, fkdyelsj we;' …….. m%:u jsNd.fhaoS ¥ka idlaIs fuu jsNd.fhaoSu bosrsm;a lsrSfuka fmr lS mrsos wNshdpkdOdlrKfha wjYH;djhka imqrd ,sh fkdyel'

fus wkqj lygmsgsh uy;df.a idlaIs" idlaIs wd{d mKf;a 33 jk j.ka;sfha jHd;sf¾Lh wkQj bosrsm;a lsrSug fkdyels nj ks.ukh lrus'"

The application was renewed later on in the course of the testimony of the Appellant on 29th March 1990, and in the face of strong objections raised on behalf of the Respondents *inter alia* on the basis that the Court has already ruled on this matter, the learned District Judge by his order dated 13th August 1990, (pages 515 to 517 of the Appeal Brief) refused to receive in evidence the previous testimony of Mr. Kahatapitiya. Despite these setbacks, the fact that the Appellant went on to win his case against the Respondents in the District Court, which by its judgement dated 16th June 1993 entered judgement for the Appellant as prayed for by him in the plaint, is a glowing tribute to the glorious certainties of litigation.

However, the Court of Appeal, which heard the appeal lodged by the Respondents against this decision, overturned the decision of the District Court on the basis that the Appellant has failed to establish due execution of his title deeds bearing Nos. 4879 (P3) and 4880 (P4), without taking into consideration the evidence of Mr. Kahatapitiya. After referring to the judgement of Tambiah, J. arising from the first trial, the Court of Appeal in its judgement dated 17th October 2002, merely observed that-

> "…..Tambiah J after setting aside the judgement of the District Judge has sent the case back for retrial with directions that in addition to the evidence of the Notary Public to record the evidence of at least one of the attesting witnesses……It is interesting to observe that by the time this case was taken for trial *de novo* at the District Court, Kahatapitiya the notary who attested the deed was dead. An application by the Plaintiff-Respondent [present Appellant] to adopt his evidence given at the earlier trial made under Section 33 of the Evidence Ordinance had been refused by the learned District Judge."

Strangely, the question whether the testimony of Mr. Kahatapitiya recorded in the course of the first trial, should be considered under Section 33 of the Evidence Ordinance has not been considered by the Court of Appeal, which concluded that the due execution of the impugned deeds has not been established by the Appellant without taking the evidence of Mr. Kahatapitiya into consideration. It is in this context that the question as to whether the evidence of Mr. Kahatapitiya has been properly and lawfully shut out from the second trial has to be considered.

It has been strenuously argued by learned President's Counsel for the Respondents that as the Appellant did not challenge by way of interlocutory appeal the orders made by the District Courts on 20th September 1988 and 13th August 1990 to exclude the evidence of Mr. Kahatapitiya, he is precluded from raising this question in a final appeal. This submission, in my view, goes against sound and established principle enunciated by our courts, which as pointed out by Bertram C.J. in *Fernando v. Fernando* 6 Ceylon Weekly Reporter 262 at page 265, "discourages appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at its final stage." It is trite law that leave to appeal will not be granted from every incidental order relating to the admission or rejection of evidence, for to do so would be to open the floodgates to interminable litigation *(Balasubramaniam v. Valliappar Chettiar* 39 NLR 553 at page 560), but if the incidental order goes to the root of the matter and it is both convenient and in the interests of both parties that the

correctness of the order be tested at the earliest possible stage, then leave to appeal will be granted *(Arumugam v. Thampu,* 15 NLR 253 at page 255; *Girantha v. Maria* 50 NLR 519 at page 521). As observed by Vythialingam, J. in *K.A. Mudiyanse v. Punchi Banda Ranaweera* at page 509-

> "A party so aggrieved, however, still has two courses of action: (1) to file an interlocutory appeal or, (2) to stay his hand and file his appeal at the end of the case even on the very same ground on which he could have filed his interlocutory appeal. If he adopts the latter course he cannot be shut out on the ground that his appeal being against the incidental order is out of time. It might well be that in spite of the incidental order against him he might have still succeeded in the action. . ."

This appears to me to be exactly what happened at the second trial in this case, where the Appellant, who was aggrieved by the decision of the District Court to disregard the evidence of Mr. Kahatapitiya recorded at the first trial, went on regardless to succeeded in the final judgement, only to be reversed by the Court of Appeal, which without considering the evidence of this vital witness, came to the conclusion that the due execution of the impugned deeds 4779 (P3) and No. 4880 (P4) had not been established by the Appellant.

Section 33 of the Evidence Ordinance, under which the Appellant moved to adopt into the record in the second trial, the evidence of Mr. Kahatapitiya led at the first trial, provides as follows:

> "Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or *in a later stage of the same judicial proceeding*, the truth of the facts which it states, *when the witness is dead* or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable;
>
> Provided-
>
> (a) that the proceeding was between the same parties or their representatives in interest;
> (b) that the adverse party in the first proceeding had the right and opportunity to cross-examine;
> (c) that the questions in issue were substantially the same in the first as in the second proceeding.
>
> ***Explanation-A*** criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section." (*emphasis added*).

In determining the questions on which leave has been granted by this Court, it is important to decide whether the application made in this case to adopt and consider the evidence of Mr. Kahatapitiya falls within the parameters of Section 33 of the Evidence Ordinance.

This is not a case in which it was sought to adopt evidence previously given in some other judicial proceedings. The application relates to evidence given by Mr. Kahatapitiya in an earlier stage (first trial) in the same judicial proceedings, but it is plain that Section 33 could apply in either situation. The basis of the application was that Mr. Kahatapitiya was dead, and that therefore evidence given by him in the course of the first trial in the same action "is relevant, for the purpose of proving, ….the truth of the facts which it states …." Section 33 one of the many exceptions found in the Evidence Ordinance to the hearsay rule, and has been considered by this Court in decisions such as *Herath v. Jabbar* 41 NLR 217, *Cassim v. Suppiah Pulle* 41 NLR 275, *Kobbekaduwa v. Seneviratne* 53 NLR 354 and *Sheela Sinharage v. The Attorney-General* [1985] 1 Sri LR 1.

It is manifest that the conditions set out in the proviso to Section 33 are fulfilled in this case, as the parties and the issues are the same and the Respondents had the right and the opportunity to cross-examine Mr. Kahatapitiya in the course of the first trial. I have compared the 13 issues formulated at the first trial with the 23 issues raised at the second, and though the issues settled in the second trial are more elaborate, they are substantially similar and Mr. Kahatapitiya, as the notary who prepared the impugned deeds and before whom it was executed, is definitely an important witness to answer the said issues. The only question that arises for determination in this appeal is, therefore, whether the trial court had any discretion not to apply Section 33 in the peculiar circumstance that although all conditions for its application were fulfilled, the untimely death of Mr. Kahatapitiya has defeated the judicially conceived objective of providing him with the opportunity of explaining his conduct as a notary in the context of the above mentioned issues.

In this connection, it is relevant to note that E. R. S. R. Coomaraswamy, *The Law of Evidence*, Vol. I, at pages 492-493 states as follows:

> "The court has to exercise the power given in Section 33 with great caution and must insist on strict proof before holding that the witness is dead or cannot be found or has become incapable of giving evidence or has been kept out of the way by the adverse party or his presence cannot be secured without an unreasonable amount of delay and expense. But once any of the first four conditions of death, not being found, incapacity to give evidence or being kept out of the way by the adverse party has been proved, *the court has no discretion* and must admit the deposition, since Section 33 declares such deposition to be relevant and, therefore, admissible." (*emphasis added*).

Coomaraswamy concedes that a court of law does have the discretion with respect to the last condition in Section 33 relating to a witness whose presence in court cannot be obtained without an amount of delay or expense which "*the court* considers unreasonable". The present case does not arise from such a situation, and there is no way in which the dead witness can be made to give evidence. Accordingly, I am firmly of the opinion that Section 33 of the Evidence Ordinance is applicable in the circumstances of this case, and that the Court had no discretion in the matter.

The only reason adduced by the District Court for rejecting the application to adopt the testimony previously given by Mr. Kahatapitiya was that the expectation of the Court of Appeal that the Respondents could confront Mr. Kahatapitiya with his convictions, in

the light of which he too could clarify his conduct as notary, had been frustrated by his death. In my view, too much cannot be made out of this expectation, as it is difficult to predict how Mr. Kahatapitiya would have fared or what he would have had to say in regard to his conduct as notary, if he had been able to testify at the second trial. It is trite law that subject to any statutory exception, evidence that a person has been convicted on a charge arising out of the same incident as that on which the civil claim is based is not admissible to establish his liability in the civil suit, because as pointed out by Goddard, L.J. in *Hollington v. F. Hewthorn and Co. Ltd.,* [1943] 2 All E.R. 35 at page 40, in the context of an appeal on a damages action arising from a road accident, –

> "The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court: it cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision."

Hence, as Goddard, L.J. observed in the said judgement at page 40, "on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant". Of course, the application of the *Hollington* principle has been curtailed in Sri Lanka by Sections 41A, 41B and 41C of the Evidence Ordinance introduced by Section 3 of the Evidence (Amendment) Act No. 33 of 1998, but since the conviction of Mr. Kahatapitiya was not a fact in issue in the instant case and none of the other new provisions are applicable thereto, the conviction will not have any relevance to the case. When Mr. Kahatapitiya testified at the first trial he was asked in cross-examination about the prosecutions that were then pending against him in the Magistrates' Court, and it was open to the Respondents to have led evidence regarding any facts that may have been relevant relating to his conduct as a notary in general, and the fact that he had subsequently been convicted in those cases cannot add any value to his cross-examination so as to make any difference.

Furthermore, it is clear from the judgement of the Court of Appeal in *Hilda Jayasinghe v. Francis Samarawickrema* [1982] 1 Sri LR 249, that the appellate court set aside the decision of the District Court and directed a fresh trial primarily on the basis that the learned District Judge had misdirected himself on certain factual matters and had erred in considering deeds 4779 (P3) and 4880 (P4) as having been duly executed despite the failure of either of the two attesting witnesses to give evidence, and the possibility of clarifying matters giving rise to the said convictions were only incidental and were not sought to be imposed by the Court of Appeal as a condition precedent for the adoption of the testimony of Mr. Kahatapitiya. I therefore hold that the District Court clearly erred in refusing to adopt his evidence recorded in the first trial upon proof of his death, and the Court of Appeal aggravated the situation by failing to take into consideration this vital deposition which was already part of the record.

The Quantum of Proof in Civil Cases Involving Fraud

I shall now come to the first of the two questions on which special leave to appeal has been granted by this Court, namely, did the Court of Appeal err in holding that P4 was *fraudulently* executed when the same has not been proved with the high degree of proof required to prove fraud? In dealing with this question it is necessary to consider whether the decision of the Court of Appeal turned on mere due execution of the impugned deeds or whether it also involved the question of fraud. It is important to observe at the outset that the Court of Appeal has concluded that the Appellant "had

failed to establish *due execution* of his title deeds 4879 (P3) and 4880 (P4)" and that therefore he cannot maintain his action "which is one of declaration of title based upon deeds 4879 (P3) and 4880 (P4)", and that in arriving at this conclusion the Court has not expressly considered the question of the quantum of proof required to prove a civil case involving fraud.

Learned President's Counsel for the Appellant submits that the decision of the Court of Appeal involved a finding of fraud, and that the Court had erred in applying the ordinary standard of preponderance of probability to the facts and circumstances of this case. On the other hand, learned President's Counsel for the Respondents submits that the Court of Appeal, in arriving at its decision, has not made any finding that there was fraud, and the basis of its decision was that the Appellant has failed to discharge the burden placed on him by law to show that the impugned deeds P3 and P4 had been duly executed, and that this decision did not encompass a finding of fraud. He has further submitted that even in a civil case involving fraud the applicable standard of proof is a balance of probabilities.

In order to determine whether the decision of the Court of Appeal involved a finding of fraud, it is necessary to consider the issues that arose for determination in the case. The 23 issues on which the case went to trial for the second time were settled on 9th May 1988 and are found in pages 450 to 456 of the Appeal Brief. It will be seen that issues 13 to 18, which are reproduced below, seek to establish that Mr. Kahatapitiya perpetrated a fraud on the Respondents and the 3rd Defendant by converting blank papers on which he obtained their signatures and thumb impression into the impugned deeds 4779 (P3) and 4880 (P4) on which the Appellant claims title to the property in suit:

"13& 1976'3'24 fyda Bg wdikak oskloS js;a;slrejkaf.a iy ush.sh js;a;sldrshf.a w;aik ysia lvodis fld, 3lg by; lS lygmsgsh uy;d jsiska ,ndf.k weoao@

14& tfia w;aika ,nd f.k we;af;a wxl 4753 ork fmdfrdkaÿ Tmamqfjs whs;sh meusKs,slreg mejrSfus kHdfhkao @

15& tfia ysia lvodis j,g w;aika lr we;af;a lygmsgsh uy;d flfrys ;snQ wp, jsYajdih u;o @

16& wxl 1 iy 2 js;a;slrejka g by; lS wxl 4880 ork Tmamqfjs i|yka m%;sYaGd uqo,a ,nd we;ao @

17& by; lS wxl 4880 ork Tmamqj fm%davdldr mejrSulao @

18& th meusKs,slre yd t,a' cS' lygmsgsh fkd;drsia uy;df.a jxl iyfhda.S ls%hdjl m%;sM,hlao @"

These issues demonstrate that the question of fraud loomed large at the trial, and in particular issue 17, which was identical with issue 10 framed at the first trial, specifically raised the question "Was Deed No. 4880 (P4) a fraudulent transfer?" Furthermore, issue 18 sought to assert that the said deed was the product of fraudulent collusion between Mr. Kahatapitiya and the Appellant. It is relevant to note that both these issues were answered in the negative by the learned District Judge in his judgement dated 16th June 1993, by which he granted relief to the Appellant as prayed for in the plaint on the basis

that the impugned deeds P3 and P4 were duly executed. It was this decision that was overturned by the Court of Appeal.

In my considered view, it is not possible to decide the question of due execution of the impugned deeds without dealing with the allegation of fraud leveled against the notary, as these issues are so closely interwoven and cannot be extricated from one another. This becomes clear from the following crucial passage in the judgment of the Court of Appeal appealed from:

> "Let us now examine the evidence to see whether the plaintiff-respondent had established due execution. As Notary Public Kahatapitiya was dead his evidence was not available at the second trial only the evidence of Dharmasena one of the attesting witnesses was available with regard to due execution of deeds No. 4879 and 4880 (P3) and (P4). Therefore it appears that the plaintiff-respondent [present Appellant] has not established due execution of deeds No. 4879 (P3) and 4880 (P4), in terms of the decision of Tambiah, J. in *Hilda Jayasinghe v. Francis Samarawickrame (Supra)."*

The Court of Appeal has itself referred to the decision of the Court of Appeal in *Hilda Jayasinghe v. Francis Samarawickrame* [1982] 1 Sri LR 249, which arose from the first trial, in regard to the question of due execution of the impugned deeds. That decision is helpful in understanding the background to the questions that arose for determination in the second trial, and shed some light on the question of proof of due execution of the impugned deeds. At page 359 of the said judgment, Tambiah, J., after citing a passage from Sarkar's *Law of Evidence,* went on to observe that –

> "The two cases *(Baronchy Appu and Seneviratne, supra)* illustrate the distinction drawn by Sarkar in the passage cited, between the mode of proof of a document required to be attested and the quantum of evidence required to prove such a document. The principles laid down in both cases are not in conflict with each other and can be reconciled. *Seneviratne's* case was concerned with the *mode of proof*; it decided-that the notary is an attesting witness and is competent to prove the execution of the document if he knew the maker of the document. *Baronchy Appu's* case was concerned more with the *quantum of evidence* required. The principle to be discerned from the judgment of Lawrie, A.C.J. is that where *the execution of a deed is challenged on the ground that it had been signed before it was written*, then, where at least one of the two attesting witnesses is alive, the evidence of the notary alone, even where he knew the executant is not sufficient; at least one of the two attesting witnesses should also be called.
>
> *The case of the defendants-appellants is that Mr Kahatapitiya fraudulently obtained their signatures and thumb impression on blank papers which were subsequently filled up in the form of a deed of sale* (P4); that no consideration passed and that the two attesting witnesses were not present at the time of the execution. The circumstances of this case require that one of the two attesting witnesses be called, in addition to the notary. To use the words of Lawrie, C.J., "the case is incomplete" without him." *(emphasis added)*.

What Tambiah, J. was saying in the above passage is that where fraud is alleged against the notary, his evidence standing alone does not satisfy the "quantum of evidence"

required by law to prove due execution, and that one or both attesting witnesses, provided they are living and able to testify, must be called to the witness box. Although his Lordship did not expressly say so in that judgment, it follows as a natural corollary to what he did say, that where one or both attesting witnesses have testified, the evidence so elicited has to be assessed adopting the standard of proof applicable to a civil case involving allegations of fraud.

Section 101 of the Evidence Ordinance deals with the burden of proof in cases, and lays down that who ever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. This provision is based on the rule *ei incumbit probation quit dicit, non qui negat,* and as Lord Maugham observed in *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corp. Ltd.* [1942] A.C. 154; [1941] 2 A.E.R. 165 "it is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons". Accordingly, the legal burden of proving all facts essential to his claim ordinarily rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings, and it was therefore the burden of the Appellant in this case to prove due execution of the impugned deeds on which he based his claim to title. As it is apparent from Section 102 of the Ordinance, the Appellant's action would be liable to be dismissed if he fails to discharge this legal burden.

While the legal burden to prove his claim in a civil action generally rests on the plaintiff, it is expressly provided in Section 103 of the Evidence Ordinance that the burden of proof if any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person. As the two illustrations provided in Section 103 are from criminal prosecutions, it might be useful to quote from E.R.S.R. Coomaraswamy's *The Law of Evidence* Vol II, Book 1 page 259 in which it is stated that-

> "Numerous illustrations may be given from civil cases to illustrate the application of Section 103. Where a deaf and dumb person has executed a deed, conveying immovable property to another, and the notary (since dead) has stated in his attestation that he read over and explained the instructions to such person, the burden on such person, when he challenges the validity of the deed for want of proper understanding as to its purport at the time of execution, is a heavy one."

This illustration is derived from the decision of this Court in *Subramaniam v. Thanarase* 61 NLR 355, in which the Supreme Court considered the declaration made in the attestation clause by the notary, who was dead when the case went into trial, that he read over and explained the instructions to the executant would be *prima facie* evidence of the truth of that declaration. This was not a case where fraud was alleged, and the only issue was whether the executant of the deed, being deaf and dumb, understood the purport of the deed, but nevertheless it is a useful decision that illustrates the principle that a defendant who relies on a particular fact has the burden of proving such fact. Accordingly, in the context of the present appeal, it may be said that while the burden is on the Appellant to prove due execution of the impugned deeds, it is the burden of the Respondents to show that its execution was tainted with fraud.

So much for the burden of proof, but it is now necessary to deal with the *standard* of proof. In this context, it is important to remember that unlike a criminal case, which has

to be proved beyond reasonable doubt, a civil claim may be decided on a preponderance of evidence or on a balance of probabilities. Adverting to this fundamental distinction, Denning, J., in *Miller v. Minister of Pensions*, [1947] 2 A.E.R. 372 observed at pages 373 – 374 that the standard of proof in a criminal case was proof beyond a reasonable doubt, which carries a high degree of probability, but "does not mean proof beyond the shadow of a doubt" to the exclusion of even "fanciful possibilities." He went on to observe that by contrast, proof in a civil case –

> "….must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, 'we think it more probable that not', the burden is discharged, but if the probabilities are equal it is not."

The English courts have taken the view that the standard of proof required for a criminal offence in civil proceedings is not higher than the standard of proof ordinarily required in civil proceedings, (vide *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247, [1956] 3 W.E.R. 1034; [1956] 3 Q.E.R. 970 – C.A; *Re Dellow's Will Trusts* [1964] 1 W.L.R. 451; *Post Office v. Estuary Radio* [1967] 1W.L.R. 847; *Nishina Trading v. Chiyoda Fire Co.* [1969] 2 Q.B. 449) but within that standard, as Denning, L.J., put it in *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. …… at page 258, "the more serious the allegation the higher the degree of probability that is required." The degree of proof depends on the subject matter, and as Denning L.J. observed in *Bater v. Bater* [1951] P. 35 at 37-

> "A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking itself if negligence is established. It does not expect so high a degree as a criminal court even when it is considering a charge of a criminal nature; but it still does require a degree of probability which is commensurate with the occasion."

Our Evidence Ordinance does not anywhere draw the distinction between the two standards of proof in criminal and in civil cases, but our courts have recognized and consistently applied the English distinction. The key to the question lies in the definitions of "proved" and "disapproved" in Section 3 of the Evidence Ordinance, which postulate either belief or a consideration of its existence being so probable that a prudent man ought under the circumstances of the particular case, to act on the supposition that it exists or does not exist. It is legitimate to presume that in a criminal case the prudent man would require a very high degree of proof – proof beyond reasonable doubt, whereas in a civil case, he would not require the same high standard, and would be satisfied if the fact is more probably than not.

The first question that arises in this appeal is simply what is the standard applicable to the proof of fraud in civil proceedings in Sri Lanka? In *Lakshmanan Chettiar v. Muttiah Chettiar* 50 NLR 337, which was a civil action filed by a professional money lender against his agent claiming that he had fraudulently and in breach of trust assigned a decree made in his favour to a third party without any consideration, the court had to decide whether the assignment was fraudulent, and Howard, C.J. (with Canakaratne, J. concurring) held that the standard applicable to the proof of fraud was the criminal standard. His Lordship observed at page 344, that "fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt" as such a finding "cannot be based on suspicion and

conjecture." This decision was followed in *Yoosoof v. Rajaratnam* 74 NLR 9, in which in the context of an inquiry under Section 325 of the Civil Procedure Code, G.P.A. Silva A.C.J., observed at page 13 that-

> "Both principle and precedent would support the view that when a transfer is effected for valuable consideration the burden of proving that it was fraudulent rests on the plaintiff in these circumstances. It is an accepted rule that such a burden even in a civil proceeding must be discharged to the satisfaction of a Court. For that degree of satisfaction to be reached, the standard of proof that is required is the equivalent of proof beyond reasonable doubt."

However, in *Associated Battery Manufacturers (Ceylon) Ltd. v. United Engineering Workers Union* 77 NLR 541 at 544, and *Caledonian Estate Ltd., v. Hilaman* 79 - 1 NLR 421 at 426, it has been observed by this Court that allegations of misconduct in labour tribunal proceedings may be proved on a balance of probabilities. It is clear from these decisions that while the civil standard is generally applicable, the more serious the imputation, the stricter is the proof which is required. As explained by Lord Nicholls in *Re H (Minors)* [1996] AC 563, at page 586 –

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that on the evidence, the occurrence of the event was *more likely than not.* When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case, that *the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability*. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury."(*emphasis added*).

Explaining the principles enunciated by the courts in this regard, *Phipson on Evidence* (16th Edition – 2005) at page 156, emphasizes that "attention should be paid to the nature of the allegation, the alternative version of facts suggested by the defence (which may not be that the event did not occur, but rather that it occurred in a different way, or at someone else's hand), and the inherent probabilities of such alternatives having occurred."

It is necessary to bear these principles in mind in examining the relevant evidence to answer the main question that arises on this appeal: has the Appellant discharged the burden placed on him by law to prove the due execution of the impugned deeds P3 and P4? As already noted, this question is intrinsically linked to another question: have the Respondents discharged their burden to show that the execution of Deed No. 4880 (P4) was tainted with fraud? It is common ground that on 24th March 1976, the 1st and 2nd Defendant-Appellant-Respondents placed their signatures and the 3rd Defendant-Appellant-Respondent placed her thumb impression on certain sheets of paper which were presented to them by Mr. Kahatapitiya at his residence, and the parties are at variance only in regard to the nature of the transaction and the manner in which the deeds in question were executed.

The Appellant in his testimony claimed that what the parties signed were duly perfected deeds bearing Nos. 4779 (P3) and 4880 (P4) intended to transfer title in the land

constituting the subject matter of this appeal to the Appellant. According to him, the Respondents, who were related to him and who were his neighbors, approached him with a view to selling the land in questioned which he agreed to buy for Rs. 8000/-. The Appellant has also testified that on 24th March 1976, when by prior arrangement, he went to the residence of Mr. Kahatapitiya, the said Respondents and Defendant were already there and the deeds were prepared only thereafter. According to the Appellant, in view of the conveyance in favour of Yasantha Ajith Kahatapitiya effected by Deed No. 4753 (P2) two deeds had to be prepared, one to retransfer the title from Yasantha, the minor son of Mr. Kahatapitiya to the 1st and 2nd Defendant-Appellant-Respondents and the 3rd Defendant, and the other, for the latter to convey the title to the Appellant. At pages 498-499 of the Appeal Brief, his testimony regarding the financial aspect of the transaction was as follows:-

> "tosk uu re' 8000$- la ÿkakd ux ys;kafka' uu re' 8000$- ;a wrf.k .shd' Tmamq ,Sjsjd' uu uqo,a ÿkakd iagSjka chisxyg' ^2 jeks js;a;s;reg&' Tyq ta uqo,ska re' 3752$- la ÿkakd t,a' cS' lygmsgsh uy;dg' fmdfrdkaÿ iskaklalf¾g wjYHh uqo,q;a" fkd;drsia .dia;=;a" fmd<sh;a i|yd th ÿkafka'

His position was that he took with him Rs. 8000/- , which he paid to the 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe out of which Jayasinghe paid Rs. 3,752/- to Mr. L. G. Kahatapitiya as money payable to secure the retransfer of title in terms of P2, which included interest and notarial charges. He further testified that while Yasantha Ajith Kahatapitiya placed his signature on P3 the said Respondents signed and the Defendant placed her thumb impression on Deed No. 4880 (P4) by which they conveyed their title to him by way of sale.

The version of the Respondents is that they were under the impression that their title to the property in question had been transferred by Deed No. 4753 dated 12th August 1975 (P2) to Mr. L.G Kahatapitiya and not to his minor son Yasnatha Ajith Kahatapitiya; that on 24th March 1976, they signed printed deed forms commonly used for the making of deeds with several blank spaces, in the expectation that the signed papers will be perfected by Mr. Kahatapitiya to constitute an assignment of what they thought were his rights under the said Deed No. 4753 (P2) to the Appellant; that there was no intention to sell the property outright to the Appellant; that in the circumstances no money changed hands at the time of signing these papers; and that the 2nd Defendant-Appellant-Respondent was not present at the time when the 1st Defendant-Appellant-Respondent signed the papers and the 3rd Defendant placed her thumb impression thereon. Both Respondents were consistent in their testimony that what they signed were printed deed papers with unfilled blanks. Elaborating on this position, the 2nd Defendant-Appellant-Respondent stated in evidence (at page 625 of the Appeal Brief) that he signed on "Tmamq ,shk ysia fld,j," in which there were unfilled blanks which he described saying: "ysia;eka ;sfnkjd' ta ysis;eka mqrjd keye'"

The 1st Defendant-Appellant-Respondent testified to the same effect, but went on to assert an additional fact, which if true, might have contributed to her belief that the transaction was an assignment to the Appellant of the rights of Yasantha Ajith Kahatapitiya under Deed No. 4753 (P2) and not an outright sale, namely that the deed formats were in the English language. She described the papers she signed in the following words:

"wms w;aika l,d ysia Tmamq fld, j,g' uql=;a ,sh,d ;snqfka keye' bx.s%isfhka tfyu ,sh,d ;snqkq wÉpq .ymq fld,hl mukhs" ta wjia:dfjs uu w;aika lf,a' ta wjia:dfjs uu w;aika lf,a W.ig' jslsKSula lshd uu oek isgsfha keye'"
(page 631 of the Appeal Brief)

The learned District Judge has accepted the Appellant's story and rejected the version presented by the Respondents. An important fact that the learned District Judge took into consideration was that, apart from the signatures of the two attesting witnesses and Mr. Kahatapitiya, nothing was written on Deed No. 4880 (P4) in the English language. Not only was the entire deed P4 in the Sinhalese language, it commenced with the Sinhalese words "iskaklalrh re"""""""""""""""""""""""", printed in large letters, with the space meant for indicating the amount filled using a typewriter with the figure "8000/=". Even if one assumes that the amount had not been filled in at the time the deed was signed by the Respondents, the deed format in the Sinhalese language, which they well understood, clearly showed that it is an outright sale. The printed deed format refer to the executants as "jsl=Kqïldr" and also include words such as "fuhska iskaklalrfha jsl=Kd whs;slr" ysuslr" mjrd Ndr ÿks"""""", which clearly militate against the version of the Respondents that they genuinely believed that the transaction was an assignment by Mr. Kahatapitiya of his rights under Deed No. 4753 (P2), and not an absolute sale of the property.

It is also relevant to note that the learned District Judge has concluded in the light of all the evidence, documentary and oral, placed before the District Court in the second trial, that the executants as well as the attesting witnesses of the impugned deeds had placed their signatures on the deeds in the presence of the notary, and that the said deeds were duly executed. When reversing this decision of the learned District Judge. the Court of Appeal (at page 6 and 7 of the judgement) has highlighted the following three factors as lending credence to the story of the Respondents that deed No. 4753 (P2) was a conditional transfer and signatures on deeds 4879 (P3) and 4880 (P4) were obtained in blank sheets before they were written into deeds on the pretext of assigning the conditional transfer P2 to the Appellant:-

1) The execution of deed No. 4753 of 12th August 1975 (P2) as a conditional transfer in the name of son of Kahatapitiya who was a minor, when the respondents needed money from Kahatapitiya and expected Kahatapitiya to be the transferee.

2) Before the effluxion of three years specified in the deed, Kahatapitiya calling for repayment of the loan from the respondents.

3) Kahatapitiya was found guilty of not forwarding duplicates of deeds and not sending weekly and monthly returns to the Registrar General.

The circumstance in which Mr. Kahatapitiya advanced a loan of Rs. 3,500/- to the Respondents and the 3rd Defendant, utilizing money deposited in a pass book opened in the name of his minor son, Yasantha Ajith Kahatapitiya, and the execution of the deed P2 in his favor was explained by Mr. Kahatapitiya when he testified in the first trial (vide page 242 of the Appeal Brief). It is unfortunate that the District Court refused an application to adopt this evidence under Section 33 of the Evidence Ordinance upon the death of Mr. Kahatapitiya being brought to the notice of Court, and I have to add with great respect, that it is even more unfortunate that the Court of Appeal concluded that

these circumstances support the position taken up by the Respondents, without taking into consideration the testimony of Mr. Kahatapitiya. In fact, he has expressly stated in evidence that he informed the Respondents and the 2nd Defendant-Appellant-Respondent that the deed will be executed in his son Ajith's name, which position was denied in the first trial by the Respondents, but was accepted by the learned District Judge as credible. It is significant that Ajith who was born on 13th April 1964, filed his answer dated 22nd September 1986 in the District Court after he attained majority, and specifically admitted in paragraph 4 of the said answer that upon the sum of money advanced by him and interest been repaid, he had on 24th March 1976 by deed No. 4879 (P3) re-conveyed title in the property in question to the Respondents.

In regard to the view expressed by the Court of Appeal, that calling for the repayment of the loan before the expiry of the 3 year period stipulated in P2, supports the position that P3 and P4 were fraudulently executed, I say with great respect that I cannot agree for several reasons. In the first place, Mr. Kahatiapitiya has vehemently denied that he demanded the money within a few months of the execution of P2, and it is his position that the Respondent wanted to sell the property outright as they needed the money. In any event, it is unreasonable to attribute to Mr. Kahatapitiya an intention to defraud the Respondents even if he had wanted the money back before the effluxion of the 3 year period, as any failure on the part of the Respondents to repay the sum advanced with interest within the said period would only have benefited Mr. Kahatapitiya's minor son, who would have become the absolute owner of the property. Furthermore, the fact that Mr. Kahatapitiya was found guilty of failing to comply with the provisions of Section 31 of the Notaries Ordinance is altogether irrelevant to this case for the reasons already noted, and in any event, would not affect the validity of deeds P3 and P4 as Section 33 of the Notaries Ordinance expressly provides that "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".

In this connection, it is also relevant to note that the Court of Appeal has considered the discrepancy in the date of attestation of deed No. 4880 (P4) as an additional factor that supports the Respondent's story that Mr. Kahatapitiya fraudulently fabricated the impugned deed P4. Learned President's Counsel for the Respondents has highlighted the fact that on the first page of P4 the date of attestation is given as 24th March 1976, but the attestation clause on the last page gives the date as 24th April 1976, the existence of which discrepancy was admitted by witness Upamalika Wijesooriya, a clerk of the Land Registry, Kalutara, who was called to give evidence by the Appellant himself. However, the said witness has produced marked P9 (at page 556 of the Appeal Brief) the deed attested by Mr. Kahatapitiya bearing No. 4881 which is dated 25th March 1976, which corroborates the evidence of Mr. Kahatapitiya recorded in the first trial (at page 239-240 of the Appeal Brief) that the said discrepancy was caused by a "typing error". Wijesooriya also produced marked "jS2" the Register maintained at the Land Registry which shows that deed No. 4880 (P4) was registered on 30th June 1976 ahead of deed No. 4879 (P3) which has been registered only on 8th July 1976.

It is significant that in the plaint filed by the Appellant as well as in his testimony, he has stated that the deed P4 was executed on 24th March 1976, and even the Respondents have admitted the fact that they signed the so called "blank papers" on this date. The only attesting witness who testified at the second trial, Dharmasena, has also stated in his evidence that the deed was executed, signed and attested on 24th March 1976. It is also

relevant to note that 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe, has signed an endorsement across the protocol of P4 to the effect that "wo osk isg udi folla (24-5-76) hkakg m%:u ïïmQ¾K N=la;sh Ndr fokjd we;", which tends to show that the deed was executed on 24th March 1976. None of this material has been considered by the Court of Appeal.

Learned Counsel who appeared for the Respondents in the original court as well as in the appellate proceedings have argued that all executants of the impugned deed P4 did not sign the deed at the same time and no consideration passed and that the deed was therefore not duly executed. The Respondents have testified that when summoned by Mr. Kahatapitiya to sign the deed, the 2nd Defendant-Appellant-Respondent stayed at home to look after the sister's baby and sent his sister, the 1st Defendant-Appellant-Respondent, and his mother, who is the original 3rd Defendant, to sign the deed, and that he went to Mr. Kahatapitiya's residence and signed the deed only after they returned home. Although the learned District Judge has dealt with this aspect of the matter, the Court of Appeal, surprisingly, has not. During the argument of this appeal, learned President's Counsel for the Respondents relied heavily on the following answer given by Dharmasena, the only surviving attesting witness to the impugned deed, to a question put to him under cross-examination (at page 570 of the Appeal Brief) with respect to the persons present at the time of execution of the impugned deeds –

"m% : Th wjia:dfjs ljqo ysgsfha ?
W : uu" lygmsgsh uy;d" ikafodarsia" ys,avd" frdia,ska" lygmsgsh uy;df.a mq;d Th lÓgsh ysgshd"'

It was stressed by Counsel that the omission, on the part of Dharmasena, to name the 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe, is significant in view of the requirement of Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 that any party making a sale and transfer of immovable property shall place his or her signature "*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." As against this, learned President's Counsel for the Appellant has submitted that witness Dharmasena was not questioned specifically regarding the 2nd Defendant-Appellant-Respondent's presence on that occasion, nor was it put to him in cross-examination that he was not present at the time the other two executants placed their signatures on the deed P4. He has invited the attention of Court to the examination in chief of Dharmasena where he had categorically stated that the three executants of P4 were present when the contents of the deeds were explained to the parties and they placed their signatures thereon. The evidence reads as follows:-

"m% : fuh w;aika lrk wjia:dfjs ;ud ysgsho ?
W : TÚ' Tmamqj lshjd ÿkakd jsl=Kqïlrejkag' uu;a wks;a idlaIslre;a isgshd' ta jsl=Kqïlrejka 3 fokd w;aika l,d' uymgeÕs,s i,l=Kla ;sfnkjd frdia,ska fmf¾rdf.a th"' (at page 565 of the Appeal Brief)

Learned President's Counsel has also emphasized that a few minutes prior to putting the particular question which elicited the answer on which so much reliance is placed by the Respondents, he had been asked in cross-examination (at page 569 of the Appeal Brief) about the signing of the impugned deeds and who were present at that time, and he had stated that all those whose signatures and thumb impressions appear in the deeds were

present. It is also significant that the learned Counsel for the Respondents failed to suggested to the Appellant in cross-examination that the 2nd Defendant-Appellant-Respondent was not present at the time the deeds were signed, in the face of the Appellant's testimony at page 499 of the Appeal Brief, which was as follows:-

> "uu Tmamq w;aika lrk wjia:dfjs ysgshd' uq,ska w;aika lf,a uu ys;kafka''''''''''iAgSjka' B,Õg ys,avd chisxy' wïud wka;sug w;aika lf,a' wxl 4880 orK Tmamqjg uu w;aika l,d' msgm;a 3g w;aika l,d' tajd ysia tajd fkdfjhs' idlaIs jYfhka ikafodarsia iy Ou_fiak uy;=ka w;aika l,d'"

I must confess that I cannot fault the learned District Judge for disbelieving the story of the Respondents that the 2nd Defendant-Appellant-Respondent did not go with the other executants to sign the deed and remained at home to look after the sister's baby, as the 2nd Defendant-Appellant-Respondent who is the bread winner to his family, has been an active and vigilant individual, who had after discovering the alleged fraud committed on them by Mr. Kahatapitiya, had gone by himself to the Land Registry in Kalutara to verify the situation about the registration of the impugned deed and had also complained to the Police about the alleged fraud. By nature, he is not the type of person who would baby-sit while his sister and mother were signing an important deed.

In this context, it is noteworthy that the most important reason advanced by the Court of Appeal to set aside the decision of the District Court in the second trial was the insufficiency of evidence that the monetary consideration for the execution of the impugned deeds had been paid. It was the position of the Respondents and the original 3rd Defendant that no payment was made to them or to Mr. Kahatapitiya or his son during the time when they were present at the residence of Mr. Kahatapitiya and singed the blank papers. As against this, the Appellant has testified that he took Rs. 8,000/- with him and he paid that sum to the 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe who paid Rs. 3,752/- to Mr. Kahatapitiya and kept the balance sum, which according to my calculation amounts to Rs. 4,248/-. This conflict of testimony presented the District Court with two versions, that of the Respondents that no money changed hands, and that of the Appellant that Rs. 8,000/- was paid, and the District Court has accepted the Appellant's version as the more plausible, only to be reversed by the Court of Appeal.

The Court of Appeal has highlighted the admission made by witness Dharmasena that while he was at the residence of Mr. Kahatapitiya, he did not observe any monetary transaction. At page 577 of the Appeal Brief, Dharmasena answered the question put to him as follows:-

> "m% : i,a,s .kqfokq .ek ;ud okafka keye ?
> W : keye". uu jskdvs 15la muK ysgshd' uu w;aika lr .shd' Tmamqj ,shd w;aika lrk ;=re uq, isg w.gu uu ysgshd'"

The Court of Appeal has in its judgment stressed that this evidence is contradictory to the attestation clauses in deeds No. 4879 (P3) and 4880 (P4), which state that consideration passed in the presence of the notary. Learned President's Counsel for the Respondents has referred us to the decision in *E. A. Diyes Singho v. E. A. Herath*, 64 NLR 492, where T.S. Fernando J observed at pages 494-495 that he is "unable to agree that proof of the existence of a statement in the deed or instrument by the notary that

consideration was paid is sufficient to establish the truth of the payment of such consideration", in the context of a case involving the issue of prior registration in which proof of valuable consideration was indispensable for a subsequent deed to receive priority. Consideration may not be an ingredient to prove "due attestation", but in a case such as this, where the question is whether the execution of the impugned deeds was tainted with fraud, proof of payment of the amounts stated as consideration for the execution of the deeds may be equally relevant.

However, it is necessary to bear in mind that according to Dharmasena, he was present at Mr. Kahatapitiya's residence only for about 15 minutes, and that he left the place soon after the deeds were signed. The evidence of the Appellant (at page 523 of the Appeal Brief) which is quoted below is that Dharmasena came while the deeds were being prepared.

m% : fldhs fj,dfjso ,Sfjs
W : / 7'00 g js;r' lygmsgsh uy;df.a f.oroS'
m% : ta fj,dfjs ysgsfha ljqo ?
W : uu" js;a;slrefjda" lygmsgsh uy;d" ikafodarsia ,shk uy;a;h ysgshd' wms jev lrf.k hk jsg Ou_fiak ,shk uy;a;h;a wdjd'"

According to the operative part of Deed No. 4880 the Respondents and the 3rd Defendant have acknowledged receipt of Rs. 8,000/-. Since it is in evidence that Dharmasena came to Mr. Kahatapitiya's residence while the deed was being prepared, it is possible that the consideration was paid before his arrival at a time when the deeds were being prepared or even prior to that. It is therefore unfortunate that the Court of Appeal did not consider that possibility as well as the evidence of Mr. Kahatapitiya led at the first trial that the consideration was paid in his presence, and the testimony of the Appellant to the same effect. It is also significant to note that the Appellant has categorically stated in evidence that he paid the money to the 2nd Defendant-Appellant-Respondent on the date of execution of the deed, and that the Respondents have failed to put to him in cross-examination that this position is false, if that be the case.

I find it difficult to believe the story of the Respondents that they signed the deed papers intending to transfer rights and obligations of Mr. Kahatapitiya under P2 to the Appellant and that no money was paid to them, when the word "iskaklalrh" was prominent in the papers they signed and they were aware that the land was surveyed by surveyor Premaratne a short time before, which should have made them realize that what was taking place was an outright sale. It is, in my view most likely that it is the prospect of getting approximately Rs. 4,248/- from the Appellant that motivated the Respondents and the 3rd Defendant to respond so readily to Mr. Kahatapitiya's request to come to his residence and sign the deed P4. It is also probable, that as claimed by the Appellant, the money was paid to the 2nd Defendant-Appellant-Respondent, which also explains the necessity for the Respondents to make up a story that the 2nd Defendant-Appellant-Respondent was prevented from being present when they signed the deed as he had to look after his sister's baby.

It is my considered opinion that the Court of Appeal should have taken into consideration the evidence of Mr. Kahatapitiya led at the first trial (at page 240 of the Appeal Brief) that the 2nd Defendant-Appellant-Respondent was present at the time of exchanging the deeds, and that he accepted the consideration. The Respondents had not

suggested to Mr. Kahatapitiya when he testified at the first trial that the 2nd Defendant-Appellant-Respondent was not present along with the other executants at the time of the execution of the impugned deeds. The Respondents have clung onto a very small part of the evidence of Dharmasena to assert that 2nd Defendant-Appellant-Respondent was not present at the time of the execution of the deeds, whereas on a consideration of the totality of the evidence it appears to be more likely than not that all three executants of P4 along with Yasantha Ajith Kahatapitiya who was the executant of P3 were present, and there was due attestation and execution of both deeds P3 and P4 as required by Section 2 of the Prevention of Frauds Ordinance. The Court of Appeal, when applying the standard of balance of probability to the facts in issue in this case, has also failed, in my view, to bear in mind the principle that the more serious the allegation the stronger the evidence that is required to establish the allegation, a matter which is of great importance in a case where the parties who have placed their signatures on deed formats, albeit with some blanks, are claiming that they have been defrauded by the notary.

An important submission that was made by learned President's Counsel for the Appellant is that the decision of the Court of Appeal that the Appellant has failed to prove due execution of the deeds P3 and P4 would have the effect of reviving the title of Yasatha Ajith Kahatapitiya to the property in question. This, no doubt would be altogether absurd as the latter has filed answer and got himself discharged from the action on the basis that he has no claim as he conveyed his title to the Respondents through P3. None of the Respondents nor any other party has prayed for the setting aside of the deed P2 by which the Respondents and the original 3rd Defendant have conveyed title to Yasantha Ajith Kahatapitiya, and in view of the effluxion of the 3 year period specified therein for making payment of the moneys mentioned therein as condition precedent for the re-conveyance, the latter will become the absolute owner of the property, unless the decision of the Court of Appeal is set aside.

While I am compelled by the foregoing to disagree with the assessment of the evidence made by the Court of Appeal and its ultimate decision, in doing so, I take comfort in the following oft-quoted words of Viscount Simon from the decision of the House of Lord in *Watt v. Thomas* [1947] 1 All E. R. 582, at pages 583 which were cited with approval by the Privy Council in *Munasinghe v. Vidanage* 69 NLR 97-

> "…….an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal

testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given".

In this case, which was commenced in the District Court of Kalutara more than 3 decades ago, there have been two trials, and both trial judges have come to the same conclusion in what I would regard as essentially the same factual scenario, even though the stories of the two sides were unraveled through different witnesses. The Court of Appeal has in this case failed to observe the time tested principle enunciated by James L.J. in *The Sir Robert Peel*, 4 Asp. M. L. C. 321, at 322 which was quoted with approval by Viscount Sankey L.C in *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243 at 248, that an appellate court-

> "will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour unless they find some governing fact which in relation to others has created a wrong impression."

I am of the opinion that in this case too the District Court had to choose between two conflicting versions of facts on the basis of credibility or demeanor of the witnesses who testified at the trial, and the circumstances outlined by the Court of Appeal to differ from the decision of the District Court were, with great respect, neither substantiated by the totality of the evidence presented in the case nor sufficiently convincing. In the factual context of this case, I therefore hold that the Appellant has discharged the burden placed on him by law to prove the due execution of the impugned deeds, and the Respondents have failed to discharge the burden placed on them by law to establish that P4 was executed fraudulently.

For the foregoing reasons, I am of the opinion that the two questions on which special leave to appeal has been granted should be answered in the affirmative. Accordingly, I allow the appeal, vacate the judgment of the Court of Appeal appealed from and affirm the judgment of the District Court dated 16th June 1993. I make no order for costs of appeal in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

HON. S. N. SILVA, C.J.
I agree.

CHIEF JUSTICE

HON. TILAKAWARDANE, J.
I agree.

JUDGE OF THE SUPREME COURT