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

Horathal Pedige Jayathilake also known as
Hettiarachchige Jayathilake

Plaintiff-Appellant-Petitioner-Appellant

SC Appeal 231/2014

SC/HCCA/LA No.175/2014
WP/HCCA/Gph 123/2008(F)
DC Attanagalla Case No.17/P

Vs

1. Horathal Pedige Jayarathne
2. Wijayalath Pedige Jayawathi Dayawathi
3. Horathal Pedige Upul Priyantha Deepthi
4. Horathal Pedige Jayathissa
5. Yoda Pedige Josi Nona
6. Horathal Pedige Nimalasiri Jayatissa
7. Horathal Pedige Leelaratne Jayatissa
8. Jeevananda Jayatissa
9. HA Keerthi Jayalath

Defendant-Respondent-Respondent- Respondents

Before : Priyasath Dep PC J
Sisira J De Abrew J
Anil Gooneratne J

Counsel : Damitha Karunaratne for the Plaintiff-Appellant-Petitioner-Appellant.
Sudarshani Cooray for the Defendant-Respondent-Respondent-Respondents

Argued on : 13.11.2015

Written Submissions
tendered on : By the Plaintiff-Appellant-Petitioner-Appellant on 23.1.2015
By the Defendant-Respondent-Respondent-Respondents on 25.5.2015

Decided on : 9.3.2016

Sisira J De Abrew J.

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) filed action in the District Court to partition the land described in the schedule to the plaint. The original owners of the land to be partitioned were Horathal Pedige Donchiya and Hewa Pedige Dingira. The said owners gifted 1/5th share of the land to Horathal Pedige Amarasinghe by deed No 13197 dated 30.3.1997. This deed was not challenged in this case. It was alleged by the Plaintiff-Appellant that said Horathal Pedige Amarasinghe gifted 1/5th share of the land to the Plaintiff-Appellant by deed No.1735 dated 13.6.2000 attested by TP Ranjani Ashoka Notary Public. It is noted that other transfer deeds in this case namely deed No.13188 dated 30.3.1997, deed No. 13199 dated 30.3.1997 and deed No.13200 dated 30.3.1997 were not challenged by either party. But the Defendant-Respondent-Respondent-Respondents (hereinafter referred to as Defendants) challenged the deed of gift No.1735 dated 13.6.2000 wherein Horathal Pedige Amarasinghe is alleged to have gifted 1/5th share of the land to the Plaintiff-Appellant.

The defendants took up the position that by deed No.1735 dated 13.6.2000 no rights had passed to the Plaintiff-Appellant as the said deed was not an act of

Horthal Pedige Amarasinghe who died unmarried and issueless and that accordingly rights of Horthal Pedige Amarasinghe should devolve on his brothers and sisters who are the 1st defendant, 4th defendants, Seelawathi, Sirinimal and the Plaintiff-Appellant. After trial the learned District Judge rejected the deed No.1735 dated 13.6.2000. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Appellant appealed to the Civil Appellate High Court. The Civil Appellate High Court, by its judgment dated 4.3.2014, affirming the judgment of the learned District Judge, dismissed the appeal. Being aggrieved by the said judgment, the Plaintiff-Appellant has appealed to this court. This court by its order dated 28.11.2014 granted leave to appeal on the questions of law set out in paragraph 13(a) to (e) of the petition of appeal which are reproduced below.

1. Did the Honourable judges of the Civil Appellate High Court of Gampaha err in law by not considering the fact that the Notary TP Ranjani gave evidence stating that she knew the executant and that the executant signed deed No.1735 in her presence?

2. Did the Honourable judges of the Civil Appellate High Court of Gampaha err in law by refusing to accept the evidence of TP Ranjani Notary Public in relation to the execution of the deed No.1735 in the circumstances of the case?

3. Did the Honourable judges of the Civil Appellate High Court of Gampaha err in law by not considering the fact that the Notary TP Ranjani was an impartial independent witness?

4. Whether the Honourable judges of the Civil Appellate High Court of Gampaha err in law by not considering that the respondents did not call any

independent witnesses to show that the executant Amarasinghe could not sign since he was illiterate?

5. Whether the deed No 1735 executed by the TP Ranjani Notary Public is in conformity with the provisions of the Evidence Ordinance?

The most important question that must be decided in this case is whether the deed of gift No 1735 dated 13.6.2000 was an act by Horthal Pedige Amarasinghe or not. In other words whether the deed of gift No 1735 dated 13.6.2000 was a fraudulent deed. If the deed of gift No 1735 dated 13.6.2000 was not an act by Horthal Pedige Amarasinghe or it was a fraudulent deed, the appeal of the Plaintiff-Appellant should fail. I now advert to these questions. The Defendants challenged the deed of gift No.1735.

It is undisputed that Horthal Pedige Amarasinghe is the brother of the Plaintiff-Appellant and the 1st and the 4th defendants and that said Amarasinghe was a disabled person. The Plaintiff-Appellant in his evidence says that Horthal Pedige Amarasinghe could sign. TP Ranjani Ashoka the Notary Public who attested the deed No.1735 too says, in her evidence, that Horthal Pedige Amarasinghe placed his signature on the deed before her. But the 1st Defendant Horathal Pedige Jayarathne, in his evidence, says that his brother Horthal Pedige Amarasinghe who was a disabled person could not sign and write. He further says, in his evidence, that when his parents gifted 1/5th share of the land in question to Horthal Pedige Amarasinghe by deed No. 13197, he (the 1st Defendant) placed his signature on the deed on behalf of Horthal Pedige Amarasinghe as the said Horthal Pedige Amarasinghe could not sign. He has identified his signature on the deed. He placed his signature to show the acceptance of the gift by Horthal Pedige Amarasinghe. When I examined the above evidence, I am of the opinion that the 1st

Defendant has clearly established that Horthal Pedige Amarasinghe was a person who could not sign. In considering truthfulness of this evidence one must not forget the claim of the defendants. The claim of the Defendants was that the rights of Horthal Pedige Amarasinghe should devolve on all brothers and sisters. In the light of this evidence how can anybody accept Notray's evidence as true evidence when she said that Horthal Pedige Amarasinghe placed his signature on the deed No.1735 before her?

TP Ranjani Ashoka the Notary Public who attested the deed No 1735 says, in her evidence, that two attesting witnesses who signed the deed are Daisy Agnus who is the wife of the Plaintiff-Appellant and Ranthatige Wijethilake. She further says in her evidence that she does not know the said Wijethilake. But she, in her attestation in the said deed, has certified that she knew both witnesses. Thus it appears that her evidence contradicts her own attestation. When the above evidence is considered the question that arises is whether any reliance could be placed on her evidence. In my view no reliance could be placed on the evidence of Ranjani Ashoka the Notary Public who attested the deed No.1735. As I pointed out earlier, the Notary Public who attested the deed says, in her evidence, that one of the attesting witnesses was Daisy Agnus, the wife of the Plaintiff-Appellant. The words 'Daisy Agnus' can be clearly seen on the deed as one of the signatures on the said deed. But surprisingly the Plaintiff-Appellant in his evidence says that he did not take his wife to the office of the Notary Public on the day that the deed No 1735 was executed. It is to be noted here that the Plaintiff-Appellant did not call his wife Daisy Agnus to give evidence that she placed her signature when the deed No.1735 was executed. Why didn't the Plaintiff-Appellant call his own wife to give evidence on his behalf? There is no explanation to this question. Even the other attesting witness was not called as a witness by the Plaintiff-Appellant. There

is no explanation to this failure by the Plaintiff-Appellant. In my view the Plaintiff-Appellant should have, under these circumstances, called one of the attesting witnesses. When I consider all the above evidence the execution of deed No.1735 is a very suspicious act and gives the impression that it is a fraudulent deed. This could be a forged deed. Therefore the Inspector General of Police should be directed to investigate into this matter.

Learned counsel for the Plaintiff-Appellant contended that the Notary Public who attested the deed can be considered as an attesting witness. He therefore contended that the execution of the deed No 1735 had been proved by the evidence of the Notary Public. He relied upon the judgment of Basnayake CJ in Wijegunatilake Vs Wijegunatilake 60 NLR 560. I now advert to this contention. I have already pointed out that no reliance could be placed on the evidence of the Notary Public. Section 68 of the Evidence Ordinance reads as follows.

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."

In Samarakoon Vs Gunasekera [2011] 1SLR 149 at 154 and 155 Supreme Court held as follows: "A deed for the sale or transfer of land, being a document which is required by law to be attested, has to be proved in the manner set out in Section 68 of the Evidence Ordinance by proof that the maker (the vendor) of that document signed it in the presence of witnesses and notary. If this is not done the document and its contents cannot be used in evidence."

In Hilda Jayasinghe Vs Fransis Samarawickrama [1982] 1 SLR 349 the Court of Appeal observed the following facts: "By Deed No. 4753 dated 12.8.75 the Defendant-Appellants transferred their ancestral home to Ajith minor son of

Mr. Kahatapitige Attorney at Law and Notary Public for a sum of Rs. 3,500/- on condition that the property be transferred back to Defendant-Appellants on the expiry of three years on payment of Rs.3,500/- with 8% interest. By Deed No. 4879 of 24.3.76 Ajith the minor son of the Notary Public re-transferred the property to Defendant-Appellants on payment of Rs.3,500/-. By Deed 4880 of 24.3.76 the Defendant-Appellants sold the same land to Plaintiff Respondent for Rs. 8,000/-. These two deeds too were attested by Mr. Kahatapitige Attorney at Law and Notary Public.

Defendant Appellants alleged that through the machinations of the Attorney at Law and Notary Public both Deeds Nos. 4879 and 4880 of 24.3.76 were fraudulently executed by obtaining the signatures of the Defendant Appellants by misrepresentation of facts and by obtaining their signatures and thumb impression on blank sheets of paper. They also alleged that no consideration passed and that the two attesting witnesses were not present at the time they placed their signature and thumb impression. Mr. Kahatapitige the Notary gave evidence but no attesting witness was called."

After considering the above facts Thambiah J (Ranasinghe J agreeing) held that the circumstances of this case required that one of the two attesting witnesses be called to prove execution of the deed.

In N U Wijegoonatilake Vs B Wijegoonatilake 60 NLR 560 Basnayake CJ (Pulle J agreeing) by judgment dated **6.7.1956** held thus: "A Notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance."

In L Marian Vs Jesuthasan 59 NLR 348 Sinnathamby J (Sansoni J agreeing) by judgment dated **20.7.1956** held thus as follows:" Where a deed executed before a notary is sought to be proved, the notary can be regarded as an attesting witness

within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant."

What is the value of the evidence of a Notary Public who has failed to state in his/her attestation that he personally knew the executant but says in his evidence that he knows the executant? If he knew the executant personally at the time of the execution of the deed, what was the difficulty for him to state the same in his attestation? When he certified the attestation the facts were fresh in his mind. Then the preparation of the attestation was the best time for him to state that he knew the executant personally. If he has failed to state in the attestation the fact that he knew the executant personally and later says that he knows the executant personally, no reliance can be placed on such evidence. In the present case the Notary Public who attested the deed No.1735 has failed to state in her attestation that she personally knew the executant but says in her evidence that she knew the executant. It must be borne in mind that when she was giving evidence, she was aware that her own deed was being challenged. Therefore she would naturally defend his deed. When I consider all these matters, I hold the view that no reliance could be placed on her evidence. TP Ranjani Ashoka is an Attorney-at-Law and a Notary Public. When lawyers give evidence, courts expect more accuracy of his/her evidence than lay witnesses because they are aware of the procedure of courts and the relevant legal provisions.

If the executant is known to the Notary Public, he is expected to state it in the attestation. In fact according to Section 31(20) of the Notaries Ordinance, if the executant is known to the Notary Public, he should state it in his attestation. Section 31(20) of the Notaries ordinance reads as follows:

"He shall without delay duly attest every deed or instrument which shall be executed or acknowledged before him, and shall sign and seal such attestation. In such attestation he shall state-

(a) that the said deed or instrument was signed by the party and the witnesses thereto in his presence and in the presence of one another ;

(b) ***whether the person executing or acknowledging the said deed or instrument or the attesting witnesses thereto (and in the latter case he shall specify which of the said witnesses) were known to him ;***

(c) the day, month, and year on which and the place where the said deed or instrument was executed or acknowledged, and the full names of the attesting witnesses and their residences ;

(d) whether the same was read over by the person executing the same, or read and explained by him, the said notary, to the said person in the presence of the attesting witnesses ;

(e) whether any money was paid or not in his presence as the consideration or part of the consideration of the deed or instrument, and if paid, the actual amount in local currency of such payment;

(f) the number and value of the adhesive stamps affixed to or the value of the impressed stamps on such deed or instrument and the duplicate thereof;

(g) specifically the erasures, alterations, and interpolations which have been made in such deed or instrument, and whether they were made before the same was read over as aforesaid, and the erasures, alterations, and interpolations, if

any, made in the signatures thereto, in its serial number, and in the writing on the stamp affixed thereto." (emphasis added).

Thus the Notaries Ordinance requires the Notary Public who attested a deed to state in the attestation that the executant is known to him if he knows the executant. After considering the above legal literature, I hold that when a deed executed before a Notary Public is sought to be proved, the Notary Public can be regarded as an attesting witness within the meaning of Section 68 of the Evidence Ordinance if the following criteria are satisfied.

1. He (the Notary Public) knew the executant personally.
2. He has stated the said fact (the fact that he knows the executant personally) in his attestation.
3. He can testify to the fact that the signature on the deed is the signature of the executant.

In the present case the 2nd criterion above has not been satisfied. In fact TP Ranjani Ashoka the Notary Public has not complied with Section 31(20) of the Notaries Ordinance. For the above reasons, I hold that the deed No1735 has not been proved and that it is not a valid deed in law. I therefore hold that the rejection of deed No.1735 said to have been attested by TP Ranajni Ashoka, the Notary Public by the Learned District Judge is correct. I therefore hold that the deed No.1735 dated 13.6.2000 attested by TP Ranjani Ashoka the Notary Public was not act of Hortahl Pedige Amarasinghe.

Learned counsel for the Plaintiff-Appellant also contended that the Defendant-Appellant should, by calling independent evidence, prove that Horthal Pedige Amarasinghe was a person who could not sign. I now advert to this

contention. When considering this contention I would like to consider Section 101 of the Evidence Ordinance which reads as follows:

"Whoever 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. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

In the present case it is the Plaintiff-Appellant who says that Horthal Pedige Amarasinghe signed the deed No.1735. Then it becomes his burden to prove it. This position is evident by the illustration (b) given in Section 101 of the Evidence Ordinance which reads as follows:

"A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true. A must prove the existence of those facts."

In view of the aforementioned reasons, I answer the questions of law raised by the Plaintiff-Appellant in the negative. I have earlier observed that the deed No.1735 dated 13.6.2000 attested by TP Ranjani Ashoka could be a forged deed. I therefore direct the Inspector General of Police to investigate into this matter and take steps according to law.

I have gone through the evidence and the judgments of the District Court and the Civil Appellate High Court. I see no reasons to interfere with the said judgments.

For the above reasons, I affirming the judgment of the Civil Appellate High Court, dismiss this appeal with costs. The Registrar of this Court is directed to send

a certified copy of this judgment, a certified copy of the appeal brief and a certified copy of the deed No.1735 dated 13.6.2000 attested by TP Ranjani Ashoka to the Inspector General of Police for necessary action.

Judge of the Supreme Court.

Priyasath Dep PC,J

I agree.

Judge of the Supreme Court.

Anil Gooneratne J

I agree.

Judge of the Supreme Court.