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

AHAMED LEBBE HADIAR ATHAMLEVVAI

No. 1, Second Cross Street, Batticaloa.

-PLAINTIFF-

Vs.

1. ADAMBAWA MAHMOOTHU, (Deceased)
2. SEYADU PATHTHUMMAH, (Deceased)

70/1, Main Street, Batticaloa.

-DEFENDANTS-

FOUSIYA UMMAH ABDUL CADER

70/1, Main Street, Batticaloa.

SUBSTITUTED-DEFENDANT

S.C. (Appeal) No: 164/12

S.C (HCCA) LA APPLICATION NO: 186/11

HIGH COURT CIVIL APPEAL NO:

EP/HCCA/BC/80/09

D.C BATTICALOA NO: 4006/L

AND

AHAMED LEBBE HADJIAR ATHAMLEVVAI

No. 1, Second Cross Street, Batticaloa.

-PLAINTIFF-APPELLANT-

Vs.

FOUSIYA UMMAH ABDUL CADER

70/1, Main Street, Batticaloa.

-SUBSTITUTED-DEFENDANT-

RESPONDENT-

AND NOW

AHAMED LEBBE HADIAR ATHAMLEVVAI
No. 1, Second Cross Street, Batticaloa.
-PLAINTIFF-APPELLANT-PETITIONER

Vs.

FOUSIYA UMMAH ABDUL CADER
70/1, Main Street, Batticaloa.
-SUBSTITUTED-DEFENDANT-
RESPONDENT-RESPONDENT-

Before: Priyantha Jayawardena, PC, J.
Vijith K Malalgoda, PC, J.
L.T.B. Dehideniya, J.

Counsels: V. Puvitharan, PC, with Anuja Rasanayakham for the Plaintiff-Appellant-Petitioner.

S. Mandaleswaran, PC, with S. Abinaya for the Substituted Defendant-Respondent-Respondent.

Argued on: 03.02.2020
Decided on: 25.07.2022

L.T.B. Dehideniya, J.

The Plaintiff- Appellant- Appellant (hereinafter sometime referred to as the Appellant) instituted this action for a declaration of title on long chain of title. At finally, the Appellant claimed that he became the owner of the land by Deed marked P1. This Deed was tendered in evidence subject to proof.

The Respondent stated that he was a tenant under A.M. Meera Lebbe Marikkar who was the original owner and on the death of him he possessed the land for a long period and acquired the prescriptive title. Though he claimed that he has acquired prescriptive title, he has not prayed for a positive judgment other than a dismissal of the action.

The learned District Judge dismissed the plaint on the basis that the Appellant had failed to prove the title deed. Being aggrieved by the said judgment, the Appellant appealed to the Civil Appellate High Court of Eastern Province Holden at Baticloa where the Learned High Court Judge too affirmed the judgment of the learned district judge. The appellant being aggrieved by the said judgment presented this appeal to this court. The Court granted leave to appeal on the following questions of law;

1) Did the learned Judges of the High court err in law in holding that the Deeds P1 and P2 have not been proved without giving due weight to the well-established principle reiterated by the Supreme Court and the Court of Appeal in ***Balapitiya Gunananda Thero v. Talalle Meththananda Thero (1997) 2 Sri L.R 101*** and ***Sri Lanka Ports Authority And Another v Jugolinija- Boal East (1981) 1 Sri L.R 18*** that if no objection is taken to receive in evidence at the close of a party's case a document which was earlier marked subject to proof then the said document would be considered as evidence before court for all purpose?
2) Did the learned Judges of the High Court err in law in holding that the Plaintiff has failed to prove the document P1 and P2 in terms of Section 68 and 69 of the Evidence Ordinance

without giving any weight to the other relevant provisions of the Evidence Ordinance, particularly in view of the fact that the document P3, a deed attested by the same Notary attesting the document P1, and admitted in evidence without being marked subject to proof, was before court?

This being a *rei vindicatio* action the plaintiff has to establish his title. Until the title is established the defendant need not to prove anything. Once the plaintiff proves title, the burden shifts on to the defendant to show that he has independent right in the form of prescription as claimed by him.

His Lordship Justice Saleem Marsoof PC in the case of ***Jamaldeen Abdul Latheef V. Abdul Majeed Mohamed Mansoor And Another [2010] 2 Sri L.R 333*** considering a long line of cases held that;

*"In Dharmadasa v. Jayasena(12) De Silva, C.J/. equated an action for declaration of title with the rei vindicatio action, and at 330 of his judgement quoted with approval the dictum of Heart, J., in Wanigaratne v. Juwanis Appuhamy **(**13),for the proposition that the burden is on the plaintiff in a rei vindicatio action to clearly establish his title to the corpus, echoing the following words of Withers, J., in the old case of Allis Appu v. Endis Hamy (supra) at 93-*

In my opinion, if the plaintiff is not entitled to rei vindicate his property, he is not entitled to a declaration of title...

If he cannot compel restoration, which is the object of a rei vindicatio, I do not see how he can have a declaration of title. I can find no authority for splitting this action in this way in the Roman-Dutch Law books, or decisions of court governed by the Roman-Dutch Law.

As Ranasinghe, J., pointed out in Jinawathie v. Emalin Perera (14) at 142, a plaintiff to a rei vindicatio action "can and must succeed only on the strength of his own title, and not upon the weakness of the defence." In Wanigaratne v. Juwanis Appuhamy, (supra) at page

168, Heart, J., has stressed that "the defendant in a rei vindicatio action need not prove anything, still less his own title." Accordingly, the burden is on the Respondents to this appeal to establish their title to the land described in the schedule to their petition …"

At the trial for the Appellant only the Appellant and the surveyor gave evidence. The title deed of the appellant was marked as P1 and it was marked subject to proof. Appellant did not call any witness to prove the execution of P1. At the closer of the evidence the Appellant read P1 in evidence and the Respondent did not object to the document.

The issue in the instant appeal is whether the P1 can be used as evidence. The Appellant has not called any witness to prove the execution of P1. Since the defendants have not objected to the document marked P1 at the closer of Appellant case the Counsel argue that the P1 becomes evidence as per the Judgement in ***Sri Lanka Ports Authority And Another v Jugolinija- Boal East (1981) 1 Sri L.R 18.*** In the said case at p. 23-24 Samarakoon CJ, held that;

"When P1 was marked during the trial objection was taken "as the author of P1 has not been called". I take it, what was meant was, that P1 be rejected unless the author was called to prove the document. Counsel for the respondent closed his case leading in evidence P1 and P2. There was no objection to this by counsel for the appellants who then proceeded to lead his evidence. If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law".

This Judgement was followed in ***Balapitiya Gunananda Thero v. Talalle Meththananda Thero*** (1997) 2 Sri L.R 101. Where at p. 105 G. P. S. De Silva CJ, held that;

"...however, was marked in evidence subject to proof and the District Court held that the document was not proved, although P5 was read in evidence at the close of the plaintiff's case without objection. This finding of the District Court was reserved by the Court of Appeal on the basis of the decision in Sri ***Lanka Ports Authority And Another v Jugolinija-***

Boal East. *In that case when P1 was marked in the course of the trial objection was taken but when the case for the plaintiff was closed reading in evidence P1, no objection was taken by the opposing counsel".*

Section 68 of the Evidence Ordinance provides that a document which is required to be attested shall not be used in evidence until at least one attesting witness is called to give evidence. The Section 68 read thus;

"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 process of the court and capable of giving evidence".

In **Wijegoonatilleke v. Wijegoonatilleke 60 NLR 560** Basnayaka CJ held that, *"In our opinion a Notary who attests a deed is an attesting witness within the meaning of that expression in section 68 and 69 of the Evidence Ordinance*". If the notary knows the executer the notary also can be witnesses. Neither of them were called as witnesses and no reason was given for not calling either. Under these circumstances whether the deed can be accepted as evidence is the issue.

As Tambiah J explained in ***Jayasinghe v. Samarawickrema (1982) 1 Sri. L.R 349*** *at p. 359* citing Sarkar's Law of Evidence*, "Section 68 of the Evidence Ordinance lays down that documents required by law to be attested shall not be used as evidence unless at least one attesting witness is called to prove its execution. If he is alive and subject to process of the Court. 'This is not the same thing as saying that a document required to be attested by more than one witness shall be proved by the evidence of only one witness. S. 68 only lays down the mode of proof and not the quantum of evidence required. More than one attesting witness may be necessary to prove a document according to the circumstances of a case' (Sarkar's Law of Evidence, 10th Edn. P. 591)".*

His Lordship Justice Sisira De Abrew with the agreement of myself and Justice Padmam Surasena, considered the decisions of the said ***Sri Lanka Port Authority And Another v Jugolinija- Boal East (1981)*** and ***Balapitiya Gunananda Thero v. Tallalle Meththananda Thero (1997) 2 Sri L.R 101*** cases and several other relevant cases and held in the case of ***Dadallage Anil Shantha Samarasinghe Vs Dadallage Mervin Silva SC Appeal 45/2010*** S/C Minute dated 11.6.2019 that;

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

As mentioned above, if the witness is not called cannot be considered as evidence. In the case of ***Amarasinghe Arachchige Don Dharmarathna v. Dodamgodage Premadasa and Others*** SC Appeal No.158/2013, Decided on: 12th October 2016, Prasanna Jayewardene, PC, J, has applied the same principle. His Lordship noted that;

> *"Our Courts have consistently taken the view that, other than in instances where a notarially attested Deed is admitted by the opposing party or is produced in evidence without objection or requirements of proof,* ***the requirements of Section 68 of the Evidence Ordinance are imperative and that Deed will not be considered in evidence unless the testimony of, at least, one attesting witness has been led****. Thus, in Bandaiya v. Ungu [15*

NLR 263]. Lascelles CJ described the requirements of Section 68 of the Evidence Ordinance as a "wholesome rule" and held that, a notarially attested Deed shall not be used as evidence until one attesting witness at least has been call for the purpose of proving its execution, if there be an attesting witness alive, capable of giving evidence and subject to the process of the Court. [Emphasis is added]"

Section 31(9) of the Notaries Ordinance reads as follows, *"He shall not authenticate or attest any deed or instrument unless the person executing the same be known to him or to at least two of the attesting witnesses thereto..."*

E.R.S.R.Coomaraswamy in The Law of Evidence Vol 2 Book 1 at page 108 explains the object of calling the witness. He says "In *Solicitor General vs. Ava Umma* 71 NLR 512 at 515-516" T.S. Fernando J. said "*The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in Section 2 of No. 7 of 1940 (Prevention of Frauds Ordinance) means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution."*

Coomaraswamy further say thus;

"Stephen says that the rule in Section 68 is probably the most ancient, and is, as far as it extends, the most inflexible of all the rules of evidence. As Lord Ellenborough says in R. vs. Harringworth the rule ... is universal that you must first call the subscribing witness; and it is not to varied in each particular case by trying whether, in its application, it may not be productive of some inconvenience, for then there would be no such thing as a general rule."

Coomaraswami in the same book 106 states that "*if the witness is alive the subject to the process of the court and capable of giving evidence a witnesses shall be called. If further states that if one attesting witness, satisfying the three requirements set out above, can be called, he must be called.*

The omission to call such a witness, where execution is denied or not admitted, is fatal to the admissibility of the *document."*

In the instant case the title Deed marked P1 was presented in evidence subject to proof. It means that the defendant is not admitting the title Deed of the Appellant. Since this is a Deed attested by a Notary Public in front of two attesting witnesses Section 68 of the Evidence Ordinance comes into operation. It becomes a necessary to call at least one of the attesting witness to prove the execution. The Appellant has failed to call any of such witness. Therefore the Deed marked P1 was not proved and therefore it cannot be considered as evidence. If Appellant has failed to establish his title in a *rei vindicatio* action, he is not entitle to any relief.

Not challenging the document marked P3 will not establish the execution of P1.

I answer the both question of law in negative.

Appeal dismissed. Subject to costs fixed at Rupees 25000.00.

Judge of the Supreme Court

Priyantha Jayawardena, PC, J.
I agree

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J.
I agree

Judge of the Supreme Court