

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

S.C. Appeal 89/2010

NWP/Civil Appellate High Court
No. NCP/HCCA/ARP 210/2007

D.C. Anuradhapura 15625/L

In the matter of an application for
Leave to Appeal

Seyyadu Mohommaduge Razik
Gallenbindunuwewa
Horowpotana.

PLAINTIFF

Vs.

1. Suleiman Adam Kandu
Kivul kade,
Horowpothana.
2. Abdul Hameed Mahamad Mihilar
Fancy Textiles Mahaveediya,
Horowpothana.

DEFENDANTS

Seyyadu Mohommaduge Razi
Gallenbindunuwewa
Horowpotana.

PLAINTIFF-APPELLANT

Vs.

1. Suleiman Adam Kandu
Kivul kade,
Horowpothana.
2. Abdul Hameed Mahamad Mihilar
Fancy Textiles Mahaveediya,
Horowpothana.

DEFENDANTS-RESPONDENTS-

AND NOW BETWEEN

Seyyadu Mohommaduge Razik
Gallenbindunuwewa
Horowpotana.

PLAINTIFF-APPELLANT-PETITIONER

Vs.

1. Suleiman Adam Kandu
Kivul kade,
Horowpothana.
2. Abdul Hameed Mahamad Mihilar
Fancy Textiles Mahaveediya,
Horowpothana.

DEFENDANTS-RESPONDENTS-
RESPONDENTS

BEFORE:

B.P. Aluwihare P.C., J.
Anil Gooneratne J. &
K. T. Chitrasiri J.

COUNSEL: Mahanama de Silva with
K.N.M. Dilrukshi for the Plaintiff-Appellant-Petitioner

N. M. Shaheid for Defendants-Respondents-Respondents

ARGUED ON: 15.07.2016

DECIDED ON: 30.09.2016

GOONERATNE J.

This was an action filed in the District Court of Anuradhapura for a declaration of title and eviction of the 1st and 2nd Defendants named in the plaint filed in the District Court. The learned District Judge of Anuradhapura, after trial delivered judgment dismissing the plaint. An appeal had been preferred to the Civil Appellate High Court from the judgment of the District Court, and that Appeal was dismissed by the High Court on or about 20.10.2009. The application for leave was supported before this court on 30.08.2010, and court having heard the application, granted leave on the said date on the questions of law set out in

paragraphs 17(a) and 17(b) of the petition dated 26.11.2009. The said question of law reads thus:

- (a) Has the High Court misdirected itself in holding that the corpus was an undivided and co-owned land on the basis of Deed P1 since the evidence was that after the execution of the said deed the vendees, namely the 1st defendant and the said Seynul Abdeen, had possessed their respective shares separately and as two distinct and divided lots?
- (b) Has the High Court misdirected in law in holding that the order made in respect of the said preliminary issue No. 22 is not final and conclusive? Is the said determination obnoxious to section 147 of the Civil Procedure Code?

It is unfortunate that the hearing of this case had been postponed since 30.08.2010, for various reasons. However, a further petition dated 23.10.2014 was filed by the Plaintiff-Appellant-Petitioner moving this court to admit fresh evidence which had emerged subsequent to supporting this application for leave, and this order concerns only the admission of fresh evidence at the stage of appeal. The application of learned counsel for appellant to admit fresh evidence is clearly stated in the petition dated 23.10.2014. To state very briefly it is pleaded that the deceased Sella Marrikar Seyinul Abdeen who was the owner of the land described in the schedule to the plaint transferred the land in dispute to the 1st Defendant-Respondent-Respondent by deed bearing No.

5862 dated 23.2.1998. (correct Deed No and date to be ascertained) Subsequent to the delivery of the judgment by the District Court the learned Magistrate of Anuradhapura convicted the 1st Defendant-Respondent-Respondent and two others for forgery of the deed in question bearing No. 9075. (Order A1). The 1st Defendant-Respondent-Respondent appealed to the High Court from the order of conviction, and the High Court affirmed the Order of the Magistrate (Order A2)

The only matter to be decided at this stage is whether fresh evidence pertaining to the forgery of the deed (A1 & A2) could be admitted, to enable this court to consider same at the hearing of this appeal. The learned Magistrate and the High Court Judge confirm that the deed in question bearing No. 9075 was a forgery. In the subsequent petition (dated 23.10.2014) it is disclosed that the Defendant-Respondent-Respondent has filed a Leave to Appeal Application SC/LA/67/2014 against the order of the learned High Court Judge and it is pending in this court. One argument that could be advanced would be that since the Leave to Appeal Application SC/LA/67/2014 is pending new material or fresh evidence should not be admitted, as the question of forgery would depend on the outcome of the said Leave to Appeal Application. On the other hand it could be contended that even though the Apex Court need to decide on the above question the material relevant to the case could be placed before court as fresh material and it

would be a matter for court to either accept or reject such material (A1 & A2) irrespective of the outcome of the Leave to Appeal Application.

In Ratwatte Vs. bandara 70 N.L.R 231 - Pgs 475/476...

In Ratwatte Vs. Bandara et al..., it was laid down by the Supreme Court, following an English decision, that reception of fresh evidence in a case at the stage of appeal may be justified if three conditions are fulfilled, viz.,

- (i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- (ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it may not be decisive;
- (iii) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible although it need not be incontrovertible.

The English decision followed in this case was *Ladd vs. Marshall*, where Denning, L. J enumerated those three conditions.

It may be helpful to ascertain the position of the land in dispute at least to a point prior to variance of facts between the parties. (The position of the case need to be dealt at a proper hearing). Petitioner states that the original

owner of the land called "Kattakuduwa" in extent of 34 perches was one S.Kulasekera and his wife and both of them sold 1/4th share of the land to the 1st Defendant and Sella Marrikar Seyinul Abdeen. Petitioner claims his share of the land through Sella Marrikar Seyinul Abdeen. On the demise of the said Sella Marrikar Seyinul Abdeen the said Abdeen's wife and children sold the land to the Petitioner by deed No. 79 (P1). 1st Defendant-Respondent claims that Sella Marrikar Seyinul Abdeen sold his share to the 1st Defendant by Deed No. 9075 which according to the Petitioner was a forged deed. As such the question of forgery seems to be at the forefront of this case and subsequent application to admit fresh evidence.

However if the question of forgery and orders A1 & A2 are contested, until finality is reached A1 and A2 may not show the expected results. In fact learned counsel for Defendant-Respondent-Respondent submitted to this court that the Leave to Appeal Application SC/LA/67/2014 is pending in the Supreme Court challenging the High Court Order (A2).

Forgery as contemplated by the Penal Code is an offence which is illegal and contrary to law. Illegality is a question of law which could be raised at any stage of a suit. I am also mindful of Section 44 and 41A of the Evidence Ordinance. It reads thus:

44. Fraud, collusion, or incompetence of court may be proved.

Any party to a suit or other proceeding may show that any judgment, order, or decree which is relevant under sections 40, 41, 41A, 41B, 41C or 42 and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion.

41A. Relevancy of judgments recording convictions in civil proceedings.

- (1) Where in an action for defamation, the question whether any person committed a criminal offence is a fact in issue, a judgment of any court in Sri Lanka recording a conviction of that person for that criminal offence, being a judgment against which no appeal has been preferred within the appealable period or which has been finally affirmed on appeal, shall be relevant for the purpose of proving that such person committed such offence, and shall be conclusive proof of that fact.

- (2) Without prejudice to the provisions of subsection (1) , where in any civil proceedings, the question whether any person, whether such person is a party to such civil proceedings or not, has been convicted of any offence by any court or court martial in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a judgment or order of such court or court martial recording a conviction of such person for such offence, being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant for the purposes of proving that such person committed such offence or committed the acts constituting such offence.

The above sections of the Evidence Ordinance are quite clear and does not need further explanations. However finality on A1 & A2 will be reached at the conclusion of the Leave to Appeal application to the Supreme Court, and its outcome. (SC/Spl Leave to Appeal No. 67/2014).

In all the above circumstances the application to admit fresh evidence is justified provided finality is reached accordingly in the pending Leave to Appeal application, which should favour the Plaintiff-Appellant-Petitioner, and not otherwise. The Plaintiff-Appellant-Petitioner was not able to place the evidence of forgery before the District Court as material based on conviction by the Magistrate's Court and the High Court was available only by 19.03.2014. The question of forgery will if admitted in law, would have an important influence on the final outcome of the case and such evidence may be apparently credible. Therefore this court is of the view that application of the Plaintiff-Appellant-Petitioner cannot be allowed at this stage, unless some finality could be gathered from the above Leave to Appeal Application. It would be premature at this stage to admit the evidence or the orders A1 & A2. As such I am not in a position to accede to the application of the Petitioner to admit fresh evidence. However if at the hearing of the final appeal it could be considered by this court if Leave to Appeal is refused.

Subject to above application to admit fresh evidence is refused.

Application refused subject to above views of court.

JUDGE OF THE SUPREME COURT

B. P. Aluwihare P.C., J

I agree

JUDGE OF THE SUPREME COURT

K. T. Chitrasiri J.

I agree

JUDGE OF THE SUPREME COURT