IN THE SUPREME COURT OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Special Leave to Appeal against the Judgment of the High Court of Civil Appeal dated 25th August 2010.

Samuel Vivendra Eliyatambi
No 248, Whitehorse Road,
Corydon CRO 2 LB, Surrey
United Kingdom

Appearing by his Attorney
Reginald Perera Wickramarachchi
Saman Mawatha,
Nugegoda

SC/Appeal No. 120/2014 **Plaintiff**
HCCA Case No. WP/HCCA/Mt/22/02/F

DC Mt Lavinia Case No. 347/94/L **VS**

1. John Cyril Fernando (Now Deceased)
   No. 83, Gregory's Road,
   Colombo 07

2. Selwyn Danaraj Eliyatambi
   No. 1 & 1/1, Elibank Road,
   Colombo 05

3. Surangani Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

4. Marinie Samantha Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

Defendants

AND

1. John Cyril Fernando (Now Deceased)
   No. 83, Gregory's Road,
   Colombo 07

3. Surangani Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

4. Marinie Samantha Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

1st ,3rd and 4th Defendants – Appellants

VS

Samuel Vivendra Eliyatambi
No 248, Whitehorse Road,
Corydon CRO 2 LB, Surrey
United Kingdom

Appearing by his Attorney
Reginald Perera Wickhramarachchi
Saman Mawatha,
Nugegoda

Plaintiff – Respondent

2. Selwyn Danaraj Eliyatambi
   No. 1 & 1/1, Elibank Road,
   Colombo 05

2nd Defendant – Respondent

AND NOW BETWEEN

1. John Cyril Fernando (Now Deceased)
   No. 83, Gregory's Road,
   Colombo 07

1A. Surangani Jayasekera
   No. 4 & 4 1/1 Elibank Road,
   Colombo 05

1st Defendant – Appellant – Appellant

VS

Samuel Vivendra Eliyatambi
No 248, Whitehorse Road,
Corydon CRO 2 LB, Surrey
United Kingdom

Appearing by his Attorney
Reginald Perera Wickramarachchi
Saman Mawatha,
Nugegoda

Plaintiff – Respondent – Respondent

2. Selwyn Danaraj Eliyatambi
   No. 1 & 1/1, Elibank Road,
   Colombo 05

2nd Defendant – Respondent – Respondent

3. Surangani Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

4. Marinie Samantha Jayasekera
   No. 4 & 4 1/1, Elibank Road,
   Colombo 05

3rd and 4th Defendant – Appellant – Respondents

Before : Vijith K. Malalgoda, PC, J
S. Thurairaja, PC, J and
E.A.G.R. Amarasekara J.

Counsel : Anuruddha Dharmaratne with Indika Jayaweera for the 1st Defendant – Appellant – Appellant.
Ikram Mohamed PC with Roshan Hettiarachchi instructed by Mallawarachchi Associates for the Plaintiff – Respondent - Respondent.
Faisz Mustapha PC with Harsha Soza PC for the 3rd and 4th Defendant – Appellant – Respondents.

Argued on : 04/09/2019

Decided on : 20/05/2021

E. A. G. R. Amarasekara J

The Plaintiff- Respondent – Respondent above named (hereinafter sometimes referred to as the Plaintiff) through his power of attorney holder G.H.A. Watson, instituted an action in the District Court of Mount Lavinia on the 29th of December

1994, against the 1st defendant – Appellant - Petitioner (hereinafter referred to as the Petitioner or the 1st Defendant Appellant or the 1st Defendant) and the 3rd and 4th Defendants – Appellants – Respondents and the 2nd Defendant – Respondent – Respondent (hereinafter sometimes referred to as the 3rd , 4th and the 2nd defendants respectively) seeking inter-alia for a declaration of title for the premises no. 4 and 4 1/1 Elibank Road, Colombo – 05, ejectment of the Defendants from the said property and for the recovery of damages. It appears that the said Plaintiff had thereafter given a Power of Attorney to one Reginald Perera Wickramarachchi for the purposes of the said case filed in the District Court. As per the minute dated 10th March 2017, one Surangani Jayasekera has been substituted by this court in place of John Cyril Fernando, 1st Defendant Appellant as 1A Defendant Respondent Appellant.

As per the Plaint:

- The Plaintiff is resident in the United Kingdom since March 1980.
- On 27.02.1980 by Power of Attorney No 1482, attested by K. Sivanatham, Notary Public, the Plaintiff's father, the 2nd Defendant was appointed as his Attorney. (vide paragraphs 1- 4 of the Plaint).
- At the time of execution of the said Power of Attorney the Plaintiff was only 19 years of age. And the said Power of Attorney is of no force in law since the Plaintiff was a minor at the time it was executed.
- By virtue of Deed of Transfer No. 2085 dated 15.02.1985, the Plaintiff became the lawful owner of the premises Nos. 4 and 4 1/1, Elibank Road, Colombo 05. The 2nd Defendant wrongfully and illegally without the knowledge of the Plaintiff sold and transferred the said premises by Deed of Transfer No. 60 dated 12.09.1985 to one John Cyril Nirmal Fernando, 1st Defendant Appellant, for a sum of Rs. 800,000/-. (vide paragraphs 5 to 8 of the Plaint) and this was done owing to a debt owed to the 1st Defendant Appellant by the 2nd Defendant, who was the father of the Plaintiff and the power of attorney holder at that time for the Plaintiff.
- It is also stated that the Plaintiff became aware of the said transfer only in 1994 - (vide paragraph 13 of the Plaint). The premises in suit is a two storied house and was worth Rs. 7 million. Thus the 2nd Defendant has sold it way below the market value - (vide paragraph 17 of the Plaint).

- The 1st Defendant Appellant by Deed No. 73 dated 13.11.1987 has fraudulently and wrongfully transferred the said premises to his sister the 3rd Defendant. And the said 3rd Defendant by Deed of Transfer No. 31 dated 08.07.1988 has transferred the premises in question to her daughter the 4th Defendant - (vide paragraph 19 and 20 of the Plaint).
- The said 3 Deeds of Transfer (No. 60, 73 and 31) are void and do not convey title. Thus, the 1st, 3rd and 4th Defendants are in wrongful and unlawful possession of the premises in question.

As per the prayer to the plaint, what has been prayed for is a declaration of title to the land referred to in the schedule to the plaint. It was on the basis that the aforesaid deeds referred to in the body of the plaint and the Power of Attorney are void in law, but no relief has been prayed in the prayer to declare those deeds or the Power of Attorney are void in law.

1st and 3rd Defendants in their answer denied the allegations made and stated that;

- there is a misjoinder of Defendants,
- the Plaintiff cannot have and maintain this action as presently constituted and he cannot approbate and reprobate,
- the Plaintiff's action is prescribed in law,
- the plaint does not disclose a cause of action against the Defendants and the Plaintiff is not entitled to the reliefs prayed for in the Plaint.
- that the Plaintiff is estopped from claiming that the Power of Attorney was not valid in that he took no steps to revoke it and received benefits under the Power of Attorney.

Thus, the said Defendants prayed for dismissal of the action.

The 4th Defendant in her answer dated 17th March 1995, averred similarly and prayed for the dismissal of the action.

The 2nd Defendant, the father of the Plaintiff and the power of attorney holder of the Plaintiff at the relevant time of the alleged incidents, in his answer while admitting the main contentions in the plaint, had averred that he signed the deed No.60 in his personal capacity as a security in relation to a loan and he signed a blank deed and no consideration was given to him. However, it is not

clear, if he signed a blank deed, why he called it a deed signed in a personal capacity as a security in relation to a loan.

The learned District Judge on 23.08.2002 delivered her judgment in favour of the Plaintiff as prayed for in the Plaint and also setting aside the Deeds Nos. 60, 73 and 31, dated 17.09.1985, 17.11.1987 and 08.07.1988 respectively, even though there was no prayer for such relief.

Being aggrieved by the Judgment of the District Court, the 1st, 3rd and 4th Defendants preferred an appeal, which was heard in the High Court of Civil Appeal of the Western Province holden in Mount Lavinia.

On 25.08.2010 the High Court delivered its Judgment dismissing the appeal while affirming the Judgment of the District Court.

This Court, after considering the leave to appeal application, granted leave on the questions of law set out in paragraph 18(b), 18(c), 18(e), 18(f), 18(g), and 18(h) of the Petition of the 1st Defendant Appellant Petitioner dated 04.10.2010 – vide Journal Entry dated 17.07.2014. The said questions of law are reproduced at the later part of this judgment.

As this is an appeal filed against the aforesaid decision of the Civil Appeal High Court of the Western Province sitting in appeal, it is the task of this court to see whether the said High Court erred in law as aforesaid in coming to its decision in confirming the judgment of the District Court of Mount Lavinia. In this regard it is relevant to see whether the learned District Judge erred in law and whether the learned High Court Judges identified such errors, if any, before confirming the decision of the learned District Judge. In this sphere, it is pertinent to understand the nature of the action filed and maintained before the District Court.

As per the plaint as well as per the issues raised by the Plaintiff, he has never taken the position that the impugned deed of transfer No. 60 executed by the then power of attorney holder, the second defendant was done when he was a minor. In fact, it was executed in 1985 and according to the Plaintiff's stance he should have been a major by that time, even as per his age. Thus, he cannot challenge the validity of that transfer on the ground that it was a contract entered into by a minor. On the face of it, it has been done through his agent, then power

of attorney holder. Through the issues raised in the original court the Plaintiff challenged this deed on the following grounds;

- The Plaintiff was a minor when he executed the Power of Attorney and therefore, Power of Attorney is void and, thus the said deed no. 60 is not valid - vide issues nos.3,4,5 and 17.
- The consideration was not paid and thus, the transaction in deed no.60 is not valid- vide issues Nos.6 and 17.
- Power to sell was not given by the Power of Attorney and, thus the transaction in deed no. 60 was not valid- vide issues Nos. 7,8,17.
- The doctrine Laesio Enormis applies and, thus said deed is voidable – vide issues Nos. 10,11 and 12.

Thus, if the relevant Power of Attorney was valid and the power to sell immovable property was given to the power of attorney holder at the time of executing the deed, the said deed no. 60 cannot be challenged on the basis of said purported defects related to Power of Attorney. Since, this challenge to the Power of Attorney appears to be the main contention in this appeal I will advert to it first in this judgment.

At the commencement of the trial, parties have admitted the execution of the Power of Attorney no.1482 given to the 2nd Defendant, the father of the Plaintiff, and the execution of the aforementioned deeds nos. 60,73, and 31 by which deeds the title allegedly passed from the Plaintiff to the 4th Defendant. (However, it is observed that these documents have been challenged in the body of the plaint as void.) It is also admitted that 3rd Defendant is the sister of the 1st Defendant and the 4th Defendant is the daughter of the 3rd Defendant.

The learned District Judge had correctly found that that the main legal question to be answered was whether the Power of Attorney granted by the Plaintiff to the 2nd Defendant on 27.02.1980 was void. It appears that she had considered that the Plaintiff, as per his age, was a minor in terms of our law at the time the said Power of Attorney was given and when the transaction is not for the benefit of the minor, it is not valid against the minor, and as such the Power of Attorney and the transactions based on that Power of Attorney are void. The learned District Judge in coming to the said conclusion also had stated that the sale of the subject matter to the 1st Defendant was done without the knowledge of the Plaintiff, and

also not for the benefit of the Plaintiff. As per the answers given to the issues raised, the learned District Judge had come to the conclusion that the Plaintiff has not received any consideration on the said sale, and that the Plaintiff came to know in 1994 that his property had been transferred illegally. It appears that, in this regard, the learned District Judge believed the evidence given by the power of attorney holder appointed for the prosecution of his case by the Plaintiff, who stated in evidence that the 2nd Defendant owed a sum of money to the 1st Defendant Company and the land was transferred to the 1st Defendant in lieu of the said debt of the 2nd Defendant. Consequently, at the end, the learned District Judge held in favour of the Plaintiff. In the appeal preferred by the Defendant – Appellants to the High Court of Civil Appeal of the Western Province holden in Mount Lavinia, the learned High Court Judges identified what has to be decided by them as "…whether the power of Attorney No. 1482 and the Deed of Transfer No 60 is valid in law?" - vide page 7 of the High Court Judgment. In their Judgment of the High Court that dismissed the appeal of the 1st, 3rd and the 4th Defendants while affirming the Judgment of the District Court, the learned High Court Judges have indicated their reasons as follows;

a. Under the Age of Majority Ordinance Chapter 7a of Volume 4 of the Legislative Enactment Sri Lanka the age of majority at the relevant time (28/02/1980) was 21 years. And as at 28/02/1980 when the Power of Attorney was executed, the Plaintiff was only 19 years and 2 months old- vide page 7 of the High Court Judgment.

b. The Plaintiff was, at the time of execution of the said Power of Attorney, a citizen of Sri Lanka and is subject to the Sri Lankan law.

c. The alienation or sale or mortgage of immovable property by a minor to be valid it needs the sanction of the Court.

d. According to Section 24(1) of the Judicature Act No. 2 of 1978, the charge of the property of minors is vested in the District Court of family courts (Sic). Hence at the time executing the said Power of Attorney, the District Court of Mt. Lavinia should have granted consent as the upper guardian since the Plaintiff was a minor. This contract has been effected without the necessary court permission- vide page 9 of the High Court Judgment. The contract should be treated as an unassisted contract.

e. If a contract is void ab initio due to an illegality or is illegal at the time of formation it cannot become effective later by the removal of disability.

f. No permission of the court has been obtained at the time of transferring the property to the 1st Defendant. The said contract is illegal and if the illegality exists either at the time of the formation of the contract or at the time of performance, such contract is void as the said Power of Attorney was not legal from its inception, since the Power of Attorney No. 1482 is of no force or effect in law because the principal "the plaintiff" was a minor and had no capacity to execute the said Power of Attorney and/or to sell immovable property without the sanction of the court -vide pages 11 and 12 of the High Court Judgment. Thus, the Power of Attorney is illegal and all transactions arising out of an illegal act are considered to be null and void - vide page 12 of the High Court Judgment.

g. The Defendants have failed to lead any evidence to suggest that they were bona fides purchasers and had purchased the land for valuable consideration- vide page 12 of the High Court Judgment.

Nevertheless, it is clear from the judgments of the Courts below that the learned judges have failed to consider and evaluate the following aspects in coming to their conclusions, namely;

- That the witness Reginald Perera Wickramaarachchi was not a party or witness to the impugned Power of Attorney or to Deeds challenged by the Plaintiff and, as such, he may not have any personal knowledge on those transactions other than as hearsay. As such he is not a suitable witness to state that consideration was not passed when Deed No.60 was executed or to state that it was executed in relation to a loan of the 2nd Defendant or to state that conveyance of the property from 1st Defendant to the 4th Defendant are fraudulent. Similarly, that he is not a member of the Plaintiff's family and as such he is not a person who can identify the purported birth certificate of the plaintiff as plaintiff's other than on hearsay. Further, that, neither the Plaintiff nor the 2nd Defendant who must have firsthand knowledge had given evidence.
- Whether, as per the evidence, the Plaintiff could have been considered as a person who emancipated himself from the status of a minor as at the date of executing the impugned Power of Attorney and as such, whether

the said Power of Attorney was a contract of agency made between 2nd Defendant Father and the Plaintiff as an unassisted minor or not.

- Whether, as per the evidence and law, the Plaintiff had ratified the Power of Attorney after he reached the age of 21 prior to the sale by the 2nd Defendant, power of attorney holder.
- Whether a court can invalidate the Power of Attorney and the relevant deeds when there is no relief prayed for in that regard.
- That the Plaintiff was not a minor even by age at the time of the impugned deed no. 60 was executed. As such, if the Power of Attorney was valid at that time and there was no need for an approval from the court as it becomes a transaction of an adult through his agent, the power of attorney holder. Further, that the impugned Power of Attorney is only a document that grant certain powers or authority to the agent, namely the power of attorney holder named therein but not a document that convey any property of the Plaintiff to anyone.

As mentioned above, the main witness of the plaintiff was his power of attorney holder appointed for the prosecution of his case, namely Reginald Perera Wickramaarachchi. He, in his evidence at page 780 of the brief, states that he went to see the Plaintiff to Rathnapura Hospital when he was born. This answer was given when he was questioned about the age of the Plaintiff. However, as per the birth certificate marked as P3 at the trial, the Plaintiff was born in Colombo at Ratnam Hospital. This indicates that the witness does not have personal knowledge with regard to the birth certificate of the Plaintiff. Official witness who was summoned to prove the birth certificate can only say that it is a certified copy of the original in their register, but to say that it is Plaintiff's birth certificate either the Plaintiff or one who has personal knowledge as to that fact should have given evidence. Even objection to P3 had been reiterated at the closure of the Plaintiff's case. Even though, the learned judges of lower courts have relied on this document to decide that the Plaintiff was a minor at the time he executed the impugned Power of Attorney, they have not considered this aspect of the evidence. As decided in **Sheila Senavirathne v Shereen Dharmarathna (1997) 1 Sri L R 76**, a court cannot rely on hearsay evidence to prove facts of a case. Be

that as it may, as there is no question of law allowed on such ground, I am not inclined to decide whether the Plaintiff was a minor or not on that ground.

The main issue to be considered by this Court is whether the Power of Attorney (No 1482 dated 27.02.1980) which is in question was valid at the time of executing deed no. 60 by which the property in issue was sold to the 1st Defendant by the 2nd Defendant as the power of attorney holder, and in such circumstances, whether the agent has acted within the scope of the power and authority given to him. In this regard, this court has to contemplate whether the Plaintiff in fact was a minor as per our law, at the time he appointed his father, the 2nd Defendant as his power of attorney holder: If in fact , he was a minor whether it was an assisted contract or not on behalf of the minor; If it is an assisted contract whether the Plaintiff took steps to rescind it after attaining the age of majority before the prescriptive period lapsed; If it was an unassisted contract of the Plaintiff as a minor whether he ratified it after attaining the age of majority and in such circumstances whether the 2nd defendant had the authority to sell the impugned property; If the Plaintiff ratified the impugned power of attorney and used it for his benefit whether he is estopped from denying the validity of the said power of attorney.

It appears that the learned judges below in deciding whether the plaintiff was a minor at the time he executed the power of attorney has only concerned the statutory provision that existed at that time, namely the provisions in Age of Majority Ordinance as per which the age of majority was 21 years. It was only in 1989 it was amended and brought down to 18 years by the Majority (Amendment Act) No.17 of 1989. However, one must take into account that the statutory provisions that existed at the time of executing the impugned Power of Attorney, only set the age for attaining majority. However, our law recognized other circumstances where minority terminates and such circumstances can be defined as follows;

- Marriage before reaching 21 years
- Obtaining letters of *Vinia Aetatis*
- Express or Tacit Emancipation
- In the case of Muslims, by the attainment of Puberty- vide **The Law of Contracts – By C. G. Weeramantry – Volume I section 445, page 456**

The Plaintiff is not a Muslim and there was no evidence that he was married or had letters of *Vinia Aetatis* at the time he executed the impugned Power of Attorney. Further there was no evidence of express emancipation. As there were issues that, without referring or limiting the scope of the issues to his age, query whether he was a minor when he executed the impugned Power of Attorney, and as such, whether it was not valid, in my view it was within the scope of the action for the learned District Judge and the learned High Court Judges to evaluate evidence to find whether the Plaintiff was in fact emancipated from his status as a minor by his own conduct. In this regard I would like to quote from section 457 in pages 462 and 463 of the afore quoted monumental work by C.G. Weeramantry.

"*Tacit Emancipation. Tacit emancipation takes place when a minor with the consent of his parents or guardian carries on a trade or occupation on his own account. Tacit emancipation is a question of fact depending on the circumstances of each particular case. Emancipation must be clearly proved and this involves proof of liberty and independence, freedom from parental control and the carrying on by the minor of a business, profession, trade or occupation. Trading is not of itself sufficient to emancipate a filius familias so long as he lives under his father's roof or is supported by him." …….*

"The question to be decided is whether there has been in fact a separation of the minor from the control of the parent." …….

……. "But in fact, the minor has, to the knowledge of his parents or guardians, carried on some occupation on his own account for substantial period, he will be tacitly emancipated, as the South African case of a girl who earned her own livelihood as a servant for some years and retained her wages for herself even though she lived with her mother." …….

"*If a minor has engaged in trade at the time of contracting, he is liable on his contract, the law considering that if a man has understanding and experience enough for commerce, he may safely be left to his own protection in the ordinary concerns and dealings of life.*"

Even according to Wille's 'Principles of South African Law' 5th edition 85; A minor is tacitly emancipated, i.e., tacitly released from the tutelage of his legal guardians if, with their consent, which may be express or implied, he carries on a trade or occupation on his own account.

Even though the pleadings and issues raised by the Plaintiff attempt to create an impression that the Plaintiff signed the Power of Attorney as a minor and then left to United Kingdom in 1980, the evidence led through his main witness Reginald Perera Wickramaarachchi, power of attorney holder for the prosecution of the case, reveals that the Plaintiff went to the United Kingdom in 1972 and had come back to Sri Lanka in 1980 and wanted to give the Power of Attorney to the said witness, but, as he was a Government Servant and he did not want to involve in the matter, he asked to give the Power of Attorney to the father of the Plaintiff, the 2nd Defendant. The witness also had said that it was to clear goods from the harbour and relates to the business of export and import of the Plaintiff – vide evidence of the said witness at pages 757,774,779,780,781 and 782 of the brief. Even the contents of the impugned Power of Attorney indicate that it was given to his father, the 2nd Defendant to manage and transact the Plaintiff's business and affairs in Sri Lanka, which included vehicle clearance from the Port of Colombo. Thus, the evidence led indicates that the Plaintiff went abroad to the United Kingdom, a country that considered the age of majority as 18 years at that time, as a minor and stayed there and, by the time he executed the Power of Attorney, had started a business of his own in export and import of vehicles. There was no evidence to show that business was done under the control and guidance of his father.

Further, it should be noted that 2nd Defendant was the father of the Plaintiff and the natural guardian, if the plaintiff has to be considered as a minor at the time of giving the impugned Power of Attorney. Generally, the natural guardianship has been defined as that of parents over the person and property of their minor children and the power of parents consisted in Roman Dutch Law in a general supervision of the maintenance and education of their children and in administration of their property – vide **section 414 of afore quoted book by C. G. Weeramantry at page 418 and Gunasekara Hamini V Don Baron 5 N L R 273 at 279.** Thus, it appears, the task of the natural guardian is to take care of the person and property of the minor, but in the case at hand, it seems the purported minor has gained a position, other than doing his own business, to command or direct his purported natural guardian as his agent. In the backdrop of authorities cited about what else is needed to show that the Plaintiff had emancipated himself

from the status of a minor to a responsible businessman who can take his own commercial decisions independently.

The Plaintiff has argued that the question of emancipation is not pleaded and not put in issue as such should not be considered in the present appeal. Nevertheless, it should be noted that the issues Nos 3 and 4, raised before the learned District Judge, put in issue whether the Plaintiff was a minor at the time he gave the impugned Power of Attorney and, in that backdrop whether the said Power of Attorney is invalid and of no avail in law. The said issues, even though contemplate on the status of the Plaintiff as a minor, does not limit that status to the age of the Plaintiff or has no reference to his date of birth. Thus, in my view, when deciding whether the Plaintiff was a minor or not, the learned District Judge had no limitation to consider whether he was emancipated from that status at the time of the execution of the said Power of Attorney. Thus, there were evidence to say that even at the time of granting the Power of Attorney to his father, the 2nd Defendant, the plaintiff has the capacity to enter into contracts as a person who was emancipated from his status as a minor, and, as such, the power of attorney was valid from the beginning.

If for the sake of argument, one considers that the Plaintiff was a person who was not emancipated from his status as a minor since he was only 19 years of age and less than 21 years at the time he gave the impugned Power of Attorney to his father, the 2nd Defendant, the impugned Power of Attorney has to be considered as an unassisted contract of a minor, since it was not entered in to with the assistance of a guardian or with the sanction of the court, the upper guardian.

Siriwardene V Banda (1892) 2 C.L.Rep.99 at 101 and Selohamy v Raphiel (1889) 1 S C R 73 expressed the view that minor's conveyance was not *ipso facto* void but only voidable. However, our courts later on in some cases opined that such contracts were void and not voidable- See **Gunasekera Hamini V Don Baron (1902) 5 N L R 273, Andiris Appu V Abanchi Appu (1902) 3 Browne 12, Manuel Naide V Adrian Hamy (1909) 12 N L R 259. Saibo V Perera (1915) 4 Bal.N. 57**. Thereafter, in 1916 again the Supreme Court came to the conclusion that a contract with a minor is generally voidable and not void- vide **Fernando V Fernando (1916) 19 N L R 193 and Silva V Mohamadu (1916) 19 N L R 426**. The said case Silva V Mohamadu followed the ruling in the South African case of

Breytenbach V Frankel (1913) A. D. 390 which decided that a dealing by a minor with his property was not *ipso jure* void but only voidable at his instance. This view was followed later on by our courts- see **Wickremaratna V Josephine Silva (1959) 63 N L R 569. – (also see section 416 of the afore quoted book By C. G. Weeramantry at pages 422 and 423)**

However, it appears that jurists contend that the words 'void' and 'voidable' not bear the same meaning as understood in English law as far as the contract of a minor is concerned. Thus, in Roman Dutch Law a minor's contract is such that it does not bind the minor unless he ratifies it on attaining majority, while it binds the other party to it. It is therefore invalid so far as the minor's obligation is concerned until he ratifies it. But it is valid so far as the obligation on the part of the other party is concerned – **vide Fernando V Fernando (supra) and section 416 at page 423 of the afore quoted book by C. G. Weeramantry**. However same author points out that there are exceptions to the rule that the minor is not bound by his unassisted contracts, namely;

- Contracts which are ratified by the minor or his guardian
- Contracts which benefit the minor
- Contracts entered into in consequence of misrepresentation by the minor in regard to his age
- *Donationes mortis causa*
- Obligations incurred *quasi ex contractu* – **vide section 416 and page 426 of the aforesaid book.**

As per the case of **<u>Wickramasinghe V Corrine De Zoysa (2002) 1 SLR 33;</u>**

> *"(2) The Roman Dutch law relating to ratification is in force in Sri Lanka. The Roman Dutch Law permits ratification after majority, of an invalid contract of a minor and differs from the English Law…*
> *(3) In our law a contract upon ratification by a minor after attaining majority becomes as binding upon him as if it had been executed after his majority and it is effective from the time the contract was made.*
> *(4) Ratification <u>maybe express or implied from some act by the minor manifesting an intention to ratify</u>. For example, where a person with full knowledge of his legal rights continues after majority to use as his own the subject matter of a purchase made by him during minority, he must be*

taken to have ratified the contract." (underlined by me)– also see **section 418 at page 428 of the aforementioned book by C. G. Weeramantry**

In the case of **Ramen Chetty v. Silva 15 NLR 286** it was held;

"*the Roman Dutch Law of ratification of contracts by a minor is in force in Ceylon. Contracts which are neither certainly to a minor's prejudice nor necessarily for his benefit are neither void nor absolutely valid, but are voidable and capable of conformation after majority.*"

As per the case at hand, it is clear from the evidence that the Plaintiff after becoming a major entered into an Agreement to Purchase no.1976 dated 2nd may 1984 with the seller of the land in dispute through his power of attorney holder, the 2nd Defendant, using the same impugned Power of Attorney. It appears that the said agreement No.1976 has been marked as V1 at the trial without objection -vide page 791 of the brief, and, even though the power of attorney holder for the plaintiff for the purposes of the case at hand, who gave evidence for the plaintiff at the beginning, had said that he was not aware of such agreement, later has admitted that the Plaintiff used the impugned power of attorney to buy and sell the land in dispute - vide pages 794 and 811of the brief. No objection has been raised to this V 1 agreement at the closure of the Defendant's case -vide page 859 of the brief. Thus, it is clear, as per the evidence, the Plaintiff after becoming a major treated the impugned Power of Attorney as a valid one and used it to enter into agreements. Therefore, by his conduct as a major, he has ratified the impugned Power of Attorney and used it for his benefit. He cannot be allowed to approbate and reprobate to say that, in relation to deed no.60, it is not a valid Power of Attorney. As mentioned above, when he entered into the said agreement to purchase and the impugned sale of the land through his power of attorney holder, the 2nd Defendant, the Plaintiff was not a minor to say that agreements which are detriment to a minor are not valid against him.

Hence, even if one argues that the impugned Power of Attorney was not valid since the Plaintiff was a minor as at the date it was given to his father, the deed no 60 by which the Power of Attorney holder sold it to the 1st Defendant cannot be challenged on that ground since by the time Deed no.60 was executed, the impugned power of attorney was valid due to the subsequent ratification by his own conduct by the Plaintiff as a major. The

plaintiff executed the impugned Power of Attorney when he was 19 and for the benefit of his business in Sri Lanka. The existence of this power of attorney was within his knowledge when he reached the age of 21. Instead of taking steps to revoke it, he had used it for his benefit after attaining majority.

This court also observes that the Power of Attorney was a contract of agency which was entered into for the benefit of the Plaintiff to carry on his business in Sri Lanka, that is to say that it was for the improvement or maintenance of his business in Sri Lanka without rendering it to a worse position. Even though there is no evidence to show that it was used during his purported minority, it is clear it was used for his benefit in entering into the contract marked V1 after becoming a major.

Thus, even for the sake of argument if one considers that the Plaintiff was not emancipated from his position as a minor when he gave the impugned Power of Attorney to his father, the Power of Attorney was executed for his benefit and has been ratified by his own conduct after he became a major and the impugned deed no 60 was executed after such ratification.

However, it appears that on behalf of the Plaintiff there is an attempt to show that subsequent ratification was neither pleaded nor put in issue. This court observes that even though the word 'ratification' was not used, it is pleaded in the answer that the Plaintiff is estopped from claiming that the Power of Attorney was not valid in that he took no steps to revoke it and received benefits under the Power of Attorney. Issue No .25 had been raised accordingly. Even though, the word 'ratification' was not used, in fact this issue put in issue whether the Plaintiff is estopped from denying the validity of the Power of Attorney since he has gained benefit from the Power of Attorney. What this court find in the above analysis is that even after becoming a major, the Plaintiff has used the Power of Attorney for his benefit which amounts to ratification and in turn which estops him from denying the validity of the Power of Attorney.

Furthermore, that the Plaintiff's conduct, as a major, amounts to approbation and reprobation with regard to the validity of the power of attorney. As indicated above, after becoming a major, the Plaintiff used the Power of Attorney to enter into an agreement to buy the same property treating it as a valid document. If the Power of Attorney was detrimental to

him, he could have taken steps to revoke it after becoming a major, instead he used the same document for his benefit. Now he cannot be allowed to say that it is not valid when the same property was sold on the strength of the said Power of Attorney.

In the case of **Ceylon Plywoods Corporation V. Samastha Lanka G.N.S.M. and Rajya Sanstha Sevaka Sangamaya (1992) 1 SLR 157,** it was stated; "The doctrine of approbate and reprobate (quod approbo non reprobo) is based on the principle that no person can accept and reject the same instrument."

It is the contention of the Plaintiff that "The power of attorney bearing No. 1482 given to the 2nd Defendant was to empower the 2nd Defendant to act in special circumstances. Thus, it cannot be construed to have given any power or authority to the 2nd Defendant to sell or transfer the premises in suit to any person even if the general clauses were to authorize him to sell any property in general and, as such, the 1st Defendant did not get title to the premises…" (written submissions of the plaintiff on 18th Sep. 2019). By this the Plaintiff attempts to argue that power to sell the impugned property was not given by the impugned Power of Attorney and, thus the transaction in deed no. 60 was not valid and, as such, the deeds written on the strength of the said deed no. 60 also are not valid. In this regard the Plaintiff argues that even though the impugned Power of Attorney bearing No. 1482 appears to be a General Power of Attorney, it is given with reference to a particular purpose and, as such, it is a Power of Attorney given for special particular purpose and thus, the general clauses contained in the said power of attorney will become inoperative and will not authorize the holder of the power of attorney to do any act under the said general provisions. In this regard, the Court's attention is brought to the said purported special authority given to the 2nd Defendant, the power of attorney holder, which read as follows;

"*To apply to the Principal Collector of Customs for the purpose of clearing Motor Vehicle or Vehicle arriving at the port of Colombo and for that purpose to sign make and execute bonds declarations applications statements and all documents of whatsoever kind or nature under the law relating to Exchange Control Imports and Exports and Customs Ordinance in force in the said Republic of Sri Lanka,*

To apply for the policy of insurance to insure and keep the vehicle or vehicles insured in my name,

To apply for Revenue License and to pay all License fees in respect of Motor Vehicle or Vehicles and procure receipts,

To sell dispose of my Motor vehicles or vehicles for such consideration upon such terms and subject to such covenants as my said attorney may think fit or to enter into or agreement for any such sale disposal conveyance and exchange and to sign necessary documents for such purpose."

It is true that above is type written and inserted to the Power of Attorney form but nowhere in the Power of Attorney it is stated that the afore quoted clause is the special authority that was intended by the Plaintiff to be given to the 2nd Defendant. It is found among the other powers given by the same Power of Attorney which are mainly in printed form with certain blank parts filled by typing.

At the commencement of the Power of Attorney it is stated as follows;

'*As I am desirous of appointing some fit and proper person as my attorney to manage and transact all my business and affairs in the said Sri Lanka*'

Thus, it is clear that the intention of the Plaintiff was to appoint an Attorney to manage and transact all his business and affairs in this country and for that purpose he has appointed the 2nd Defendant his father in the following manner.

"*……. I the said Samuel Vivindra Eliathamby have made nominated and appointed and by these presents do make, nominate and appoint my father Selwin Danaraj Eliathamby also of No.1, Elibank Road, Colombo 5 true and lawful Attorney in the said Sri Lanka to act for me and on behalf and in the name of me and of my said firm or otherwise for all and each and every of any of the following purposes that is to say :-*"

Among the purposes so described in the impugned Power of Attorney, what was quoted above and relied by the Plaintiff, is the last one and what is quoted below is the 1st purpose.

"*To superintend, manage and control house, land, estates, other landed property as also the ships vessels and boats which I now or hereafter become entitled to*

possessed interested in and <u>to sell and dispose</u> of or to mortgage and hypothecate or to demise and lease or freight or charter or to convey by way of exchange the houses, land, estates and other landed property ships vessels and boats which I now or hereafter may become entitled to possessed of or interested in. …….."(underlined by me)

Among other purposes for which the 2nd Defendant as the Attorney of the Plaintiff had been empowered to do, what is quoted below is also included.

"To *purchase or take on lease for me any necessary lands tenements hereditaments as to my said Attorney shall seem proper.*

In the event of such purchase, <u>sale</u>, lease, exchange, mortgage and hypothecation, partition, freight, charter or for any other purpose whatsoever for me and in my name and as my act and deed <u>to sign execute and deliver all deeds</u> and other writings for giving effect and validity to the same respectively or to any contract, agreement or promise for effecting the same respectively." (underlined by me)

It must be noted that there is nothing in the document itself to show that the purpose relied upon by the Plaintiff in this case as quoted above was the special purpose to give this power of attorney to the 2nd Defendant. After setting out each and every purpose of giving the Power of Attorney the Plaintiff had given ancillary powers in the following manner;

"Generally, *to do execute and perform all such further and other acts, deeds matters and things whatsoever which my said attorney shall think necessary or proper to be done*……"

Thus, the purported purpose relied upon by the Plaintiff, as per the submissions made, stand *pari passu* with other purposes referred above and there is no special attention given to it through the words used in the document itself. It has been added to the items of purposes by typing it in the space provided for such additions. This does not indicate that it was the special purpose the Power of Attorney was given. Neither the Plaintiff nor the 2nd Defendant has given evidence to say that there was such special purpose. The power of attorney holder for the case, who was not a party to the impugned Power of Attorney, cannot give evidence to indicate that it was a Special Power of Attorney though it was written as a General Power of Attorney, other than on hearsay. The document marked as

the Power of Attorney given to the 2nd Defendant indicate that power to purchase and sell immovable property stand *pari passu* with the power to do the needful to clear vehicles from the port and matters related to such clearance, which is stressed as the special purpose for the Power of Attorney on behalf of the Plaintiff. On the other hand, a third party looking at the Power of Attorney cannot recognize such special purpose and power attached to such clearance of vehicles. Even if one argues that, as it is typewritten and inserted to the main body, it is the special purpose for giving the Power of Attorney to the 2nd Defendant, power to purchase and sell immovable property has been given expressly at least to serve the purported special purpose. As such a third party dealing with the power of attorney holder comprehend the document as one giving authority to sell the immovable property. Whether it is in relation to a special purpose or not is only within the knowledge of the Plaintiff or the power of attorney holder, the 2nd Defendant. If the power of attorney holder, the 2nd Defendant father had cheated or defrauded the Plaintiff, it is a matter between the principal and the agent for which the others cannot be held liable. Though the Plaintiff complained that there is collusive relationship among 1st,3rd and 4th defendants, this court observes that no substantial prayer is sought against the 2nd Defendant in this case and no evidence was led to show that the Plaintiff has taken sufficient steps against the 2nd Defendant, namely to prosecute the 2nd Defendant in a criminal action or to gain compensation in a civil action. This indicates that the collusion may lie somewhere else.

In the aforesaid backdrop I do not see that the Ratio decidendi in the case **Vijith Abraham De Silva V S P Claris De Silva S C Appeal No. 44/2012** relied by the Plaintiff, which says that 'the specific powers conferred by a power of attorney should be construed in the light of the intention of the principal who grants the power of attorney and that the general words couched into clauses in general power of attorney cannot in anyway be construed to disturb the specific clauses contained in the power of attorney and that the intention of the principal has to be gathered from the clauses in the power of attorney whether it is a special power of attorney or whether it is a general power of attorney', supports the case for the Plaintiff in this instant for the following reasons;

- It says that the clauses in a general power of attorney shall not be construed to disturb the specific clauses but it does not say that specific clauses nullify the general clauses totally.
- Here in the case at hand, as mentioned above power to sell the lands, houses and other landed property is given in *pari pass*u with the purported special clause relied by the Plaintiff in view of enabling the attorney to manage and transact all the businesses and affairs of the Plaintiff. Even if the purported clause relied by the Plaintiff is considered as a special clause for the sake of argument, power to sell the lands is given at least for the purposes covered by the purported special clause.
- The case cited above appears to be a case where a gift was made when the power to make such gift of lands was not given, but under the power given to manage and to sell and dispose property. In the case at hand power to sell lands was given not by implication but in black and white even if it is construed *per se* as contemplated in the case of **Adaicappa V Cook 31 N L R 385** or construed fairly and strictly as contemplated in **Marshall V Senaviratne 36 N L R 369 at 382.**
- Selling of lands is within the ostensible authority given by the impugned Power of Attorney and, as such a third party, namely the 1st Defendant buying through the Attorney cannot be found fault with.

Further the counsel for the Plaintiff through his submissions while referring to **Pillai Anna Fernando 54 N L R 113, Bowster on Agency 1st Edition Article 36 at page 59 and Harper V Godsell 1870 LR 5 QB 422 at 427** argues to indicate that general words do not confer general powers or unrestricted general effect but shall be construed as limited to the purpose which the authority is given. However, as indicated above, it is clear that the power to sell lands was given to the Attorney for the purpose of the business and affairs of the Plaintiff in this country.

For the foregoing reasons, it is my considered view that the argument on behalf of the Plaintiff that the impugned Power of Attorney has not in law granted any authority or power to sell the relevant premises cannot hold water.

In the said backdrop, this court has to answer the questions of law in favour of the 1st defendant Appellant.

However, since there were other grounds such as nonpayment of consideration, laesio enormis pleaded by the Plaintiff, it is necessary to see before setting aside the Judgment of the learned District Judge which was confirmed by the High Court whether the said judgment can stand intact on those grounds.

It must be noted neither the Plaintiff nor the 2nd defendant power of attorney holder for the impugned transaction has given evidence to say that consideration was not paid. One Reginald Perera Wickramarachchi, power of attorney holder of the Plaintiff for the case filed in the District Court and one Hewage Sirisena from the Central Registry who had come to give evidence with regard to the Birth certificate have given evidence for the Plaintiff. Neither of them was a party or a witness to the impugned deed no.60. Thus, they are not eligible witnesses to say anything about the consideration unless as hearsay that came to their knowledge from other sources. Furthermore, Hewage Sirisena has not uttered anything regarding the consideration in relation to deed no.60. In fact, when said Reginald Perera Wickramarachchi was questioned in this regard on 22/06/2000 at page 7 of that day's proceedings (page 759 of the brief) as to whether the father of the plaintiff (2nd Defendant) was given any money by the 1st defendant on this transaction and his answer had been that he did not know. Thus, there was no reliable evidence to show that no consideration was paid for the transaction contemplated in deed no.60. On the other hand, if he does not know how much was paid at the transaction how can he be a reliable witness to say that the amount paid was less than half of the value and thus, doctrine of laesio enormis applies. It is true that the consideration mentioned in deed no.60 (P5) is Rs. 800000.00 and this witness states in his evidence that the true value of the land in 1985 was Rs. 5000000.00 -vide page 760 of the brief, again at page 846 of the brief, he says that it was Rs.700000.00 or 800000.00 per perch in 1985, indicating that the value of the land was around Rs.9750000.00, but it is clear from the deed no. 2085 marked P4 that the Plaintiff bought the land for Rs. 800000.00 only few months prior to the sale by deed no.60. This witness has not shown any qualification in valuation and even his stance with regard to the value at 1985 is not constant as mentioned above. There is no proper explanation, how the value mentioned in P4 in February 1985 rose up to an amount that exceeds double of that amount or to amounts mentioned by him in evidence in September 1985, that is within 7 months period. He tried to explain this by saying that correct

amount is not mentioned in deeds when buying lands. Then, how can he say that, when the 2nd Defendant as the power of attorney holder sold the land, the correct amount was mentioned, when this witness was not a party or witness to the said transaction.

As decided in **Sheila Senavirathne v Shereen Dharmarathne (1997) 1 Sri L R 76**, a court cannot rely on hearsay evidence to prove facts of a case. The main witness as to the incident in question was merely an attorney appointed for the case and was not a party to or a witness to the impugned deed.

Hence, there was no reliable evidence to show that the first Defendant bought or the second Defendant sold the land less than half the value of the property to apply the doctrine of laesio enormis. On the other hand, doctrine of laesio enormis does not ipso facto make the deed void. It is used to rescind the contract. For that there is no prayer in the plaint to declare that deed no.60 is void. Thus, the claim of the Plaintiff that the deed no.60 was void on the grounds of not paying the consideration and laesio enormis should fail. It is questionable whether the plaintiff could on one hand saying that the consideration was not paid and on the other state that what was paid as consideration is less than half the value of the true value, since it amounts to approbation and reprobation. However, I need not go into that issue, since, it is clear those positions were not established factually. Even though, the learned District Judge had answered an issue to indicate that it was not proved that the consideration for P5, deed no. 60 was paid, as discussed above there was no acceptable evidence to come to that conclusion against what is mentioned in and evidenced by the deed itself. It is also observed that there was no evidence to establish that the 1st Defendant, 3rd Defendant and the 4th Defendant acted fraudulently.

As shown above other stances taken by the plaintiff cannot be considered proved as per the evidence led.

Further it was held that a Court has no jurisdiction to grant reliefs not prayed for. – Vide **Surangi V Rodrigo (2003) 3 SLR 35.** It is observed the learned District Judge has invalidated certain deeds without any prayer in that regard.

Afterall it is my view that the Power of Attorney given to the 2nd Defendant, father of the Plaintiff, was a valid one as the Plaintiff could have been considered as emancipated from his status of a minor at the time he executed the impugned

Power of Attorney. Further, even if he was a minor it was executed for his benefit and was ratified when he became a major and used to enter into agreements as a major prior to the impugned incident of selling the land in dispute. As such he is estopped from denying its validity. Power to sell immovable property was ostensibly given by the said Power of Attorney.

The answers to the questions of law allowed by this court are as follows;

18(b). Did the High Court of Civil Appeal of the Western Province err by failing to appreciate that at the time of executing the Power of Attorney the Plaintiff was not a minor, in that he has been "emancipated" in the light of the evidence adduced before the trial court to the effect that he has been living independently of his parents, conducting business independently, employed overseas etc.?

Answer: Yes

18(c). Did the High Court of Civil Appeal of the Western Province err by failing to appreciate that the Plaintiff has ratified the Power of Attorney in the light of the clear evidence that he has continued to act on the said Power of Attorney and had not taken any steps to revoke it, even after he has attained the age of majority?

Answer: Yes

18(e). Did the High Court of Civil Appeal of the Western Province fail to appreciate the true legal effect of a contract entered in to by a minor, in that, a contract by a minor is only voidable and not void, thus, the Power of Attorney remained valid until it is set aside and that subsequent setting aside of the Power of Attorney, will not affect the property rights acquired by the Petitioner as innocent third parties through the Power of Attorney?

Answer: Yes, the learned High Court judges erred in appreciating the true legal effect of a contract entered into by a minor. Even if an unassisted contract is void against the minor it can be ratified and make valid by the minor after becoming a major as happened in the case at hand. Once it is ratified and made valid and used for his benefit, he is estopped from stating that it is void ab initio.

18(f). Did the Court of Appeal (Sic) fall into substantial error by holding that "Defendants have failed to lead any evidence to suggest that they were bona fide

purchasers had purchased the land for valuable consideration" in the light of evidence placed before Court – [Deed of Transfer bearing No. 60, dated 17-09-1985 speaks for itself]?

Answer: Yes, the High Court of Civil Appeal fell into a substantial error in that regard. There is no acceptable evidence to disprove what is evidenced from the deed and to state that no valuable consideration was passed and the 1st, 3rd and 4th Defendants acted fraudulently.

18(g). Did the High Court of Civil Appeal of the Western Province err by failing to appreciate that the District Court had no jurisdiction to set aside the Power of Attorney and the Deeds Nos. 60[dated 17-09-1985], 73[dated 17-11-1987] & 31[dated 08-07-1988] since there was no prayer in the Plaint seeking the setting aside of the same?

Answer: Yes, the learned District Judge could have come to a finding whether the deeds were valid or not, but could have granted only the reliefs prayed for in the plaint. However, learned District Judge also erred in finding the deeds giving rights to the Defendants are invalid.

18(h). Did the High Court of Civil Appeal of the Western Province err by failing to appreciate that even if it is assumed [without in any manner conceding] that the District Court had the jurisdiction to set aside the Power of Attorney and the Deeds Nos. 60[dated 17-09-1985], 73[dated 17-11-1987] & 31[dated 08-07-1988] without a prayer to that effect in the Plaint, the Court in this instance could not have set aside them, since the action of the Plaintiff had prescribed, in terms of the provisions of section 10 of the Prescription Ordinance?

Answer: Yes, since instead of filing an action to revoke the impugned Power of Attorney within time, the Plaintiff had by his conduct ratified the Power of Attorney.

For the reasons demonstrated in the discussion above, I hold that the impugned Power of Attorney is valid in law and thus, impugned deeds are valid, and the appeal of the 1(a) Defendant should be allowed.

The Plaintiff argues that, since leave to appeal was refused in SC/HCCA/LA 313/2010, this court ought not make an order contrary to the said order. However, it appears that the Appellant of this matter was only a Respondent in

that application. In this matter 1st Defendant Appellant has satisfactorily supported his application to leave and this court has granted leave on several questions of laws. Thus, the decision of this application has to be based on such questions of law allowed and not on the outcome of an application made by another party who apparently had failed in satisfying this court to use its desecration in his favour.

Hence the appeal of the 1st Defendant Appellant is allowed and accordingly, the relevant judgment dated 25.08.2010 of the Civil Appellate High Court of the Western Province holden at Mount Lavinia and the judgment dated 23.08.2002 of the District Court of Mount Lavinia are set aside. Further, the learned District Judge of Mount Lavinia is directed to enter a decree dismissing the action filed by the Plaintiff Respondent.

1st Defendant Appellant is entitled to the costs of this appeal as well as to the costs in the lower courts.

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Judge of the Supreme Court.

V. K. Malalgoda, PC, J

I agree.

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Judge of the Supreme Court.

S. Thurairaja, PC, J

I agree.

.....

Judge of the Supreme Court.