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

Kodithuwakku Archchige Dona
Wimalawathie,
No. 5, Main Road, Attidiya, Dehiwala.
Defendant-Respondent-Appellant

SC/APPEAL/22/2015
CA/APPEAL/1223/1998(F)
DC MT LAVINIA 8/92/L

Vs.

World Link Exports (Pvt) Limited,
No. 9, Attidiya Road, Dehiwala.
Plaintiff-Appellant-Respondent

Before: Hon. Justice Mahinda Samayawardhena
Hon. Justice Arjuna Obeyesekere
Hon. Justice M. Sampath K.B. Wijeratne

Counsel: Dr. Romesh De Silva, P.C., with Widura Ranawake and Sugath Caldera for the Defendant-Respondent-Appellant.

Saliya Peiris with Susil Wanigapura and Farhad Jiffry for the Plaintiff-Appellant-Respondent.

Argued on: 19.09.2025

Written submissions:

By the Defendant-Respondent-Appellant on 29.10.2025.
By the Plaintiff-Appellant-Respondent on 07.11.2025.

Decided on: 13.01.2026

Samayawardhena, J.

The plaintiff instituted this action against the defendant in the District Court of Mount Lavinia, seeking a declaration of title to the land described in the schedule to the plaint, ejectment of the defendant therefrom, and damages. The defendant filed answer seeking the dismissal of the plaintiff's action, a declaration that she is the owner of the land, and damages. After trial, the District Court dismissed the plaintiff's action and entered judgment for the defendant. On appeal, the Court of Appeal reversed the judgment of the District Court and entered judgment for the plaintiff, except for damages. This appeal, with leave obtained, is against the judgment of the Court of Appeal. A previous Bench of this Court granted leave to appeal on the following two questions of law:

(a) Did the Court of Appeal err in law by failing to advert to the fact that evidence recorded *de bene esse* under section 178(1) of the Civil Procedure Code had not been read at the hearing of the action, as required by section 178(3) thereof?

(b) Did the Court of Appeal err in law by adopting and acting upon evidence recorded under section 178(3) of the Civil Procedure Code in the absence of material establishing that the witnesses could not be called at the trial, as required by the proviso to that sub-section?

Section 178 of the Civil Procedure Code with its marginal note "*Evidence de bene esse*" reads as follows:

> *178(1) If a witness is about to leave the jurisdiction of the court, or if other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately, the court may upon the application of either party or of the witness, at any time after the institution of the action and before trial, take the evidence of such witness in manner hereinbefore provided.*

(2) Where such evidence is not taken forthwith, and in the presence of the parties, such notice as the court thinks sufficient of the day fixed for the examination shall be given to the parties.

(3) The evidence so taken may be read at any hearing of the action, provided that the witness cannot then be produced.

The plaintiff's case was that it acquired title to the land under deed of transfer marked P1, executed by the defendant's husband in its favour. The defendant, however, contended that deed P1 was a fraudulent document.

According to Journal Entry No. 24 dated 22.01.1993, after replication was filed, in terms of section 80 of the Civil Procedure Code, the case was fixed for trial on 12.05.1993. Journal Entry No. 26 dated 12.05.1993 records that it was the first date of trial. The subsequent journal entries indicate that the trial was thereafter postponed from time to time on various grounds. Journal Entry No. 44 dated 24.09.1996 records that it was the third date of trial. It further notes that the case was called on that date for the purpose of leading evidence under section 178 of the Civil Procedure Code.

The evidence on 24.09.1996 was led in open Court, and the proceedings of that day form part of the record. A perusal of those proceedings reveals that the Notary who attested deed P1 and the Managing Director of the plaintiff company gave evidence in open Court as in a normal trial. There is no indication whatsoever in the recorded proceedings that the evidence was recorded *de bene esse*. The proceedings further show that the defendant was fully represented by her team of lawyers and that both witnesses were subjected to extensive cross-examination by the defendant's lawyers.

It is significant that this evidence was recorded before the same District Judge who recorded the evidence of the remaining witnesses and ultimately delivered the judgment. Deed P1 was marked through the evidence of the Notary without any objection. The defendant's counsel cross-examined the

Notary and the other witnesses with regard to deed P1, and the defendant herself gave evidence on deed P1, denying its validity on various grounds. When the plaintiff closed its case, reading in evidence documents marked P1 to P14, no objection was raised to any of those documents. There was no objection that deed P1 was not marked in evidence or not led in evidence or not proved.

There was no issue whatsoever before the District Court or the Court of Appeal regarding the admissibility of evidence recorded *de bene esse*. For the first time before this Court, learned President's Counsel for the defendant, with characteristic ingenuity, contends that, since the evidence allegedly recorded *de bene esse* had not been read at the hearing of the action and since no material had been placed before Court to establish that the said witnesses could not be called at the trial as required by section 178(3) of the Civil Procedure Code, such evidence is inadmissible. Learned President's Counsel therefore strenuously submits that the plaintiff's action must fail on the footing that deed P1 was therefore not proved in accordance with section 68 of the Evidence Ordinance. I have no hesitation in rejecting this submission for several reasons.

Firstly, the evidence of the two witnesses, including the Notary, cannot be regarded as evidence recorded *de bene esse*, as such evidence was recorded during the course of the trial. In terms of section 178(1) of the Civil Procedure Code, evidence *de bene esse* may be recorded "at any time after the institution of the action and before trial." Accordingly, there was no necessity to read such evidence at the hearing of the action or to satisfy the Court, as contemplated by section 178(3), that the witnesses could not be produced at the trial.

Secondly, both parties and their counsel, both before the District Court and the Court of Appeal, proceeded on the footing that the said evidence was evidence given at the trial. At the close of the plaintiff's case, when

documents marked P1 to P14 were read in evidence, no objection whatsoever was taken to any of those documents, including deed P1.

Thirdly, even assuming that the said evidence could be characterised as evidence recorded *de bene esse*, it was led in open Court on oath, before the same District Judge who heard the rest of the evidence and delivered the judgment, and the witnesses were subjected to extensive cross-examination, as in an ordinary trial. In these circumstances, the failure to formally read such evidence at the hearing, or the absence of material establishing that the witnesses could not be produced at the trial, caused no prejudice to the defendant and did not occasion a failure of justice. In delineating the jurisdiction of the Court of Appeal, the proviso to Article 138 of the Constitution expressly provides that "*no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.*"

Finally, objections as to procedure which were not raised before the trial Court, but were acquiesced in, cannot be raised for the first time in appeal so as to frustrate the entire proceedings.

I answer the two questions of law on which leave has been granted in the negative. I also note that, as no such argument was advanced before the Court of Appeal seeking a determination on this issue, the Court of Appeal had no opportunity to decide upon it.

I accordingly affirm the judgment of the Court of Appeal and dismiss the appeal with costs.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court

M. Sampath K.B. Wijeratne, J.

I agree.

Judge of the Supreme Court