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

In the matter of an Appeal.

Kadireshan Kugabalan

No, 52, Main Street,

Kandapola.

Plaintiff.

SC Appeal No. 36/2014

SC (HC CA) LA No. 232/2012

CP/HCCA/KAN/136/2010(FA)

D.C. Nuwara Eliya Case No. 1279/L

Vs-

Sooriya Mudiyanselage Ranaweera,

Gajabapura, Mahagastota,

Nuwara Eliya.

Defendant.

AND

Sooriya Mudiyanselage Ranaweera

Gajabapura, Mahagastota,

Nuwara Eliya.

Defendant – Appellant.

Vs-

Kadireshan Kugabalan

No, 52, Main Street,

Kandapola.

Plaintiff – Respondent.

AND NOW BETWEEN

Kadireshan Kugabalan

No, 52, Main Street,

Kandapola.

Plaintiff – Respondent – Petitioner.

Vs-

Sooriya Mudiyanselage Ranaweera

Gajabapura, Mahagastota,

Nuwara Eliya.

Defendant – Appellant – Respondent.

Sooriya Mudiyanselage Kanthi Ranaweera

No. 32, Gajabapura, Mahagastota,

Nuwara Eliya.

Substituted Defendant – Appellant – Respondent.

Before: Sisira J de Abrew J

S. Thurairaja PC J

E.A.G.R. Amarasekara J

Counsel: Dr. J.A.De Gunarathne with Parakrama Agalawatta and Mohan Walpita for the Plaintiff – Respondent – Petitioner.

Harsha Soza President's Counsel with Nishaka Jayasena for the Defendant – Appellant – Respondent.

Argued On : 21.09.2020

Decided on : 12.02.2021

E.A.G.R. Amarasekara J

I had the privilege of reading the judgment written by his lordship justice Sisira de Abrew in its draft form. Though I inclined to agree with the final conclusion of the said judgment to dismiss the appeal, since I hold a different view with regard to the *cursus curiae* of original civil courts, namely the reiteration of objections to marked documents at the end of one's case as well as with regard to the ratio in **Sri Lanka Ports Authority V Jugolinija Boal East (1981) 1 Sri L R 18**, with all due respect to his lordship's reasoning, I think it is my duty to give my reasons separately to explain why I agree in dismissing this appeal.

First, I would like to refer to the Latin maxim "*cursus curiae est lex curiae*" which means "the practice of court is the law of the court". This Court in **Samarakoon Mudiyanselage Samarakoon and another V Mohammadu Sally Fajurdeen SC Appeal No. 06/2012** quoted as follows;

"Every Court is the guardian of its own records and master of its own practice" and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in law generally stands upon principles that are founded in justice and convenience." – (Taken from **Broom's Legal Maxims- 10th Edition page 82**.)

"*A court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure contrary to or inconsistent with rules laid down by statute or adopted by ancient usage*. - (Taken from **Halsbury's Laws of England 4th Edition Vol.10, Para 703.**)

Thus, if the practice is not inconsistent with a rule laid down by a Statute or to the long-standing practice or usage, it has the force of law. Hence, in my view when this court proclaim an established practice invalid in toto or partially limiting its application to certain areas or scopes, this court has to be very careful, since it may cause serious repercussions to people who acted relying on such practice as law up to that moment; Not only in the case such proclamation is made, but, even in others which have been already decided and pending in appeal due to the reason that a party can take up the position that such practice has no legal consequences in toto or relating to certain areas or scopes even though a new legal position that is created by case law has no retrospective effect.- (See **Arulanandam Puvirajakeerthy V Nadaraja Indranee CA 1222/2000(F)**).

In this backdrop, I would prefer to consider whether the practice and ratio enunciated in Jugolinija Boal East case is still valid law even with regard to documents that are required to be

attested by law and whether the factual background of the matter at hand has an exceptional situation that does not allow the application of the said practice and ratio to the case at hand.

His lordship in his draft judgment has expressed the view that due to section 68 of the Evidence Ordinance, ratio in Jugolinija Boal East decision does not apply to documents that are required by law to be attested. However, in my view, not only with regard to the documents that are required to be attested by law, even with regard to other documents, there are provisions in law how they should be proved. For example, any document has to be proved by primary evidence or tendering the original except on occasions where leading of secondary evidence is allowed by law. (see section 64 and 65 of the Evidence Ordinance).

I do not argue against the view that when a document is to be proved, whether it is a one that is required by law to be attested or not, it has to be proved according to the relevant statutory provisions of the law such as provisions found in the Evidence Ordinance. However, there are certain situations where even the law accepts that certain documents need not be further proved. Followings are among them;

- A document admitted by parties need not be proved and with regard to a deed that is required by law to be attested, this principle is contained in section 70 of the Evidence Ordinance.
- Similarly, a deed which is 30 years or more old and comes from the proper custody, may not be proved by the party tendering it due to the presumption contained in section 90 of the Evidence Ordinance.
- As per Section 68 of the Partition Law formal proof of the execution of any deed which, on the face of it, purports to have been duly executed, is not necessary, unless the genuineness of that deed is impeached by a party claiming adversely.
- As per section 154 of the Civil Procedure Code, if the opposing party does not object to the document when a document is tendered in evidence, if it is not a document forbidden by law to be received in evidence, the court has to admit it.

In my view, the practice referred to in Jugolinija Boal East case is linked to the impeaching and objecting to a document when it is first going to be marked in evidence as contemplated by section 154 of the Civil Procedure Code. Perhaps, in the same manner it may be linked to section 68 of partition law subject to the paramount duty of the judge to investigate title in partition actions. I opine that the practice referred to in Jugolinija Boal East case is focused on a situation where it can be considered that the objection or the challenge to the document originally raised as waived as explained below in this judgment.

Evidence Ordinance contained general provisions regarding matters relating to evidence in civil and criminal proceedings while the Civil Procedure Code contains general provisions in relation to procedure in civil proceedings. Nonetheless, when consider in comparison, the Civil Procedure Code contains provisions specially related to civil actions. Hence, if there is any conflict with regard to placing of evidence and procedure in civil actions, one has to consider provisions in Civil Procedure Code with priority.

As mentioned above, if the document is not one forbidden by law to be received in evidence and it is not objected by the opposing party for being received in evidence, the court has to admit it as evidence. The term 'forbidden by law' has been construed to mean absolute prohibition (for example, tax returns), and not to include a case where evidence was required not to be received or used unless certain requirements were fulfilled. – vide **Seyed Mohamed V Perera 58 N L R 246 at254 and Siyadoris V Danoris 42 N L R 311**.

Hence, if no objection is made to a document being marked when it was first tendered in evidence, it becomes evidence for all the purposes of the case and it cannot be challenged only in appeal. Aforesaid legal position had been confirmed by number of decisions of our superior courts. – vide **Cinemas Limited V Sounderarajan (1998) 2 Sri L.R. 16, Adaicappa Chetty V Thos.Cook and Son 31 N L R 385, Silva V Kindersley 18 N L R 85, Seyed Mohommad V Perera (Supra), Siyadoris V Danoris (Supra), Andrishamy V Balahamy (1 Matara Cases 49), Seelawathie Gunasekara V K.W. Resanona S C Appeal No.22 of 1987.**

Of the aforementioned decisions**, Seyed Mohommad V Perera,** and **Siyadoris V Danoris** were decisions of benches comprising two judges of the apex court while **Seelawathie Gunasekara V K W Resanona** was a decision of a bench comprising of 3 judges of the apex court. These three judgments relate to marking of deeds without objections being raised. Thus, all three judgments support the position that if no objection was taken when a document is tendered in evidence for the first time and marking it, it becomes evidence for all the purposes of the case and even if it is a deed, in such circumstances it is not necessary to prove it in accordance with section 68 of the Evidence Ordinance. They further indicate that such objections cannot be taken for the first time in appeal. In this regard I would like to quote from **Seyed Mohommad V Perera** (Supra).

"*Documents are constantly put in evidence in the course of a trial, sometimes without objections and sometimes by express consent. To rule every such document out on the ground of hearsay would necessitate parties calling in to the witness box persons whose testimony in regard to the authenticity of the document neither side disputes though the contents may be disputed. To accept such a proposition as legally sound and valid basis on which trials in the original courts should be conducted would add in no small measure both to the cost of litigation and to the law's delays, which we constantly hear so much about. We have therefore investigated this matter as fully as we can with such assistance as learned counsel were able to give us and we have come to the conclusion that evidence of documents of title of persons who are strangers to the action and have not been called may become inadmissible only if objections to their production is taken in the original court and that they cannot be objected to for the first time in appeal*."

Following extract taken from **Seelawathie Gunasekara V K W Resanona** (Supra) further fortify the aforesaid position of law.

"*In these circumstances section 68 of the Evidence Ordinance would not require the Notary or an attesting witness to be called; being a document which is not 'forbidden by law to be received in evidence', the failure to object to it being received in evidence would amount to a waiver of the objection"*

"*In the absence of an objection or an issue relating to due execution, and as due execution by the other lessors was not challenged in anyway, the finding of the learned District Judge that the deed, in its entirety, was of no force or avail in law cannot be sustained*."

Now, I would like to consider the decision in **Perera & Others V Elisahamy 65 C L W 59** which was delivered by a bench of two judges. It was an appeal over a judgment in a partition action. It appears that no objection was taken to the deed at the time when its contents were first spoken to by the witness. Irrespective of that and section 69 of the Partition Act, Basnayake C J in agreement with de Silva J held that '*the fact that its genuineness was impeached rendered formal proof necessary regardless of whether objection was taken or not*' and '*a court cannot act on facts which are not proved in the manner prescribed in the Evidence Ordinance*'. On a lighter reading of the above decision, one may get the impression that regardless of whether the document or deed was objected to or not when it was first tendered in evidence, it has to be proved according to the provisions in the Evidence Ordinance; if it is a deed, in terms of section 68 of the Evidence Ordinance; but a deeper understanding of the facts of the aforesaid case and its decision indicate that it is so necessary to prove according to the provisions of Evidence Ordinance, regardless of whether any objection is raised or not at the time of marking the document or deed, only if the genuineness of the document or deed is impeached by the opposite party. I do not see any conflict between this decision in **Perera & Others V Elisahamy** and other judgments referred above which indicate that where there is no objection to the document it can be admitted in evidence without further proof in terms of the provisions of the Evidence Ordinance. This decision in **Perera V Elisahamy** only add the condition that if the document is impeached irrespective of whether there is an objection or not it has to be proved in terms of the Evidence Ordinance. **Perera V Elisahamy** contemplates a situation where the document is impeached or challenged even prior to its marking. Even in **Seelawathie Gunasekara V K.W Resanona** (Supra) their lordships while arriving at the decision had observed that there was no issue challenging the deed.

It is necessary to see how a document including a deed can be impeached or challenged in a civil suit. Firstly, it can be impeached through pleadings. Secondly, it can be impeached by raising relevant issues. In a normal civil action, if it is not raised through an issue, the challenge to the document in the pleading may be considered as waived since with the framing of issues pleadings recede to the background. Thirdly, the document or the deed can be challenged by objecting to it under section 154 of the Civil Procedure Code and, if it is a partition action under section 68 of the Partition Law. However, what takes place in a partition action is subject to the incumbent duty of the judge to investigate title.

Hence, what was elaborated above through the decisions of our superior courts shows that in a normal civil action like the one at hand, if the document or the deed is not impeached through an issue or issues, and no objection is taken when it was first tendered in evidence, it becomes evidence for all purposes of the case. On the other hand, if the document or deed is impeached through an issue or issues, irrespective of whether any objection was taken at the first opportunity when it was tendered in evidence or not, the document has to be proved in terms of the Evidence Ordinance.; If it is a deed, in terms of section 68.

Now I would like to elaborate on the practice of reading the documents marked in evidence at the closure of one's case and reiteration of objections to the marked documents and the ratio in Jugolinija Boal East case.

As I stated above, in my view, this is a practice linked to section 154 of the Civil Procedure Code and it also can be linked to the similar provision found in section 68 of the Partition Act. In a Criminal Case, namely **Robins V Grogan 43 N L R 269**, it was held that a document cannot be used in evidence, unless its genuineness has been either admitted or established by proof, which should be given before the document is accepted by court. However, as shown above section 154 of the Civil Procedure Code allows documents, which are not forbidden by law, to be admitted in evidence when there is no objection at the time of tendering it in evidence. As explained above, if the document is challenged or impeached through an issue it still has to be proved according to the Evidence Ordinance.

When a document is objected to it being admitted when it was first tendered in evidence, two questions arise for the court to consider; Firstly, whether the document is authentic, in other words whether it is what the party tendering it represents it to be; Secondly, if it passes the test of authenticity, whether it is legally admissible. Admissibility may be decided on arguments with reference to relevant legal provisions but authenticity has to be decided through the evidence adduced in that regard - vide section 154 of the Civil Procedure Code. If one has to prove the authenticity at the very moment whenever an objection is taken, the court may have to adjourn the recording of the evidence of ongoing witness and allow witnesses to be called to prove the authenticity of the document. If they are not available, the court may have to adjourn the proceedings for the day to give an opportunity to summon witnesses necessary to prove the document. Thus, it makes it expedient to mark a document 'subject to proof' when there is an objection to it and proceed with the ongoing witness. On the other hand, it is always not possible for the opposing counsel to state exactly whether he/she objects or not, since in a civil trial, it is not mandatory for the clients to be present in courts. The counsel may need instructions from his client to object to the document tendered in evidence. One may say, since documents are listed, he can get instructions prior to the trial date, but no one can assume that a fake document with the same description as in the list may not be introduced through a witness. Furthermore, there are occasions where documents are marked with the permission of court as well as by showing to the witness during cross-examination. Hence, in a civil trial, it is necessary for the counsel to get instructions from his client to raise a steady objection to a document. This creates a situation in a civil trial to object to documents tentatively till the counsel gets instructions from his client. Hence, it is conceivable that in a civil trial, certain documents are marked 'subject to proof' tentatively. This make a party to refer or mention those documents when that party intends to close his case to see whether the objections made are carried forward by the opposing party or not. Otherwise, I am not aware of any provision that requires parties to mention the documents marked again at the closure of their case. If the objection is reiterated it is considered as a steady objection and if not, it is considered as a withdrawal or wavier of a tentative objection. If the objection is reiterated, in my view, the party who marked the documents have two options, that is either to show through submissions that further proof is not necessary or it is already proved, or ask permission of court to summon witnesses to prove the documents which are steadily objected

since it is the moment objection is confirmed leaving aside its tentative nature. On the other hand, if the objection is not reiterated, it is considered that it was a tentative objection that was withdrawn. In such circumstance as there is no objections in terms of section 154 of the Civil Procedure Code, the law relating to the application of section 154 as discussed above would apply.

Afore described practice has been so ingrained in our system and, sometimes after mentioning the documents marked, the counsel only looks at the counsel of the opposite party to see his response. Even the court may not record his response unless there is a reiteration of the objection. Thus, this appears to be a practice developed through the practical application of section 154 of the Civil Procedure Code which is legally acceptable. On the other hand, this practice reduces the delay and cost of litigation which is for the convenience of all the stake holders in a given case. The said practice had been adhered by our civil courts and approved by superior courts including this court, not only in Jugolinija Boal East case but also in following cases.

Supreme Court Cases:

Rolax Enterprises(pvt) Ltd. V People's Bank SC CHC Appeal 12/2011, Balapitiya Gunananda Thero V Talalle Methananda Thero (1997) 2 Sri L R 101, Stassen Exports Ltd. V Brooke Bond Group Ltd. (2010) 2 Sri L R 36, Samarakoon V Gunasekara and another (2011) 1 Sri L R 149.

Court of Appeal Cases:

Hemapala V Abeyratne (1978-1979) 2 Sri L R 222, Jayalath V Karunathilaka (2013) 1 Sri L R 337, Wijewardena V Ellawala (1991) 2 Sri L R 14, Gunawardane V Indian Overseas Bank (2001) 2 Sri L R 113, Vellage Sumanasiri De Silva V Gamage Indranee Paranagama CA 1264/1998F

Hence, it is clear that our superior courts approved the said practice and ratio in Jugolinija Boal East case through many decisions till, to my knowledge, two recent decisions expressed a different view, namely the decisions in **Mohamed Naleem Mohamed Ismail V Samsulebbe Hamithu SC Appeal 04/2006** and **Dadallage Anil Shantha Samarasinghe v Dadallage Mervin Silva & another SC Appeal 45/2010**. As per the decision of aforesaid two cases, with regard to a deed which is required by law to be attested, even there was no objection reiterated at the closure of the case of the party who marked that deed, it has to be proved in terms of section 68 of the Evidence Ordinance. It is not clear whether the deeds which were in question in the respective cases were impeached or challenged through issues raised at the trial. However, it is clear that these two judgments refused to follow the ratio in Jugolinija Boal East case. Nevertheless, in the aforesaid two cases application of section 154 of the Civil Procedure Code had not been considered in coming to the said decisions of rejecting the application of ratio in Jugolinija Boal East Case. Both the said cases have referred to the decision of **Samarakoon V Gunasekara and another (2011) 1 Sri L R 149** (Supra). Anyhow, in my view, the decision in Samarakoon V Gunasekara is not a decision that negates the afore-discussed practice or the ratio in Jugolinija Boal East case. In that case, the requirements in terms of or application of section

68 had been considered after referring to the reiteration of objections to the relevant documents at the closure of the party who tendered the relevant documents. The said decision specifically refers to the aforesaid practice and ratio in Jugolinija Boal East case and had never stated that said ratio does not apply to deeds. There the application of section 68 was necessary since the objection was reiterated at the closure of the case of the opposite party.

In **Mohamed Naleem Mohamed Ismail V Samsulebbe Hamithu SC Appeal 04/2006** (supra) their lordships while deciding not to apply the ratio in Jugolinija Boal East case had expressed that neither in the decision of Jugolinija Boal East nor in the decision of Balapitiya Gunananda Thero V Talalle Methananda Thero(supra) it had referred to a document that was required by law to be attested. Though this court is not bound by the decisions of the Court of Appeal, it appears that decisions in Hemapala V Abeyratne (supra) and Wijewardena V Ellawala (Supra) which applied the ratio in Jugolinija Boal East to documents which are required by law to be attested had not been brought to the notice of their lordships prior to making that decision. Furthermore, as said before, the application of section 154 of the Civil Procedure Code or the decisions made by superior courts in relation to deeds that were not objected at the time of marking, namely, Seyed Mohommad V Perera (supra), Siyadoris V Danoris(supra) and Seelawathie Gunasekara V K W Resanona(supra), apparently, had not been brought to the notice of their lordships, prior to making the decision in the said Mohamed Naleem Mohamed Ismail V Samsulebbe Hamithu. Same lapses I observe in relation to the decision in **Dadallage Anil Shantha Samarasinghe v Dadallage Mervin Silva & another(supra**). In the decision of Dadallage Anil Shantha Samarasinghe v Dadallage Mervin Silva & another, there is a reference to the decision in **Robins V Grogan**(supra) but it is a criminal case which has no application of the aforesaid section 154 or section 68 of the Partition Act. Therefore, I do not incline to follow the decisions in the said Mohamed Naleem Mohamed Ismail V Samsulebbe Hamithu SC Appeal 04/2006 and Dadallage Anil Shantha Samarasinghe v Dadallage Mervin Silva & another as they were decided without the opportunity to consider the practical application of the said section 154 and some relevant case laws. As elaborated above I cannot consider Perera V Elisahamy (Supra) as a decision that nullifies the application of ratio in Jugolinija Boal East decision in relation to deeds in general terms but when the deed is impeached or challenged it requires the deed to be proved in terms of section 68 of the Evidence Ordinance.

As mentioned before, in a civil action such as the one at hand, if the relevant document is not impeached or challenged through issues, the ratio in Jugolinija Boal East is still valid. This is so even with regard to the deeds. However, if the deed is impeached or challenged through an issue raised, it has to be proved as per the provisions of Evidence Ordinance.

Moreover, in the case at hand, the defendant had refused to accept that he executed the deed of transfer as alleged by the plaintiff through his answer and thereafter have raised issues no.7 and 8 in that regard. Therefore, what was to be proved with regard to the alleged execution of the relevant deed was elaborated by the said issues. Till the learned judge answered those issues, the challenge to the alleged execution of the deed through issues stood valid. As such, the deed should have been proved in terms of section 68 of the Evidence Ordinance even though there was no objection at the time of marking it or at the closure of the Plaintiff's case. In my view and

as elaborated above, the learned District Judge should not have applied the ratio in Jugolinija Boal East decision to the present case, even though the deed was not objected to at the closure of the plaintiff's case. Hence, I cannot find fault with the decision of the learned High Court Judges for not considering the afore discussed practice or the ratio in Jugolinija Boal East case.

For the foregoing reasons I also decide to answer the questions of law in favour of the Defendant Appellant- Respondent while dismissing the appeal with costs.

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E A G R Amarasekara

Judge of the Supreme Court.