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It is also relevant to refer to the commentary made by Professor Monir in his book 'Principles and Digest of the Law of Evidence.' 4th edition at page 692 under the heading "Presumption where a party does not go into the witness box." He states; " A party runs a great risk if he does not enter into the witness box and himself give evidence in his case upon facts which are directly in his knowledge and which relate to the matters in controversy. It is the bounden duty of a party who personally knows the whole of the circumstances of the case to go into the witness box, to dispel the suspicions attaching to his case, and if he, being present in court, fails to do so, his non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case, where a party whose evidence is material does not go into the witness box and give evidence, the presumption is that he has abstained from giving evidence by reason of the fact that truth is on the opposite side and the court is entitled to infer everything against him."

Although it is seen that the aforesaid observations of Professor Monir have been made with regard to presumptions that arise in a criminal action. However in my view the same principles are valid in respect of evidence in a civil action too where the standard of proof is less stringent as they are decided on balance of probabilities and not beyond reasonable doubt like in a criminal action.

It is to be observed that the evidence of the plaintiff-appellant to the effect that the defendant-appellant entered into possession of the premises in suit, at the beginning as an employee of her late son Nandasena is uncontroverted by the defendant-respondent.

It is interesting to note that the defendant-respondent after having entered into the premises in suit as a licensee of Nandasena is now seeking to challenge the right of Nandasena's mother to claim the boutique in dispute, claiming that he had purchased same from Nandasena's father after Nandasena's death. These matters were revealed in his statement to the Kataragama police made by him on 03.12.1991 (P8).

It transpired in the evidence that Nandasena had died unmarried and issueless and three of his brothers too had died. The plaintiff-appellant who is his mother is undoubtedly an heir of Nandasena on whom the

This claim of the defendant-respondent was rejected by the plaintiff-appellant. The plaintiff-appellant sought the assistance of the local police and had made a complaint dated 03.12.1991(P7) to gain possession of the premises in suit.

In the course of the investigations conducted by the police, the defendant-respondent had made a statement to the police which too is dated 03.12.1991 (P8), wherein he had stated that he had first obtained a lease of the premises from Nandasena on payment Rs. 1,000 per month as rental.

He had further stated in his statement to the police that subsequent to the death of Nandasena he had purchased the premises in suit from his father for a sum of Rs. 50,000 out of which there was a balance sum of Rs. 5,000 to be settled. The defendant-respondent had claimed that he was in possession of necessary documents to prove his claim.

The defendant-respondent's answer filed in this case was devoid of any of the aforesaid facts. He merely had stated that he was in possession of the premises in suit and that the plaintiff-appellant had no right to institute the present action. The defendant-respondent did neither give evidence in court nor call witnesses on his behalf, to at least explain the basis on which he happened to be in possession of the premises in suit. The defendant-respondent had not refuted the matters stated by the plaintiff-appellant in her police statement (P7). His answer did not contain any of the matters that were in his statement to the police (P8).

It is pertinent to refer to the observations of H. N. G. Fernando, J (as His Lordship then was) at 174 of the case of *Edrick Silva Vs Chandradasa Silva*[1] He observed :

> "But where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional 'matter before the court.", which the definition in Section 3 of the Evidence Ordinance requires the court to take into account, namely, that the evidence; led by the plaintiff is uncontradicted".

majority of shares would devolve. And as such heir she is entitled to all leasehold rights of Nandasena, in respect of the property in suit. Being an heir of Nandasena she contended that she steps into the shoes of Nandasena.

It is of significance to observe that the defendant-respondent who was the licensee of Nandasena had become the licencee of the plaintiff-appellant by operation of law. Therefore it appears that there is privity of contract between the plaintiff-appellant and the defendant-respondent.

Under the rule of estoppel recognized by our common law, a cause of action can be based by a lessor or licensor against an overholding lessee or licensee.

It is relevant to refer to the observations of Gratien J at 173, in the case of *Pathirana* vs *Jayasundara*[2] in this regard. At 173 Gratien J observed :-

> "The scope of an action by a lessor against an overholding lessee for restoration and ejectment however is different. Privity of Contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title, until he has first restored the property in fulfillment of his contractual; obligation. The lessee (conductor) cannot plead the *exceptio domini*, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship. . . . ." Vote 19.2.32.

Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessees contractual obligation.

The legal position as stated vide, Voet, Commentary on the Pandects translated by Percival Gane, Volume 3 Book 19.2.32, "Lessee cannot dispute lessors title though a third party can-Nor can the setting up of an exception of ownership by the lessee stay the restoration of the property leased even though perhaps the proof of ownership would be the case for

the lessee. He ought in every event give back the possession first and then litigate about the proprietorship."

In the case of *Alvar Pillai* Vs *Karuppan*[3] where, the defendant was given a land on a non-notarially attested document Bonser C. J., observed at 322,

"It is not necessary for the purpose of this case, to state the devolution of the title, for even though the ownership of one half of this land were in the defendant, himself, it would seem that by our law having been let into possession of the whole by the plaintiff. It is not open to him to refuse to give up possession and then it will be open to him to litigate about the ownership."

In the case of *Mary Beatrice and others Vs Seneviratne*[4], at 202, *Senanayake*, J has observed.

"It is opportune of this moment to quote Maasdorp, Institutes of Cape, Law, 4th Edition Volume 3, page 248, "A lessee as already stated is not entitled to dispute his landlord's title and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he is himself rightful owner of the same. His duty in such a case is first to restore the property to the lessor and then to litigate with him as to the ownership." *Also Vide Ruberu and another Vs Wijesuriya.*[5]

The action of the plaintiff-appellant is not one based on declaration of title. It is based on the contract of leave and license.

Witness Piyadasa, another son of the plaintiff-appellant asserted to the fact of sending a letter through an Attorney-at-Law by the plaintiff-appellant giving notice of termination of the license to the defendant-respondent.

The defendant-respondent had failed to contravert the matters that transpired in the evidence of the plaintiff-appellant and her witnesses since he had neither given evidence nor adduced evidence on his behalf. Therefore

it is to be observed that on a balance of probabilities those matters have been established by the plaintiff-appellant.

Then, there arises the question whether the plaintiff-appellant had lawfully terminated the leave and license given to the defendant-respondent.

It is of significance to observe that in any event by his conduct in refusing to accept the rights of the licensor and hand over possession to the plaintiff-appellant he had repudiated the license. It appears that by such conduct he had ceased to be a licensee and had become a trespasser. Thus there is no necessity in law to give notice termination of such license. *Gunasekara Vs Jinadasa* [6].

The defendant-respondent is estopped from denying the rights of the plaintiff-appellant. He must first quit the premises in suit and thereafter litigate to establish his rights by way of another action.

It is to be observed that the learned District Judge had failed to embark on a proper analysis and evaluation of evidence. Further it is to be observed that the learned District Judge has erred in concluding that no rights devolved on the plaintiff-appellant on the death of Nandasena.

I set aside the judgment of the learned District Judge and direct him to enter judgment in favour of the plaintiff-appellant as prayed for in the plaint.

The appeal of the plaintiff-appellant is allowed with costs fixed at Rs. 5,000.

SOMAWANSA, J.—I agree.

appeal Allowed.

PINGAMAGE
VS
PINGAMAGE AND OTHERS

COURT OF APPEAL
SOMAWANSA, J.
CA 372/96(F)
DC KURUNEGALA 3005/L
JUNE 11, 2004

Rei Vindicatio Action - Validity of Deed ? - Due execution - Evidence Ordinance, sections 68, 101 and 114-Attesting witness children of executant - Notaries Ordinance 1 of 1907, sections 31(9), 33 - Lack of consideration - Burden of Proof ? - Is it a ground to set aside a Deed ? - Justus causa - Roman Dutch Law.

The plaintiff respondent instituted action seeking a declaration of title and ejectment of the defendant appellant. The position of the defendant appellant was that the deed relied upon by the plaintiff respondent is a fraudulent/void deed and based their title on prescription. The trial court held with the plaintiff respondent.

HELD

(i) The plaintiff respondents in complying with section 68 Evidence Ordinance have called no one but both attesting witnesses.

(ii) Their evidence was not challenged under cross examination. No suggestion was put to them that they did not attest the deed.

(iii) There was no legal duty cast on the plaintiff respondent to have called the mother executant as a witness to prove that she placed here thumb impression on the deed as this fact was established by the testimony of the two attesting witnesses

(iv) Failure of consideration does not give rise to a claim for cancellation of the deed but only to claim for unpaid consideration.

(v) In Sri Lanka consideration is only necessary for those contracts which are governed by the Roman Dutch Law. Those contracts require only 'causa' to support them. Therefore in contracts governed by Roman Dutch Law proof of the want or failure of consideration

will not enable a party to set it aside so long as there is one just a causa to support it

(vi) Evidence reveals that the impugned deed has been duly attested or executed.

An **APPEAL** from the judgment of the District Court of Kurunegala.

Cases referred to :

1. *Velupillai vs. Sivakanipullai - 1A. C. R. 180.*
2. *Solicitor General vs. Ava Umma 71 NLR 512*
3. *Asliya Umma vs. Thingal Mohamed 1999 2 sri LR 152*
4. *Meyor vs. Rudolph's Executors SALR 1918 AD 70*
5. *Jayawardane vs. Amerasekera 15 NLR 280*
6. *Mohamadu vs. Hussain 16 NLR 368*
7. *Nona Kumara vs. Abdul Cader 47 NLR 457*

Lakshman Perera for the Defendant appellant
P.P. Gunasena for the Plaintiff respondent

cur. adv. vult.

SOMAWANSA, J.

The plaintiffs-respondents instituted the instant action in the District Court of Kurunegala seeking a declaration of title to the land described in the schedule to the plaint, ejectment of the defendant-appellant and those holding under him therefrom, damages in a sum Rs. 2,000 and as from the date of the plaint continuing damages at the rate of Rs. 1,000 per annum till the plaintiffs respondents are restored to possession thereof.

The position taken by the plaintiffs-respondents was that by virtue of deed No. 465 dated 18.08.1986, they became the owners of the land in suit and that on about 10.09.1986 the defendant-appellant without any manner of title or interest forcibly and unlawfully entered the land and is in occupation of the house standing thereon. They also set up a claim on prescriptive possession.

The position taken by the defendant-appellant was that about 26 years ago the properties of the family were divided amicably among its members

and in consequence the defendant-appellant was given the property in suit that he developed the property considerably and constructed a house thereon, that the aforesaid deed on which the plaintiffs - respondents have based their title is a fraudulent and a void deed and claimed title to the land in suit on the basis of prescriptive possession. He also set up a claim in reconvention for the improvements effected by him to the property in suit in a sum Rs. 300,000 and also the right to retain the property until the aforesaid sum is paid in full. In the premis he prayed for a dismissal of the plaintiffs-respondents action and a declaration that he has acquired title to the property on the basis of prescriptive possession. In the alternative, compensation in a sum of Rs. 300,000 for the improvements effected and the right to *jus retentionis* until payment in full.

The plaintiffs - respondents in their replication denied any liability in respect of the defendant-appellant's claim in reconvention.

At the trial parties admitted that one Ukkumenika was the original owner of the land in suit and that the said land is described in the schedule to the plaint.Parties raised 15 issues between them and at the conclusion of the trial the learned District Judge by his judgment dated 01.04.1996 held with the plaitiffs respondents. However he allowed the claim in reconvention of the defendant appellant and awarded a sum of Rs. 150,000 in respect of the house constructed by him on the land in suit and also the right to retain the same until the aforesaid sum is paid in full. It is from the said judgment that the defendant-appellant has preferred this appeal.

At the hearing of this appeal, the main argument revolved around deed No. 465 dated 18.08.1986 marked P2 as to whether it was a valid deed or not. Counsel for the defendant-appellant contended that though the learned District Judge has held that the said deed is valid he does not give any reasons or explanation as to why he arrived at such a conclusion. That the learned District Judge has failed to consider the evidence led in relation to the question whether the said deed marked P2 is the act and deed of the plaintiff-respondent's mother and whether there was in fact a contract between the parties at the time the said deed was executed for which no reasons have been given in the judgment.

The relevant issue settled on this point of contest is issue No. 12 which reads as follows :

(12) පැමිණිල්ලේ 4 වැනි ඡේදයේ සඳහන් 465 සහ 1986.08.18 වැනි දිනැති ඔප්පුව උත්තර පත්‍රයේ 8.වැනි ඡේදයේ සඳහන් ප්‍රකාර හේතු එකකට හෝ සමහරක් ක්‍රියා බල ශූන්‍ය ලේඛනයන්ද ?

Paragraph 8 of the answer referred to in the said issue reads as follows:

(8) "පැමිණිල්ලේ 4 වැනි ඡේදයට උත්තර සපයමින් විත්තිකරු මෙසේ කියා සිටී. 1986ක් වූ අගෝස්තු මස 18 වැනි දින ටී. ඇම්. උක්කු මැණිකා විසින් පැමිණිලිකරුවන්ට මිලයට විකුණන ලදැයි කියන අංක 465 දරන ඔප්පුව පහත සඳහන් හේතු නිසා වංචාසහගතව සහ බලශූන්‍ය ලේඛනයක් බව කියා සිටියි :

(අ) එම ලේඛනයේ එකී ටී. ඇම්. උක්කුමැණිකේ ක්‍රියාවක් බැව් ඔප්පු නොවන බවත් හෝ,

(ආ) එකී උක්කුමැණිකා රවටා හෝ අයුතු බලපෑම් යොදවා ලබාගත් ලේඛනයක් හෝ,

(ඇ) ප්‍රතිශ්‍රවයක් නොමැතිව ලබාගත් ලේඛනයක් බවත් "

The learned District Judge in answering the issues raised has answered the said issue in the negative and the reasons given in his judgment for answering the aforesaid issue in the negative are as follows :

> " පැ2 ලේඛනයේ තිබූ අංක 465 ඔප්පුවට සාක්ෂි ලෙස අත්සන් තැබූ ගුණරත්න පිංගමගේ නමැති අයත්, පී. පොඩි මැණිකේ ගුණසේකර නමැති අයත් පැමිණිල්ල විසින් සාක්ෂියට කැඳවා ඇත. දීමනාකාරිය වූ පැමිණිලිකරුවන්ගේත් විත්තිකරු ගේත් මව වූ උක්කුමැණිකා මියගොස් බව සාක්ෂිවලින් හෙළිදරව් වී ඇත. මෙම "පැ2" ලේඛනය වංචනික ලේඛනයක් බව විත්තියෙන් දී ඇති උත්තරයේ සහ විත්තිකරුගේ සාක්ෂි වලින් කියා ඇතත්, "පැ2" ලේඛනය එවැනි වංචනික ඔප්පුවක් නොවන බවට පැමිණිල්ල මැනවින් ඔප්පු කර ඇති බව නිගමනය කරමි. "

On an examination of this paragraph wherein the validity of deed marked P2 is considered one has to concede that the learned District Judge has failed to analyse the evidence led on this point in detail. However, he refers to the all important two attesting witnesses who were called by the plaintiffs respondents to establish the due execution of the said deed. At this point,

it would be pertinent to refer to Section 68 of the Evidence Ordinance which reads as follows :

> "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."

In the instant action the plaintiffs-respondents in complying with the provisions in Section 68 of the Evidence Ordinance have called not one but both attesting witnesses to the deed marked P2 to testify to the due execution of the said deed. As to N.H. Gunaratne, Notary Public who attested the deed it tranpired in evidence that his whereabouts were not known and was not listed as a witeness. As to the evidence of these two witnesses in signing the deed as attesting witnesses was never challenged by the defendant-appellant and under cross examination no suggestion put to them that they did not attest the deed marked P2. It is also to be noted that these two attesting witnesses were not the recipients of any benefit in terms of the said deed.

It is contended by the counsel for the defendant-appellant that since the two attesting witnesses are the children of the executant and also since they are the ones who found the Notary and as the Notary did not know the executant there was a legal duty cast on the plaintiffs-respondents to have called the mother as a witness to prove the fact that she placed the thumb impression on the said deed marked P2. It is to be seen that in P2 Notray's attestation clearly says that the Notary does not know the transferor. He specifically has stated that he knows the two attesting witnesses who in turn were the children of the executant. At this point it would be pertinent to refer to Section 31(9) of the Notaries Ordinance No. 01 of 1907 which reads as follows :

> 31(9) " He shall not authenticate or attest any deed or instrument unless the person executing the same be known to him or to at least two of the attesting witness thereto; and in the latter case, he shall satisfy himself, before accepting them as witnesses, that they are persons of good repute and that they are well acquainted with the executant and know his proper name, occupation, and residence,

and the witnesses shall sign a declaration at the foot of the deed or instrument that they are well acquainted with the executant and know his proper name, occuption, and residence."

Evidence reveal that these provisions contained in the aforesaid Section of the Notaries Ordinance has been complied with. Middleton, J in **Valupillai** vs. **Sivakampillai** [1] stated that :

"To attest" means to bear witness to a fact. An attesting witness is a witness who has seen the deed executed and who signs it as a witness. Where the instrument is required by law to be attested, the meaning is that the witness shall be present at its execution and shall testify that it has been executed by the proper person. Middleton, J.was of the opinion that " to attest" does not necessarily mean that the witness is to write down anything in the document to the effect that he subscribes as a witness, and that if it is shown that **in fact he did sign** and did witness the signarture which he is attesting, that would be sufficient for attestation."

And as for the object of calling a witness in **Solicitor-General *vs.* Ava Umma**[2]at 515:

Per T.S. Fernando, J.

" The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in section 2 of No. 7 of 1940 (prevention of Frauds Ordinance (cap.84) means proof of the identity of the person who signed as maker and proof that the document was signed in the presece of a notary and two or more witnesses present at the same time who attested the execution."

Evidence of the two attesting witnesses also reveal that the deed marked P2 has been duly attested or executed. In any event, Section 33 of the Notaries Ordinance provide that :

"No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form :

provided that nothing hereinbefore contained shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions of any other written law."

In **Asliya Umma *vs.* Thingal Mohamed**[3] the Supreme Court held :

> "The failure of the Notary to observe the provisions of section 31 of the Notaries Ordinance in executing the deed of revocation did not make it invalid; for in terms of section 33 of the Ordinance, the deed shall not be deemed to be invalid by reason of such failure."

In the circumstances, I am unable to agree with the counsel for the defendant- appellant that there was a legal duty cast on the plaintiffs - respondents to have called the mother as a witness to prove the fact that she placed the thumb impression on the deed marked P2 for this fact has been established by the testimony of the two attesting witnesses. The fact that the two witnesses were children of the executant does not make them disqualified to sign as attesting witnesses or make their testimony unworthy of credit. Therefore it appears that deed P2 stands proved as having been duly executed. In the circumstances provision of section 114 illlustration "F" of the Evidence Ordinance will have no application to the facts of this case. I might also say that though evidence revealed that when evidence on behalf of the plaintiffs-respondents were led the executant of the deed marked P2 was alive, evidence also revealed that she was 82 years of age and was a sick person and according to the evidence of the defendant-appellant she was not only physically ill, but also a mental patient for a number of years before she died. Defendant-appellant in his evidence at page 285 of the brief says as follows :

"ප්‍ර. මෙම නඩුව විභාගයට ගන්නා විට මව ජීවතුන් අතර සිටියාද ?

උ සිහි විකලින් සිටියා.

තමාගේ පියා බීමත්ව සහ සුදුවට ගිය බව කීවා. මව සිහි විකලින් සිටි බව කීවා නීතිඥ මහත්වරුන්ට කුට උපක්‍රම කල බව කීවා. තමාගේ මවට සිහිය විකල වූයේ කවදාද ?

උ. 1982 දී සිහිය විකල් වී වගේ හිටියා. 1984 වන විට හොඳටම සිහි වි කල්ව සිටියා."

Again at pages 287, 288 and 289:

"ප්‍ර. මව සිහි විකලින් එය ලිවුව බවද කියන්නේ ?

උ. ඔව්.

ප්‍ර. එම ඔප්පුව ලියා තිබෙන්නේ 1986 අවුරුද්දේ ද ?

උ. 1986.08.18 වෙනි දිනට එය ලියා තිබෙන්නේ.

ප්‍ර. 1983 අවුරුද්දේ අවසාන වශයෙන් තමන්ට කතා කරන විට මව සිහි විකලින් සිටි බව දැනගෙන සිටියා නම් පැමිණිල්ල ඉදිරිපත් කරන විට මෙවැනි ඔප්පුවක් ලියා තිබෙනවා කියා දැනගෙන සිටියා නම් තමන්ගේ සහෝදරියන් වංචනික ඔප්පුවක් ලියා තිබෙන බවට පොලීසියට පැමිණිලි කලා ද?

උ. පැමිණිලි කලේ නැත.

ප්‍ර. මෙම නඩුවට මව සාක්ෂි සඳහා කැඳවීමට උත්සාහ කළාද ? ඉඩම් හුවමාරුවක් වූ බව පෙන්වීමට අවුරුදු 30කට පෙර ?

උ. මවට සාක්ෂි දෙන්නට බැහැ පිස්සියක් නිසා."

when the defendant-appellant himself in his evidence says that the executant was a mental patient who was not in a position to give evidence, I am unable to comprehend as to how the counsel for the defendant-appellant could argue that the plaintiffs-respondents should have called the executant to prove the fact that she placed her thumb impression on the said deed marked P2 or if she was unable to come to Court to give evidence, the plaintiffs-respondents should have moved for affidavit evidence to be recorded on commission or *de benne esse* evidence before the trial.

Counsel for the defendent-appellant also contended that the learned District Judge had erred in coming to the conclusion that the plaintiffs-respondent's mother was dead at the time of trial, when in fact according to the evidence of the 1st plaintiff-respondent she was very much alive. However I do not think that the learned District Judge can be faulted for his conclusion for the defendent - appellant himself in his evidence admit that his mother is no longer living. At page 282 of the brief he says :

"ප්‍ර. මව මිය ගියේ කොහේ දී ද ?

උ. කැගල්ලේ දී "

Also at page 286 of the brief :

"ප්‍ර. මවගේ මරණයට තමන් ගියා ද ?
උ. මව මිය ගිය බව දැන්වූ විට මම ගියා."

Again at page 320 of the brief :

ප්‍ර. ඇය මියගියේ මොන අසනීපයෙන් ද?

උ. පිස්සුවෙන් ඉඳල නැති වුනේ. පිස්සුවෙන් අවුරුදු ගණනක් සිටියා.

ප්‍ර. තමන් මවගේ මරණයට ගියා ද ?

උ. මම සහ බිරිඳත් ළමයිනුත් ගියා. මව පිස්සුවෙන් මැරෙන්නට ඇති."

Another matter raised by the counsel for the defendant-appellant is the lack of consideration. It is to be seen that the deed marked P2 in its attestation states that consideration was not paid in the presence of the Notary who attested the said deed. The 1st plaintiff -respondent who is one of the purported purchasers on the said deed marked P2 in his evidence admitted that no consideration passed or was paid. Evidence of Gunarathna Pingamage also reveal that consideration did not pass and the sum of R. 7,500/- was mentioned in the deed on the instructions given by the Notary.

The question arises as to whether the deed of conveyance becomes invalid if the consideration is not paid fully. According to Voet 19.1.21 non payment of purchase price is not a ground for cancellation of a conveyance. It was held in *Meyer vs. Rudolhp's Executors* (4) that the failure of consideration does not give rise to a claim for cancellation of the deed but only to claim for unpaid consideration. This question was considered in *Jayawardena vs. Amerasekera* (5) and the Court held as follows.

"On the execution of a notarial conveyance the sale is complete, and the mere fact that the whole of the consideration has not been paid cannot, in the absence of fraud or misrepresentation, afford ground for the rescission of the sale and the cancellation of the conveyance."

Where a person obtains a conveyance of property without fraud, but afterwards fraudulently refuses to pay the consideration stipulated for, the

grantor is not entitled to claim a cancellation of the conveyance, but his remedy is an action for the recovery of the consideration. This principle was adopted in *Mohamadu Vs. Hussian.*[6]

In *Nona Kumara vs. Abdul Cader*[7] the plaintiff, when she was a minor, transferred certain lands to the first defendant by a deed which, on the face of it, was a transfer for consideration. She sought to have the deed declared null and void on the ground that her signature was obtained to it by undue influence, intimidation and threats. The District Judge held against the plaintiff on the questions of undue influence, intimidation and threats. He held, however, although no specific issue was raised, that the deed was a donation, and therefore null and void, merely because the transferor did not receive the consideration mentioned in the deed. Jayetileke, J held " that the deed which on the face of it, was a transfer for consideration could not be held to be a donation merely because the transfer did not receive the consideration. The plaintiff's remedy was an action to recover the consideration and not to claim a cancellation of the conveyance."

I might also refer to the Law of Evidence E.R.S.R. Coomaraswamy vol. II Book 01 at page 203 wherein he considers 'Want or failure of consideration' and says :

" It can always be shown that a contract was entered into without consideration, or the consideration, if any, has failed. This applies even where the instrument contains an averment that the deed was for consideration."

" In Sri Lanka, consideration is only necessary for those contracts which are governed by the Roman-Dutch Law. Those contracts which are governed by the Roman-Dutch Law require only *causa* to support them. Therefore, in contracts governed by Roman-Dutch Law, proof of the want or failure of consideration will not enable a party to set it aside, so long as there is some *justa causa* to support it. But if there is and averment in a contract governed by the Roman-Dutch Law, such as a contract for the sale of land, that a certain consideration had been paid, then it is open to party, alleged to have received the consideration, to show that in fact no consideration had been paid.

Certain Indian cases took the view that the want or failure of consideration sought to be proved under the proviso must be such as invalidates an instrument. That is, total want or failure of consideration. But this view appears to be too narrow. The words "such as" in the proviso show that the words "wants or failure of consideration" need not be construed in this limited way. Our courts have held that it is open to a defendent to prove that the consideration was in fact different from the consideration stated in deed. Certain Indian cases take the same view."

Counsel for the defendant-appellant also contended that at the time of execution of the deed marked P2 none of the recipients who derived title by the said deed were present and the fact that no consideration passed between parties to the said deed goes to show that there being no nexus between the parties, no evidence of intention to transfer the property in suit and hence the validity of the deed is questionable. Here again, I am unable to agree with the counsel for the reason that due execution of the said deed has been established.

On the other hand, it is for the defendant-appellant to prove the objections taken by him to the said deed in paragraph 08 of the answer. It appears that except for lack of consideration the other matters pleaded therein have not been proved by the defendant-appellant. As the plaintiffs-appellants have proved due execution of the deed marked P2 the burden of proving that said deed marked P2 is not the act and deed of the executant Ukkumenika and that it was obtained by deceit and undue influence is on the defendant-appellant. Only evidence placed before the learned District Judge was the *ipse dixit* of the defendant-appellant that the executant was a mental patient.

Section 101 of the Evidence Ordinance reads as follows :

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.'

Illustrations

(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true.

A must prove the existence of those facts."

I would say the learned District Judge has correctly answered issue 12 raised by the defendant-appellant in the negative, though he has failed to give reasons for coming to that conclusion. Likewise once the paper title was established by the plaintiff-respondent it was for the defendant-appellant to establish his prescriptive right. However no submissions have been made by the counsel for the defendant- appellant on his claim based on prescription. Likewise no submissions have been made as to inadequacy of compensation awarded to the defendant-appellant. Hence I do not propose to go into these matters.

In the circumstances it is to be seen that even though the learned District Judge has failed to examine and analyse in detail the evidence placed before him and give reasons for his findings, on an examination of the evidence placed before the trial Judge he has it appears come to a correct finding and answered issue no. 12 in the negative and also held with the plaintiffs-respondents. In the circumstances I see no basis to interfere with the judgment of the learned District Judge. Accordingly the appeal will stand dismissed with costs fixed at Rs. 5,000/-

Appeal dismissed.

VARUNA JAYASURIYA
VS
KRISHANJINI JAYASURIYA

COURT OF APPEAL
WIMALACHANDRA, J.
CA 1201/2004 (REV)
DC COLOMBO 22047/D
NOVEMBER 8, 2004
DECEMBER 7, 2004

Civil Procedure Code – section 76 - Decree of Divorce prayed for – which Court has jurisdiction – defendant's position that a Divorce has already been granted by a foreign court – Raising same as a preliminary issue – Proper procedure to be followed – domicile of the Parties – Jurisdiction – Foreign Decree – Validity – Miscarriage of Justice – Powers of Revision – Jurisdiction not denied in the answer – Fatal?

The plaintiff petitioner (husband) instituted action in Colombo on 15.03.2004 praying for a decree of divorce on the ground of malicious desertion. The defendant respondent (wife) filed answer on 2.1. 2003 counter suing for a decree on divorce on the ground that she had filed a divorce action in Canada against the plaintiff petitioner and the said action is still pending. On the first date of trial the defendant respondent raised the issue that as the Canadian Court on 15.11. 2003 has granted a divorce, the District Court, Colombo has no jurisdiction and wanted this issue to be tried first. This was objected to by the plaintiff petitioner but the trial court decided the issue in favor of the defendant respondent and dismissed the action.

The plaintiff petitioner moved in revision.

Held:

(1) in the instant case the question arises as to the validity or the recognition of the Foreign Decree. The jurisdiction of the Foreign Court to dissolve a marriage between at Sri Lanka citizen and a lady born in Sri Lanka who has obtained the citizenship of Canada is in issue.

The only Court which has jurisdiction to entertain an action for divorce is the Court in whose area the parties are domiciled at the time of institution of proceedings. The marriage of the defendant respondent to the plaintiff petitioner took place in Colombo and therefore the

question arises whether it is only the District Court of Colombo that has jurisdiction. The wife acquires the domicile of the husband up to date of decree in a matrimonial action.

(2) If the question of law is combined or interwoven with questions of fact, the issue cannot and ought not to be tried as a preliminary issue.

(4) The defendant has not specifically traversed the averments in the plaint as to the jurisdiction of the Court – section 76. Civil Procedure Code. Issues relating to the fundamental jurisdiction of the Court cannot be raised in oblique or veiled manner but must be expressly set out in the answer.

(5) The impugned order is wrong exfacie and it amounts to positive miscarriage of justice due to a violation of a fundamental rule of procedure.

APPLICATION in Revision from an order of the District Court of Colombo
Cases referred to :

1. *Navaratnam vs. Navaratnam 46* NLR 361
2. *Annekada vs. Myappan 33* NLR 198
3. *Morris vs. Morries 40* NLR 246
4. *Julaldeen vs. Rajaratnam (1986)* 2 Sri LR 201
5. *Soya vs. Silva (2000) 2* Sri LR 235

Romesh de Silva, PC with Hiran de Alwis for plaintiff petitioner.
Defendant respondent absent and unrepresented

Cur. adv. vult.

June 28, 2005
WIMALACHANDRA, J.

This is an application in revision from the order of the Additional District Judge of Colombo dated 29.03. 2004. By that order the learned Judge answered the following issue raised by the counsel for the defendant respondent respondent (defendant) in the negative, and dismissed the plaintiffs action.

The said issue reads as follows:

"Does this Court have jurisdiction to hear this case in view of the judgment dated 15.11.2003 in case No. 500/12/2514/91/001 filed by the defendant against the plaintiff in Montreal, in the Province of Quebec, in Canada.?"

The plaintiff - petitioner (the plaintiff) instituted this action against the defendant in the District Court of Colombo on 15. 03. 2002 and prayed for a Decree of Divorce, *a vinculo matrimon*, on the grounds of malicious desertion and/or constructive malicious desertion by his wife, the defendant, and for the custody of the child of the marriage. The plaintiff averred in his plaint that on or about March 1998 the defendant, without any notice, left Sri lanka for Canada and only thereafter notified the plaintiff by registered letter. Accordingly, the plaintiff avers that on or about March 1998 the defendant deserted the plaintiff with a view to ending the marriage. The defendant filed answer on 2. 1. 2003 and counter sued and prayed for a decree of divorce against the plaintiff, on the ground that she had filed a divorce action in Canada against the plaintiff and had made the plaintiff of the present action as the defendant of that action and that action is still pending. The defendant admits that the plaintiff and the defendant were married on 7.9.1989 and there is one child from the marriage.

On the fourth date of trial on 3.2.2004, the counsel for the defendant raised the aforesaid issue on the basis that the judgment in the aforesaid action filed in Canada has been pronounced on 15. 11. 2003 and a divorce has been granted in favour of the defendant and moved that the said issue be tried as a preliminary issue. The counsel for the plaintiff objected to this application and stated that said issue involves a mixed question of fact and law and as such it cannot be taken as preliminary issue. Thereafter the Court directed the parties to tender written submissions. The learned judge by his order dated 29. 03. 2004 held that in view of the judgment in case No. 500/12/2514/91/001 referred to in the said issue, the plaintiff cannot maintain the action, and dismissed the same. It is against this order the plaintiff has filed this application in revision.

K. D. P. Wickramasinghe in his book 'Civil Procedure in Ceylon', 1971 edition, at pages 179 and 180 citing the authorities on this question has stated thus:

"It has been held that when an issue of law arises, and if it appears that the case can be disposed of on that issue only, the Judge has the power to try that issue first, postponing the settlement of the issues of fact until he has disposed of the issue of law",

If the question of law is combined or interwoven with questions of fact, the issue cannot and ought not to be tried as preliminary issue of law.

In the instant case the question arises as to the validity of the judgment entered in the matrimonial Court in the Province of Quebec in Canada, dissolving the marriage of the plaintiff and the defendant, and the recognition of the decree so entered by a Canadian Court. The defendant is residing in Canada and the plaintiff is a citizen of Sri lanka living in Colombo. Accordingly, the jurisdiction of the Canadian Court in the province of Quebec to dissolve a marriage between a Sri Lankan citizen and a lady born in Sri Lanka, who is supposed to have obtained the citizenship of Canada is in issue. Admittedly, the marriage had been registered in Sri Lanka and the spouses had lived in Sri Lanka. At the time the plaintiff instituted this action in the District Court of Colombo, the defendant was living in Canada and according to her, she had obtained the citizenship of Canada. The plaintiff has taken the position that the Canadian Court has no jurisdiction to entertain the action filed by the defendant in the province of Quebec in Canada.

The domicile of a married woman is the same as, and changes with, the domicile of her husband. According to the common law, the only Court which has jurisdiction to entertain an action for divorce is the Court in whose area the parties are domiciled at the time of the institution of proceedings ('The Law and the Marriage Relationship in Sri Lanka' by Shirani Ponnambalam, 2nd edition at page 370). The wife acquires the domicile of the husband up to the date of the decree in a matrimonial action. (*Navaratnam vs. Nawaratnam* [1] Jurisdiction to grant a divorce depends upon the domicile of the husband (*Annekade Vs. Myappan* [2]. However in *Morris Vs. Morris* [3] petitioner was a native and a permanent resident of Ceylon while her husband was an European, domiciled in England, and the Supreme Court of Ceylon was held to have jurisdiction to entertain the petition for divorce.

Another important factor in this case is that the marriage between the plaintiff and the defendant was solemnised and registered in Colombo on 7. 9. 1989, (Paragraphs 2 and 3 of the plaint) The defendant in her answer admitted paragraphs 2 and 3 of the plaint. The action has to be instituted in the Court within whose territorial jurisdiction the marriage contract was made. In the instant case the marriage of the defendant to the plaintiff took place in Colombo, and therefore the question arises whether it is only the District Court of Colombo that has jurisdiction in the matter.

The learned President's Counsel for the plaintiff also brought to the notice of Court in his submissions that the defendant had counter - sued in her answer for divorce and by this act the defendant had submitted herself to the jurisdiction of the District Court and thereby accepted the jurisdiction of Court. Moreover the defendant has not specifically traversed the averment in the plaint as to the jurisdiction of the Court. Section 76 of the Civil Procedure Code states that if the defendant intends to dispute the averment in the plaint as to the jurisdiction of the Court, he must do so by a separate and distinct plea, expressly traversing such averments. It is to be observed that the defendant has raised the aforesaid issue on the basis that in view of the judgment in the case of the matrimonial action No. 500/12/2514/91/001 in the matrimonial Court in Quebec, Canada, against the plaintiff, the District Court of Colombo has no jurisdiction to determine this action filed by the plaintiff against the defendant. Accordingly, the defendant has challenged the jurisdiction of the District Court to hear and determine this action by raising this issue. However, the defendant has not taken an objection with regard to jurisdiction in her answer at the earliest opportunity. Relating to the fundamental jurisdiction of the Court cannot be raised in oblique or veiled manner but must be expressly set out in the answer (vide Jalaldeen Vs. Rajaranam)[4]

The aforesaid issue involved the jurisdiction of the Canadian Court, and in this case where the wife is a resident of Canada, she could not obtain relief in Canada when husband was domiciled abroad.

Another issue is the recognition of foreign decrees. Following the principle that jurisdiction in divorce is based on domicile, Courts recognise a decree if it is obtained in the country in which the parties were domiciled at the time of the institution of the action. Accordingly, the recognition of a foreign decree is also an issue before Court. There are cases where

Court has a discretion to refuse recognition. For instance, divorce obtained outside the country, if it is recognised, would be contrary to public policy.

In the circumstances I am of the view that the aforesaid matters are questions of fact involved with the aforesaid issue and in view of that, the said issue ceased to be a preliminary issue of law. For a case to be disposed of on a preliminary issue, it should be pure question of law which goes to root of case. Moreover it appears to me to decide the said issue several documentary evidence have to be considered at he trial. It is my further view that the said issue cannot be decided on written submissions without taking evidence.

Considering the facts and circumstances of this case, the impugned order made by the learned Judge is wrong ex - facie and it amounts to a positive miscarriage of justice due to a fundamental rule of procedure being violated. It was held in the case of *Soysa Vs. Silva*[5] that the power given to the Superior Courts by way of revision is wide enough to give it the right to revise any order made by an original Court. Its object is the due administration of justice and correction of errors, sometime committed by the Court itself, in order to avoid miscarriage of justice.

I am of the view that non - interference by this Court will cause denial of justice and irremediable harm to the defendant. Therefore, there are special circumstances for this Court to exercise its powers of revision.

For these reasons, I hold that the learned additional District Judge erred in answering the above mentioned issue in the negative against the plaintiff and dismissing the plaintiff's action. Accordingly, I set aside the order made by the learned Judge dated 29. 03. 2004 and allow the plaintiff's application in revision. The learned Judge is directed to go through the trial and answer all issues at the conclusion of the trial.

The plaintiff is entitled to the costs of this application.

Application allowed.

District Judge directed to go through the trial and answer all issues.

DISSANAYAKE

vs.

SAMURDHI AUTHORITY OF SRI LANKA AND ANOTHER

COURT OF APPEAL
SRIPAVAN J.
DE ABREW J.,
CA WRIT APPLICATION 1939/2004
FEBRUARY 15, 2005
MAY 18, 23, 2005

Writ of Certiorari - Code of Criminal Procedrue - Sections 115, 115(1), 116(1), 136(1)(d) - Institution of actions - Establishment Code - Cap. XLVIII - Section 27:10 - Interdiction of Public Officer only after institution of Criminal proceedings - Filing of 'B' Report - does it amount to an institution ?

The Petitioner sought to quash the decision of the Respondent to interdict him and to compel the Respondent to restore him to his earlier post. The Petitioner was arrested by the Bribery Commission officials on an allegation of accepting a bribe on 10.02.2004, and was produced before the Magistrate's Court on a 'B' Report. The Respondents interdicted the Petitioner.

The Petitioner contends that he could be interdicted only after institution of proceedings and filing of a 'B' Report does not amount to an institution of proceedings in the Magistrate's Court.

HELD:

(i) The OIC of the Open Investigating Branch of the Bribery Commission filed a Report setting out the fact that the Petitioner had committed an offence under the Bribery Act.

(ii) Filing of a Report setting out the facts that a suspect has committed an offence does not amount to an institution of proceedings in the Magistrates Court. Equating a Report under Section 116(1) to an institution of criminal proceedings is wrong.

(iii) In order to interdict a State officer under Section 27:10 Establishment Code Cap. XLVIII Criminal proceedings must first be instituted against him - it is wrong to interdict a State Officer under the above Section without instituting criminal proceedings.

APPLICATION for Writs of Certiorai/Mandamus.

Cases referred to:

1. *Tunnaya* vs. *OIC Galewela* 1993 1 Sri LR 61

S. A. D. S. Suraweera for Petitioner.

Ms. Uresha de Silva, S. C. , for Respondents.

SISIRA DE ABREW J.

This is an application for writs of certiorari and mandmus to quash the decision of the second respondent interdicting the petitioner and to compel the second respondent to restore the petitioner to his earlier post. The petitioner, an employee of Sri Lanka Samurdhi Authority, was appointted as a Manager of Samurdhi Authority with effect from nineteenth of June 2002. He was attached to the Samurdhi Society of Kakirawa division of Kakirawa Divisional Secretariat at the time of his interdiction. The petitioner claims that he was authorized by the Director General of Samurdhi, the second respondent to invest money belonging to the Samurdhi General Society and Samurdhi Bank societies in various banks including Pramuka Bank. The petitioner, having obtained the prior approval of the executive committee of the Samurdhi General Society of Kakirawa, deposited an amount less than 3 million of Rupees in Pramuka Bank by way of fixed deposits. The petitioner states that he was arrested by the open investigation branch of the Commission to Investigate Allegations of Bribery and Corruption (hereinafter referred to as the Bribery Commission) on an allegation of accepting a bribe of Rupees 18,500 from the Pramuka Bank. This arrest was made on the 10th of February, 2004. The petitioner was produced before the learned Magistrate of Kakirawa on a B Report. The

second respondent, by his letter dated 31st of March 2004 (P6), interdicted the petitioner on the basis that proceedings had been instituted against in the petitioner in the Magistrate's Court of Colombo on a charge of accepting a bribe.

Learned counsel for the petitioner contended that the said decision of the second respondent (P6) was arbitrary, capricious and unlawful as no proceedings had been instituted against the petitioner in the Magistrate's Court. Learned Counsel for the petitioner further contended that the second respondent would become entitled to interdict the petitioner under section 27:10 of chapter XLVIII of the Establishment Code only after the institution of proceedings against the petitioner in the Magistrate's Court. The other contention of the learned Counsel for the petitioner is that filing of a B report does not amount to an institution of proceedings in the Magistrate's Court. In view of the above contentions it is necessary to examine whether filing of the report setting out the facts of the case, in the Magistrate's Court by the officer in charge of the open investigations branch of the Bribery Commission amounts to an institution of proceedings. Under section 136(1) of the Criminal Procedure Code, proceedings in the Magistrate's Court can be instituted in one of the following ways. (1) On a complaint being made orally or in writing to Magistrate of such court that an offence has been committed which such court has jurisdiction either inquire into or try him:

Provided that such a complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant; or (2) On written report to the like effect being made to a Magistrate of such court by an inquirer appointted under chapter XI or by a peace officer or a public servant or a servant of a Municipal Council or of an Urban Council or of a Town Council; or

(3) Upon the knowledge or suspicion of a Magistrate of such court to the like effect:

Provided that when proceedings are instituted under this paragraph the accused or when there are several persons accused any one of them,

shall be entitled to require that the case shall not be tried by the Magistrate upon whose knowledge or suspicion the proceedings were instituted, but shall either be tried by another Magistrate or committed for trial; or

(4) On any person being brought before a Magistrate of such court in custody without process, accused of having committed an offence which such court has jurisdiction either to inquire into or try; or

(5) Upon a warrant under the hand of the Attorney General requiring a Magistrate of such court to hold an inquiry in respect of an offence which such court has jurisdiction to inquire into; or

(6) On a written complaint made by a court under section 135.

Under the above section it is possible to argue that filing of a report by a police officer in Magistrate's Court amounts to institution of proceedings. In this connection, it is pertinent to consider the decision of the Supreme Court in Tunnaya vs. O. I. C. Galewela [1]. In Thunaya's case the suspect was arrested and produced before the Magistrate who remanded him. After a lapse of three months *i.e.* on 20.12.89 an application for bail was made to the Magistrate. This application was refused by the learned Magistrate on the footing that there was a report before the Magistrate setting out the facts which clearly shows that the suspect had committed an offence, and proceedings had therefore been instituted against the suspect. An application made to the Court of Appeal to revise the aforesaid order was refused. The Court of Appeal held that "the filing of a report making a definite allegation that a suspect committed the offence complained of was sufficient to constitute to an institutiion of proceedings within the meaning of section 115 of the Criminal Procedure Code". The Court of Appeal refused the application for bail made on behalf of the suspect. The Supreme Court in appeal set aside the judgment of the Court of Appeal and held that "as no proceedings were in fact instituted upon the report under section 116(1) the Magistrate had jurisdiction to release the petitioner on bail on 20.12.89, subject to the terms of the provisio to section 115(1) of the Code as a period of three months since the suspect's arrest had expired". In the said case Bandaranayaka J., at

pg. 67 stated that "producing a suspect before the Magistrate's Court in custody in terms of sectin 116(1) has nothing to do with the institution of proceedings under section 136(1)(d) of Chapter XIV or any other clause of that section ." Bandaranayaka J at pg 68 remarked as follows. " The point is that one is still at the investigative stage when a suspect is forwarded under custody to the Court in terms of sectin 116(1). It is wrong to treat it is an automatic institution of proceedings ..... Equating a report under section 116(1) to an institution of criminal proceedings is wrong."

It is manifest from the said judgment that filing of a report setting out the facts that a suspect has committed an offence does not amount to an institution of proceedings in the Magistrate's Court.

In the present case, the O. I. C. of the open investigation branch of the Bribery Commission filed a report setting out the facts that the petitioner had committed an offence under the Bribery Act. Applying the legal principals stated in the aforesaid decision, I hold that no proceedings were instituted against the petitioner in the Magistrate's Court when he was produced before the Magistrate of Colombo. Therefore it has to be concluded that no proceedings had been instituted against the petitioner when he was interdicted by the second respondent. When one examines section 27:10 of chapter XLVIII of the Establishment Code, in order to interdict a state officer under the aforementioned section criminal proceedings must, first, be instituted against him; it is wrong to interdict a state officer under above section of the Establishments Code without instituting criminal proceedings. For the above reasons, I hold that the decision of the second respondent (P6) interdicting the petitioner is arbitrary and unlawful. I, therefore, issue a writ of certiorari, quashing the decision of the second respondent contained in P6 and direct the second respondent to reinstate the petitioner in his earlier post as stated in the document marked P2.

There will be no costs.

SRIPAVAN J. — I agree.