THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2009] 1 SRI L.R. - PART 3

PAGES 57 - 84

Consulting Editors : HON S. N. SILVA, Chief Justice upto 07.06.2009
HON J. A. N. De SILVA, Chief Justice from 08.06.2009
HON. Dr. SHIRANI BANDARANAYAKE Judge of the Supreme Court
HON. SATHYA HETTIGE, President, Court of Appeal

Editor-in-Chief : L. K. WIMALACHANDRA

Additional Editor-in-Chief : ROHAN SAHABANDU

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company (Printers) Ltd.

Price: Rs. 25.00

DIGEST

land in question situated at Norochcholai in the Ampara District. The petitioners include the Venerable Thera, being the Viharadhipathi of the Deeghavapi Raja Maha Viharaya situated in the Ampara District, the President of the Dighavapi Surakeemay Sanvidanaya and Theras actively engaged in the protection of the Buddha Sasana.

The 9th and 10th Respondents being the Deeghavapi Pratisanskarana Sabhawa and the President of that Sabhawa have filed papers in support of the petition. Further, the 29th to 44th and 51st to 63rd Respondents have all intervened in support of the petition. They belong to different Buddhist organizations and represent the interests of persons concerned in preserving the Deeghavapi Raja Maha Viharaya.

The alleged infringement is the executive and/or administrative action taken to alienate the land in question which is about 60 Acres in extent to 500 families being entirely of the Muslim community. The land is located 13 kilometers to the south of the Deeghavapi Raja Maha Viharaya. The case of the Petitioner and the Respondents referred to above who support the Petition is that the settlement of such a large number of Muslims within close proximity to the Raja Maha Viharaya would bar further expansion of Sinhala Buddhist residents who are now living close to the Viharaya. They allege that the infringement results from a total failure on the part of the Respondents, to act in terms of the applicable law, being the 13th Amendment to the Constitution and the Land Development Ordinance and to follow a fair and equitable process in effecting the impugned alienation of lands. It is alleged that the alienation is arbitrary and discriminates against Sinhala and Tamil persons who are without land and have requested that they be alienated State land and, is biased in favour of Muslims. It is further alleged that the settlement of 500 families of Muslims in an area proximate to the Viharaya would infringe the freedom of religion. The infringement of the fundamental rights guaranteed under Articles 12(1), 12(2) and 10 are alleged on the aforestated basis.

At the outset it is to be noted that there has been no compliance with the provisions of the Land Development Ordinance and of the 13th Amendment to the Constitution with regard to alienation of the land in question. None of the Respondents have claimed that they have acted in terms of the applicable law.

Whilst one Minister of Government, being the 10th Respondent in his capacity as the President of the Deeghavapi Pratisanskarana Sabhawa supports the petitioners, on the basis that the impugned alienation of land is illegal and adversely affects the Buddhists, another Minister of Government being the 7th Respondent supports the alienation on the basis that the land is 13 kilometers away from the Viharaya. She however denies any involvement in the selection of the particular persons to whom the land was allocated. She denies any involvement of her Ministry, as well.

The 13th to 28th Respondents and the 45th to 50 Respondents were allowed to intervene on the basis that they are the beneficiaries of the impugned alienation. They claim that their houses at Akkaraipattu about 20 kilometers away from the land in question were affected by the tsunami of December 2004 and that their houses were located within the 200 meter buffer zone demarcated after the tsunami. Paragraph 4 (e) of the objections of the 45 - 50th Respondents states as follows:

> *"In 2007 these Respondents were promised houses by the then Divisional Secretary of Akkaraipattu. The said houses were on part of the non-irrigable highland which was administered by Hingurana Sugar Corporation for many years."*

It is significant that none of the persons who have been allowed to intervene as beneficiaries of the impugned

alienation have disclosed the process by which they were selected for the allotment of land.

I would now refer to the position of the State represented by the Deputy Solicitor General who appeared for the relevant officials and the Minister of Lands. The 1st Respondent being the District Secretary has stated that he assumed office on 27.12.2006 and that the selection process of the allottees had taken place in 2005. This position is plainly untenable since as pointed out above, none of the beneficiaries who intervened have stated that they went through a selection process in 2005. The State has failed to produce any evidence as to the official or authority who selected the land and the beneficiaries. This lacuna in the case for State lends much credibility to the case of the petitioners as to the illegality and arbitrariness of the impugned alienation. It is nevertheless claimed by the State that the beneficiaries were selected in terms of the Circular IR25. This was purportedly issued by the Secretariat of the then President. It has not been issued in terms of any applicable law. It appears to have been a general executive measure taken in the immediate aftermath of the tsunami to relocate families that were affected. The Circular cannot in any event warrant administrative action four years after the tsunami affected the Island. It is to be noted that the Circular does not specify the basis for the selection of land for relocation of persons displaced by the tsunami, being the matter in dispute in this case. It contains an elaborate process of selection with public notifications, objections, inquiries and so on. But, as observed above, the beneficiaries who have intervened do not claim to have gone through any such process of selection. Further, no official has claimed that he followed such a process for the selection of the beneficiaries in question. In the circumstances the Circular 1R5 cannot possibly ascribe validity of the impugned alienation of State land.

The Petitioners and the Respondents who support the petition submitted that the Deeghavapi Rajamaha Viharaya is one of the 16 most venerated sites of Buddhists in this country. According to the Mahavamsa the Buddha in his third visit to Sri Lanka attended the site of the Viharaya. These matters urged by the Petitioners are supported by the comprehensive Report of the Director General of Archaeology, which has been produced by the 1st Respondent himself marked 1R9. According to this report the name Deeghavapi has been used from the 2nd Century B. C. and the Viharaya was constructed by King Saddhatissa in the 1st century B. C. Further, the sacred Viharaya had been reconstructed by King Kirthsiri Rajasinghe of the Kandyan Kingdom in 1746 A. D. In the circumstances nothing further need to be stated as regards the sensitivity which has been affected by the impugned action from the perspective of the Buddhist, not only in that area but in the entire country.

The Petitioners further submit that the 7th Respondent in an interview given to the newspaper produced marked "P31" admitted that "she asked for 60 acres to house 500 Muslim families who had been victims of the tsunami". It is alleged that this is discrimination in favour of Muslims since the request does not take into account the claims of persons of other ethnicity who are landless in the matter of allocation of land. The Petitioner rely on documents produced marked P32A to F and P33A to D to establish claims of Tamil persons who are landless and who live closer to the land in question than the beneficiaries who are from the coastal areas, that have been ignored by the administration. Similarly documents marked P33E and P34A to D and P35A and B are objections and claims that have been made by Sinhala persons and ignored by the administration. Some of the claims are from victims of terrorism who are entitled to be considered in the matter of allocation of State land.

The Petitioners further allege that the purported premise of there being 500 tsunami victims being Muslims who require land for construction of houses is a sham to cover up a long standing demand to settle Muslims in the area. They seek to establish this position on a twofold basis. Firstly, it is alleged that the figure of 500 tsunami victims is a highly inflated one. For this purpose they rely on document P30A dated 30.03.2007 sent by the 11th Respondent to the District, Secretary, Ampara, which states as follows:

> *"Today, we were informed that there is a Housing Scheme Project proposed for tsunami displaced families. Our inquires revealed that there are only about 50 families awaiting houses. However, an extent of land suitable for the construction of houses for 50 families could be released from the available area."*

It is common ground that the land in question had been vested in the Hingurana Sugar Corporation which matter would be adverted to subsequently. The letter P30A sent by M. M. Ifthikar, General Manager of the Corporation has been written in the context of a request to release an extent of land of the Corporation to house tsunami victims of Akkaraipattu. The contents of the letter have not been denied. The letter forms part of official correspondence on the matter and has to be accepted by Court.

The Petitioners have also undertaken a meticulous analysis to establish from the addresses given and the like that there could not have been 500 families affected in the buffer zone of 200 meters in the Akkaraipattu area. It would not be necessary for the purpose of this judgment to analyze the copious material produced in this regard, since in my view P30A being contemporaneous official correspondence establishes that as at 30.03.2007 there were only about 50 families who had been displaced by the tsunami and required land for housing.

The second basis relied on by the Petitioners is a historic survey.

The Petitioners have submitted that the issue with regard to the allocation of land in the area had been a matter of dispute from about 1960, when the settlements on the right bank of the Gal Oya Valley Irrigation Project commenced. It is common ground that the area in question is situated on the right bank. The Petitioners contend with reference to documents that there was a demand for the settlement of Buddhists in the area proximate to the Rajamaha Viharaya from the year 1962. On the other had there was a competing claim for land in the area to settle landless Muslim families, espoused by the husband of the 7th Respondent who was the then Minister. The Petitioners have produced marked P16, letter dated 29.6.98 addressed by the husband of the 7th Respondent to the then Minister of Lands. I would reproduce the entire content of the letter which reads as follows:

"June 29. 1998
Hon. D. M. Jayaratne, M. P.,
Minister of Land & Forestry,
Rajamalwatta,
Battaramulla.

My Dear Minister

RELEASE OF NORRAICHOLAI HIGHLAND TO
AKKARAIPATTU PEOPLE FOR RESETTLEMENT PURPOSE

I have received representations from about 500 landless farmers of Akkaraipattu to the effect that they are desperately in need of land for settlement.

The D. S. of the area had recommended that there is an extent of nearly 125 acres of highland in Noraicholai area. This highland was earlier alienated to the Hingurana Sugar

Corporation for cultivation of sugarcane but was found unsuitable for that purpose and therefore left abandoned for the past 20 years.

This land could be utilized for distribution among landless people - ½ area per family of the area and could be developed with the existing resources.

I am forwarding herewith a self explanatory request of the DS Akkaraipattu already sent to the Commissioner of Lands in this regard.

I shall be grateful if you could please consider this request sympathetically and help these poor landless people to get themselves settled peacefully by issuing necessary directives to those concerned.

Thank you,
Sincerely yours,

M. H. M. Ashroff P.C., M. P.,
Minister of Port Development, Rehabilitation
& Reconstruction
Leader/Sri Lanka Muslim Congress

It is thus clear that the demand for the allocation of the land in question to 500 Muslim families from Akkaraipattu ante dates the tsunami of 2004 by nearly 6 years.

Counsel for Respondent who are beneficiaries of the impugned allocation of land have urged three grounds to oppose the application. One of which is the reliance on the Circular IR25 issued by the Secretariat of the then President which has been dealt with above in reference to submissions of the State addressed on the same basis.

The other two grounds are -

(i) The land in question is not State land since it is vested in the Sri Lanka Sugar Corporation by virtue of

an order made in terms of Section 25 of the State Industrial Corporations Act No. 49 of 1957 (vide P36) and the provisions of the 13th Amendment to the Constitution and the Land Development Ordinance relied on by the Petitioners would not apply to the land;

(ii) That in any event there is no provision in the 13th Amendment to the Constitution or in the Land Development Ordinance which prohibits the impugned alienation.

As regards ground (i) above, even assuming that land remains vested in the Corporation by virtue of P36, these Respondents do not claim that the land was alienated to them by the Corporation or its successor. I have reproduced paragraph 4e of the objections of these Respondents which states that they were promised land by the Divisional Secretary of Akkaraipattu. If the land remained vested in the Corporation this action of the Divisional Secretary would be per se invalid. On the other hand the position of the State is that the land was allocated to the beneficiaries on the basis that it was State land. Hence the ground relied on would make case worse of these Respondents.

Ground (ii) relied on by these Respondents seemed to be based on the premise that action of a public authority is valid so long as it is not prohibited by the applicable law. This is a totally untenable contention in Public Law and is contrary to the Rule of Law and the doctrine of ultra vires A.V. Dicey in his work titled "Law of the Constitution" has stated the second meaning of the phrase "Rule of Law" as follows (at page 193):

"In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit.

With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person"

The citation implies the action of an official should have :

(i) legal justification;

(ii) be not in excess of lawful authority and

(iii)be authorized by law

Wade and Forsyth in their work on Administrative Law (9th Edition at page 21) states the same proposition as the primary meaning of the Rule of Law as follows:

"The British constitution is founded on the rule of law, and administrative law is the area where this principle is to be seen in its most active operation. The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), must be able to justify its action as authorized by law and in nearly every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power, i. e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree...."

The use of the phrase "legal pedigree" implies that authority for official action has to be derived from the law itself.

In the case of *Liyanage vs Gampaha Urban Council*[1] at 7 I have examined the same question from the perspective of the doctrine of ultra vires in relation to the powers of an Urban Council and stated as follows:

> *"Anything purported to be done, by the Council, in excess of what is permitted by the statutory provisions will be considered as wholly invalid in law, on the application of the doctrine of ultra vires. However, in construing the relevant statutory provisions the Court will bear in mind the need to promote the general legislative purpose underlying these provisions and consider whether the impugned act is incidental to or consequential upon the express provisions. If it is so considered necessary, the impugned act will not be declared ultra vires."*

State land is held by the executive in trust for the People and may be alienated only as permitted by law. For the reasons stated above I hold that the impugned alienation is bereft of any legal authority and has been effected in a process which is not bona fide. Accordingly, the Petitioners have a locus standi to implead such action in a proceeding under Article 126(2) of the Constitution. On the preceding analysis of evidence, the Petitioners have established an infringement of the fundamental rights guaranteed by Articles 12(1), 12(2) and 10 of the Constitution.

The application is allowed and I grant to the Petitioners the relief prayed for in paragraph (b), (c), (d) and (e) of the prayer to the Petition. The State will pay a sum of Rs. 150,000/- as costs to the Petitioners.

AMARATUNGA J. - I agree

RATNAYAKE J. - I agree

Relief granted.

SRI LANKA CO-OPERATIVE SOCIETY
vs
SUSAI

COURT OF APPEAL
WIMALACHANDRA. J
BASNAYAKE. J
CALA 380/2001 (LG)
DC COLOMBO 35813/MS
JANUARY 12, 22, 2004

Civil Procedure Code - Section 703, Section 704(2) liquid claims dishonouring of cheques - Jurisdiction - which Court? - English Law, or Roman Dutch Law applicability? - Leave to appear and defend unconditionally - When?

The plaintiff complained that the defendant had issued 5 cheques and the cheques were dishonoured by the bank. The plaintiff resided in Colombo, the transaction took place in Colombo, the defendant resided in Nuwara Eliya, the trial Judge granted leave unconditionally. It was contended that the cheques were drawn on banks situated outside the jurisdiction of the District Court of Colombo and therefore the District Court of Colombo has no jurisdiction.

On leave to appeal being sought-

Held:

(1) In the absence of express agreement as to the place where the plaintiff is to be paid, the English Law will apply, accordingly as to the place of payment, the debtor must seek out the creditor in the absence of an express agreement with regard to payment.

The cheques were issued, from the banks at Nuwara Eliya, Hanguranketa and Padiyapalalla, payments were made in Colombo, the plaintiff resides in Colombo and the cheques were dishonoured in Colombo. It is the District Court of Colombo which has jurisdiction.

(2) Judge can order such a deposit if he considers the defence is not prima facie sustainable or not bona fide. Section 704 (2) does not say that if the Judge accepts the defence outlined as bona fide he must necessarily give leave to appear and defend unconditionally.

(3) The defendant's affidavit indicates that his defence is not prima facie sustainable. A reasonable doubt exits as to the honesty of the defence set up by the defendant. The alleged defences are not sufficient to grant unconditional leave to appear and defend, there are reasonable doubts about the good faith of the defendant.

APPLICATION for leave to appeal with leave being granted.

Cases referred to:-

1. *Ponnaih vs. Kanagasabai* 35 NLR 128
2. *Sirimanne vs. New India Assurance Company Ltd* 35 NLR 413
3. *Seneviratne vs. Thaha* 65 NLR 184
4. *Sebastian vs. Kumarajeewa* 1978 - 80 NLR 264 at 268
5. *Supramaniam Chetty vs. Kristnasamy Chetty* 10 NLR 327
6. *Issadeen & Company vs. Wimalasuriya* 62 NLR 299
7. *Vailiappa Chettiar vs. Viswanathan* 66 NLR 481

Kuvera de Zoysa with *Senaka de Saram* for plaintiff-respondent-petitioner

V. Puvitharan for defendant-petitioner-respondent

Cur.adv.vult

July 25, 2008

WIMALACHANDRA, J.

The plaintiff-petitioner (plaintiff) has filed application for leave to appeal against the order of the learned Additional District Judge of Colombo granting the defendant-respondent (defendant) leave to appear and defend this action unconditionally, under summary procedure.

The plaintiff states that the defendant had issued five cheques marked "P1 – P5", for Rs.669,000/= and these

cheques were dishonoured by the bank on presentation. The plaintiff claims the said sum of money from the defendant for supplying 'seed potatoes' to the defendant. It is common ground that the plaintiff resides in Colombo and the said transaction had taken place in Colombo. Summons were issued in terms of section 703 of the Civil Procedure Code and defendant moved for leave to appear and defend the action mainly on the following grounds:

(i) The District Court of Colombo has no jurisdiction to hear and determine this action.

(ii) Only the cheque marked 'A1' is given by the respondent and cheques marked 'A2' to 'A5' were not endorsed by the defendant in favour of the plaintiff.

When the matter was taken up for inquiry both parties agreed to dispose of the defendant's application for leave to appear and defend the action by way of written submissions. Accordingly, the parties filed written submission and invited the Court to decide the matter on the written submission filed by them. Thereafter, the learned Judge made order on 11.10.2001 allowing the defendant to appear and defend the action unconditionally. It is against this order the plaintiff has filed this application. The Court of Appeal granted leave to appeal on 25.07.2003.

It is not in dispute that the aforesaid cheques were issued by the defendant as payments for goods sold and delivered to him by the plaintiff. It is also not in dispute that the aforesaid cheques were dishonoured when presented for payment.

It is obvious that the defendant had issued the aforesaid cheques for the seed potatoes bought from the plaintiff and payments were to be made in Colombo upon the aforesaid

cheques being deposited in the plaintiff's bank in Colombo. The defendant in his petition dated 17.02.2001 filed in the District Court specifically admits in paragraph four that this action is based on the aforesaid dishonoured five cheques. The plaintiff in his petition filed in the District Court has pleaded that the parties had agreed that payment is not denied by the defendant. The main defence of the defendant is that the said cheques were drawn on banks situated outside the jurisdiction of the District Court of Colombo and therefore the District Court has no jurisdiction to entertain the plaintiff's action. However, the defendant does not deny that these cheques were not given by him to the plaintiff. It was the main contention of the defendant that the said cheques were drawn from banks situated outside the jurisdiction of the District Court of Colombo.

There is no dispute that the transaction took place in Colombo within the jurisdiction of the District Court of Colombo.

In an action to recover money on a negotiable instrument, the English law applies and hence the debtor must seek out the creditor. In such cases the cause of action, the failure to pay arises where the claimant resides.

In the case of *Ponnaih vs. Kanagasabai*[1], where a promissory note made by the defendant in favour of the plaintiff was silent as to the place of payment, the Supreme Court held that an action may be brought on the note in the Court within whose jurisdiction the plaintiff resides as the debtor must seek out the creditor at his place of residence or place of business. Similarly, in the case of *Sirimanne Vs New India Assurance Company Limited*[2] the Supreme Court held that in an action to recover money due under a policy of fire insurance the principle of English law applies and that the debtor must seek out the creditor. In such a case the cause of action, that is the failure to pay, arises where the claimant resides.

The defendant relied on the case of *Seneviratne Vs. Thaha*[3] In this case the defendant, who was residing at Panadura, drew a cheque in favour of the plaintiff payable at the Panadura Office of the Bank of Ceylon, the cheque was dishonoured at Panadura, the plaintiff instituted proceedings in the District Court of Colombo for the recovery of the amount of the cheque. It was held that the cause of action arose in Panadura and the District Court of Colombo had therefore no jurisdiction to hear the case.

However, the facts of the present case is different from the above mentioned case of *Seneviratne Vs. Thaha(supra)*. In the present case, the transaction took place in Colombo, where the plaintiff resides and payments were made in Colombo by the said cheques marked 'P1 to P5' and they were dishonoured when presented to the plaintiff's bank in Colombo. The cheques P1 to P5 are "crossed, account payee" issued from the banks at Nuwara-Eliya, Hanguranketha and Padiyapalalla. Accordingly, they can only be deposited in the plaintiff's (payee's) account and the plaintiff has deposited those cheques in his account at Bank of Ceylon, Metropolitan Branch, in Colombo. In the case of *Seneviratne Vs. Thaha (supra)* the cheque was dishonoured in Panadura and the action was filed in Colombo. Hence the facts of *Seneviratne Vs. Thaha (supra)* is different from the facts from the instant case.

In the absence of express agreement as to the place where the plaintiff is to be paid, the English law will apply. Accordingly, as to the place of payment, the debtor must seek out the creditor in the absence of an express agreement with regard to payments.

Section 704(2) of the Civil Procedure Code states thus:

"The defendant shall not be required, as a condition of his being allowed to appear and defend, to pay into Court the sum mentioned in the summons or to give security

therefor, unless the Court thinks his defence not be prima facie sustainable ,or feels reasonable doubts as to its good faith"

Thus it will be seen that the Judge can order such a deposit if he considers the defence is not prima facie sustainable or not bona fide. In the same way section 704(2), certainly, does not say that if the Judge accepts the defence outlined as bona fide he must necessarily give leave to appear and defend unconditionally. (See- *Sebastian Vs. Kumarajeewa*[4] at 268, - per- Gunasekara, J.)

In the case of *Supramaniam Chetty Vs. Kristnasamy Chetty*[5] , it was held that where there are reasonable grounds for doubting the good faith of the defense, the defendant should only be allowed to defend action if he deposit in Court the amount of the claim or gives security for it.

In the case of *Sebastian Vs. Kumarajeewa (Supra)* the Supreme Court refused to follow the decision in the case of *Issadeen & Company Vs. Wimalasuriya,*[6] where it was held that even if the defence was not prima facie sustainable or that it lacked 'good faith' the defendant should in law be permitted to defend the action unconditionally.

Gunasekara, J. in *Sebastian Vs. Kumarajeewa(supra)* at 269,said:

"I am therefore of the view that the rule enunciated in the case of *Issadeen & Company(supra)* that the judge is bound to allow unconditional leave if the whole or even part of the defence is accepted as bona fide is incorrect and should not be followed. To some extent this was made manifest in the later case of *Valiappa Chettiar Vs. Visuwanathan,* where the claim was on three cheques each of Rs. 8,400/- and no bona fide defence was available in respect of two of them and the learned

District Judge had ordered security to be given in a sum of Rs. 16,000/-. The same Counsel who appeared for the Appellant in the *Issadeen & Company(supra)* case understandably argued before Weerasooriya, J. that in keeping with the earlier decision the bona fides of the defence to a part of the claim having been established the Defendant should have been permitted to answer unconditionally. Weerasooriya, J. rejected this submission and affirmed the Order of the learned District Judge saying that the earlier decision could be distinguished on the ground that "there is no admission of any liability by the Appellant and what he seeks to obtain is leave to appear and defend the action in its entirety." If these facts create an exception to the rule enunciated in the *Issadeen & Company (supra)* case it must be observed that in the instant case too there is no admission of liability by the Appellant and the Appellant seeks to defend the action in its entirety. But both before the decision in the *Issadeen & Company (supra)* case as is shown in *Valiappa Chettiar's (supra)* case Judges of our Courts have always exercised their discretion in terms of section 706 in cases where they considered the Affidavit of the Defendant 'satisfactory' and often ordered the Defendant to deposit part of the sum claimed in the plaint.

In the instant case, there are reasonable doubts about the good faith of the defence. It is the defendant who had given the said cheques for the goods supplied by the plaintiff. Now he states that he was only an agent and bought goods for others. But he admits that he gave the aforesaid cheques to the plaintiff. The alleged defences are not sufficient to grant unconditional leave to appear and defend. The defendant's affidavit indicates that his defense is not prima facie sustainable. A reasonable doubt exists as to the honesty of the defence set up by the defendant. Admittedly,

the defendant has not even made any attempt to pay the plaintiff. In the circumstances, I am of the view that the defences raised by the defendant were not *bona fide* but a sham.

For these reasons the impugned order of the Additional District Judge dated 11.10.2001 is set aside. The defendant is directed to deposit the full sum claimed by the plaintiff in Court as a condition precedent, before the defendant is permitted to appear and defend. This sum shall be deposited within three months from the date of this Judgment, failing which the decree will be entered as prayed for by the plaintiff.

The appeal is accordingly allowed with costs.

BASNAYAKE, J. - I agree

Appeal allowed.

Defendant directed to deposit the full sum claimed.

PEIRIS AND ANOTHER
vs
SIRIPALA

COURT OF APPEAL
RANJITH SILVA. J
SALAM. J
CA 49/2001(F)
DC HOMAGAMA 1798/CD
FEBRUARY 2, 2009
MAY 6, 21, 2009

Declaration - Deed void - fraudulent - Civil Procedure Code Section 35(1) - Joining of causes of action without leave of Court-Fraud alleged-Corroboration necessary?-Burden of proving fraud-Beyond reasonable doubt or balance of probability? Non est factum?

The plaintiff-respondent instituted action seeking a declaration that the deed of transfer 4881 - be declared void on the basis that the defendant-appellants have unlawfully and fraudulently manipulated the transfer of the entire land to the 1st appellant. The trial Judge held in favour of the plaintiff-respondent.

It was contended by the defendant-appellant that the cause of action to have the impugned deed declared null and void cannot be joined with a cause of action for a declaration of title to the immovable property without leave of Court first had and obtained.

Held:

(1) The plaintiff respondent in the issues raised had confined himself to have the impugned deed set aside and had not proceeded to raise an issue with regard to declaration of title. Once issues are raised and accepted by Court the case goes to those issues raised.

Even if the respondent had formulated issues on both causes of action, such procedure is perfectly in order. The law permits one to adopt such a cause and is not repugnant to Section 35(1). There is no misjoinder as there is in reality only one cause of action. A prayer for invalidation of a deed is consequential to a prayer for declaration of title.

Held further:

(2) Corroboration is not the *sine quo non* in matters where fraud is alleged.

Per Ranjith Silva, J.

> "In Roman Law fraud is defined as *omnis calliditas, fallacia, machination, adcircumveniendum alterem adhibita* meaning any craft deceit or machination used to circumvent deceive or ensnare another person, an alienation alleged to be in fraud of creditors is voidable, it is valid till it is set aside".

(3) The standard of proof remains on a balance of probability although the more serious the imputation the stricter is the proof which is required.

(5) The defendant-appellants and a witness gave uncontroverted evidence on behalf of the appellants with regard to the circumstances under which the impugned deed was executed. The evidence is insufficient to prove fraudulent misrepresentation or undue influence. The evidence is insufficient to show that the plaintiff-respondent was tricked or gypped by the appellants to execute the impugned deed-it appears that the trial Judge had been obnoxious to those important facts.

APPEAL from the judgment of the District Court of Homagama.

Cases referred to:-

1. *Godamune Punnakiththi Thero vs. Thelulle Narada Thero* - CA 65/90- De 1418/L
2. *Dharmasiri vs. Wickrematunge* 2002 2 Sri LR 218
3. *Fernando vs. Lakshman Perera* 2002 2 Sri LR at 413
4. *Haramanis vs. Haramanis* 10 NLR 332
5. *Madar Saibo vs. Sirajudeen* 17 NLR 97
6. *Yousf vs. Rajaratnam* (1970) 74 NLR at 9
7. *Associated Battery Manufacturers Ltd vs. United Engineering Workers Union 1975* - 77 NLR 541 at 544
8. *Foster vs. Mackennon* 1896 LR 4. CP 704
9. *Luwis vs. Clay* - (1898) 67 LJQ 224

Ranjan Suwandaratne for appellant.
Nihal Jayamanne PC for respondent.

cur.adv.vult

June 18, 2009

RANJITH SILVA. J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted action bearing number 1978/ CD in the District Court of Homagama, against the 1st and the 2nd Defendant Appellants (hereinafter referred to as the Appellants) seeking *inter alia* for a declaration that the deed of transfer bearing number 4881 marked as P2 be declared void on the basis that the Appellants have unlawfully and fraudulently manipulated the transfer of the entire land to the first Appellant. After trial the Learned District Judge by his judgment dated 04.01.2001 held in favour of the Respondent. Being aggrieved by the said judgment the Appellants have preferred this appeal to this Court.

One of the main legal arguments of the Appellants, put forward in their submissions was based on section 35 (1) of the Civil Procedure Code. The relevant issue is issue number 6. The Appellants argued that a cause of action to have the deed P2 declared null and void cannot be joined with a cause of action for a declaration of title to immovable property without leave of court first had and obtained. Appellants argued that the Respondent should have dropped one of the causes that is, the Respondent should have either maintained the cause of action for a declaration of title or should have abandoned that cause of action and maintained a cause of action for a declaration that the aforementioned deed P2 was a fraudulent deed and therefore was void. But this argument appears to be unfounded and untenable for the reason that the Respondent had in his issues raised

at the time, confined himself to the cause of action to have deed number 4881 (P2) declared void and had not proceeded to raise an issue with regard to declaration of title. In this regard I would like to refer to issue number 1-5. 12.13 and 14 which are found at pages 78, 79 and 80 of the brief. In any of the said issues the Respondent has not prayed or claimed a declaration of title to the premises, but has only prayed that the impugned deed P2 be declared void.

It was not necessary for the Respondent to seek a declaration of title as the Appellants have admitted that the plaintiff became entitled to this land on deed number 6027 of 3rd of January 1997 (P1). In this regard I would like to refer to admission number 2. Once issues are accepted by court the case goes to trial on those issues and the case is tried and determined on the admissions and issued raised at the trial. The pleadings become crystallized in the issues and the pleadings recede to the background. Therefore the contention put forward by the Appellants goes overboard. *(Vide Godamune Pannakiththi Thera Vs Thelulle Narada Thero*(1) *and Dharmasiri Vs Wickramathunga*(2)*)*

On the other hand, assuming without conceding that the Respondent had formulated issues on both causes of action namely declaration of title and for a declaration that deed P2 is void, I find such procedure to be perfectly in order. The law permits one to adopt such a cause and is not repugnant to section 35 (1). There is no misjoinder as there is in reality only one cause of action. A prayer for invalidation of a deed (in this case P2) is consequential to a prayer for declaration of title. It is to prevent the Respondents from alienating the land or in order to prove that he still retains title and that he has not alienated his rights. In this regard I would like to refer to the case reported in *Fernando Vs Lakshman Perera*(3) at 413.

The facts

The original owner of the land more fully described in the schedule to the plaint was the father of the Respondent, Weerakkodige Don Pubilis who gifted the said land containing in extend 2 Roods, to the Respondent by deed of gift bearing number 6027 dated 3rd of January 1996 which is marked as P1. According to the Respondent he was eighty years of age at the time, a bachelor and an epileptic from his early childhood, with a short memory and nervous debilities related to the functions of the brain and was under treatment for the said debilities and ailments. According to the Respondent his right Eye had been removed after an eye surgery and his eye sight was weak. It is common ground that the Respondent resided in the house situated on this land all by himself and that the Respondent allowed and permitted the Appellants who were husband-and-wife to stay in a part of the Respondents house without any payments as rent or lease. The Respondent had given such permission on sympathetic grounds and as the applicants had pleaded with him to provide them with shelter. On or about 11th of July 1991 the Respondent conveyed the said land and premises to the Appellants on a deed of transfer executed before a Notary Public by the name of A. A. Karunaratne. After some time according to the Appellants, the Respondent chased away the first and second Appellants from the said premises and thereafter filed this action against the Appellants. But the version of the Respondent was that the appellants voluntarily moved to a different premise.

The version of the Respondent was that the Appellants who were feigning affection towards the Respondent from the very beginning, pleaded with the Respondent to give them 10 perches of land from and out of the said land to the Appellants and persuaded him on the 11th of July 1991 to go to a Notary Public by the name of A. A. Karunaratne on the pretext

of alienating only 10 perches of land and that the Appellants have fraudulently got a deed of transfer executed in respect of the entire property for a consideration of rupees 25,000., that after the purported transfer the Appellants moved out of the plaintiff's premises even without informing the plaintiff and took residence elsewhere. The position of the Respondent was that, as an act of benevolence he decided to gift 10 perches out of the land to the Appellants as the Appellants were looking after him for some time.

It was further contended on behalf of the Respondent that the notary who executed the deed P2 was involved in executing a forged Last Will on a previous occasion. In proof of this fact the Respondent produced the Judgment in T/1643 of the District Court of Panadura marked as P4. at the trial in the District Court.

As against this contention, it was contended on behalf of the Appellants that the Respondent had agreed to sell the land to the Appellants for 70,000 rupees and that in order to save a part of the Stamp fees they mentioned 25,000 rupees as consideration in the deed P2. It was also contended on behalf of the applicants that no fraud was practiced on the Respondent and that the complainant, for nearly 1 year never complained to the police or to any other authority that the Appellants got the conveyance executed in fraud of the Respondent. It was further contended on behalf of the Appellants that the Respondent chased away the Appellants from the said premises and as an afterthought filed action against them at the instigation of the neighbours, some of them who were related to the Respondent.

The Respondent in his evidence alleged that at the request of the first Appellant he agreed to give 10 perches

out of eighty perches from his land, as an act of charity and that consequently the Respondent went together with the Appellants before a notary. The Respondent has also admitted that he signed the deed in question before the said notary. The Respondent alleged the after some time, he became aware that the notary had misled him and got a deed of transfer executed for 80 perches instead of a deed of gift for 10 perches. The Respondent admitted that he had not taken any steps whatsoever against the said notary not even a complaint to the police, although the Respondent in his plaint and in evidence has made serious allegations against the Appellant and the notary public. The Respondent did not produce a single complaint made to the police or any other authority against the notary prior to the institution of the action. This conduct of the Respondent shows that there was nothing at the time to complain and that all these allegations are afterthoughts. This conduct of the Respondent is an indication that the Respondent, having conveyed the said property voluntarily, changed his mind subsequently due to reasons best known to him probably at the instigation of the neighbours and the relatives and instituted action in order to reclaim what he conveyed to the Appellants. It appears that the Learned District Judge had been oblivious to these important facts. Especially so in the face of the evidence of the Respondent wherein he had stated that he has several relatives living in the neighbourhood and that he instituted action in consequence to a request made by one of his relatives. In his evidence the Respondent has disclosed that even the gift of 10 perches he had kept a secret from his relations.

Generally corroboration is not the *sine qua non* in matters where fraud is alleged. However the fact that the respondent's position was not corroborated by any other

evidence cannot be disregarded in the light of the overwhelming evidence placed by the appellants in regard to the transaction in question. On the contrary the Appellants gave evidence and a witness to the said deed in question has also testified in court in support of the contention of the Appellants. The appellants, in their evidence have stated about the payments made in consideration of the conveyance executed in their favour. Although it was not necessary under the circumstances to lead evidence to show or prove the execution of the deed the appellants have led evidence to prove the execution of the deed P2 despite the fact that it may not be up to the required standard. The Respondent has admitted having gone to the notary and having signed the document. Therefore the execution of deed P2 was never in dispute. I hold that it is not necessary to prove the execution of P2, because the Respondent had admitted the execution of the contentious deed P2. From the arguments, what I deduce is that the Respondent is attempting to prove fraudulent misrepresentation on the part of the Appellants. This fact is augmented by the defence of *non est factum* the Respondent has relied on, of which I shall be dealing with in a separate chapter. Although a wise man in his normal senses would not have donated the entire property that he owns, under certain circumstances, in a frail moment or weak moment could get emotional and transfer everything that he has and that is not impracticable or improbable. Such an act cannot be branded as preposterous or impossible.

NON EST FACTUM

This defence has no application to the facts and circumstances of this case. One could have recourse to this defence only if the application of the defence is warranted

by the facts. In this case the evidence is insufficient to prove even on a balance of evidence that the Appellants practiced deception or fraud on the Respondent. In this case the only evidence available in order to prove fraudulent misrepresentation or deceit is the evidence of the Respondent. The other witnesses merely referred to the facts that the Appellant was a recipient of janasaviya and that the notary who executed P2 was suspended. On the other hand the 1st and the 2nd appellants and a witness gave uncontroverted evidence on behalf of the Appellants with regard to the circumstances under which the impugned deed was executed. The evidence is insufficient to prove fraudulent misrepresentation or undue influence. The evidence is insufficient to show that the Respondent was tricked or gypped by the Appellants to execute deed P2.

In Roman Law fraud is defined as *omnis calliditas, fallacia, machination, adcircumveniendum, alterem, adhibita meaning* any craft, deceit or machination used to circumvent, deceive or ensnare another person. Wood Renton J. in *Haramanis Vs Haramanis*(4) held that an alienation alleged to be in fraud of creditors is voidable; that is to say that it is valid till it is set aside. In *Madar Saibo Vs Sarajudeen*(5) it was held that a fraudulent, unlike a deed executed by a person not competent in law to enter into a contract is, under the Roman Dutch Law, is valid until it is set aside or cancelled, and when it is cancelled, the cancellation refers back to the date of the deed.

In Sri Lanka the earlier view was that the burden of proving fraud in regard to a civil transaction must be satisfied beyond reasonable doubt (Vide *Yoosoof Vs Rajaratnam*(6)). But the law as it stands to day is that the standard of proof remains on a balance of probabilities although the more serious the imputation, the stricter is the proof which is

required. (*Associated Battery Manufacturers Ltd Vs United Engineering Workers Union*[7])

Therefore I hold that there is no basis for the application of the defence of *NON EST FACTUM.* The decisions is *Foster Vs Mackinnon*[8] and *Lewis Vs Clay*[9] cited by the counsel for the Respondent has no application to the facts and circumstances of the instant case.

For the reasons adumbrated I hold that the Learned District Judge has come to an erroneous conclusion on the facts and the law and therefore the impugned Judgment should not be allowed to stand. I allow the Appeal and set aside the Judgment dated 04.01.2001, but make no order for costs.

SALAM, J - I agree.

Appeal allowed.