



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 12

PAGES 309-336

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

Page

PREVENTION OF FRAUDS ORDINANCE – Section 2 – Any contract for the sale or other disposition of land or any interest in the land is invalid unless in writing and signed in the presence of a Notary Public and two or more witnesses – Evidence Ordinance – Section 68 – proof of execution of document required to be attested – Section 33, Section 101, Section 102, Section 103 – Evidence in a former judicial proceedings when relevant – Section 3 – Definition of proved and disproved - Standard of proof - Criminal and Civil. 309

Francis Samarawickrema Vs Hilda Jayasinghe And Another

(Continued in Part 11)

or has become incapable of giving evidence or had been kept out of the way by the adverse party or his presence cannot be secured without an unreasonable amount of delay and expense. But once any of the first four conditions of death, not being found, incapacity to give evidence or being kept out of the way by the adverse party has been proved, the court has no discretion and must admit the deposition, since Section 33 declares such deposition to be relevant and, therefore admissible.” (emphasis added).

Coomaraswamy concedes that a court of law does have the discretion with respect to the last condition in Section 33 relating to a witness whose presence in court cannot be obtained without an amount of delay or expense which “the court considers unreasonable” The present case does not arise from such a situation, and there is no way in which the dead witness can be made to give evidence. Accordingly, I am firmly of the opinion that Section 33 of the Evidence Ordinance is applicable in the circumstances of this case, and that the Court had no discretion in the matter.

The only reason adduced by the District Court for rejecting the application to adopt the testimony previously given by Mr. Kahatapitiya was that the expectation of the Court of Appeal that the Respondents could confront Mr. Kahatapitiya with his convictions, in the light of which he too could clarify his conduct as notary, had been frustrated by his death..In my view, too much cannot be made out of this expectation, as it is difficult to predict how Mr. Kahatapitiya would have fared or what he would have had to say in regard to his conduct as notary, if he had been able to testify at the second trial. It is trite law that subject to any statutory exception, evidence that a person has been convicted on a charge arising out of the same incident as that on which the civil claim is based is not admissible to establish his li-

ability in the civil suit, because as pointed out by Goddard, L. J. in *Hollington v. F. Hewthorn and Co. Ltd.*⁽¹⁵⁾, at 40, in the context of an appeal on a damages action arising from a road accident, -

“The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court: it cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision.”

Hence, as Goddard, L. J. observed in the said judgment at 40, “on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant”. Of course, the application of the *Hollington principle* has been curtailed in Sri Lanka by Sections 41A, 41B and 41C of the Evidence Ordinance introduced by Section 3 of the Evidence (Amendment) Act No. 33 of 1988, but since the conviction of Mr. Kahatapitiya was not a fact in issue in the instant case and none of the other new provisions are applicable thereto, the conviction will not have any relevance to the case. When Mr. Kahatapitiya testified at the first trial he was asked in cross-examination about the prosecutions that were then pending against him in the Magistrates Court, and it was open to the Respondents to have led evidence regarding any facts that may have been relevant relating to his conduct as a notary in general, and the fact that he had subsequently been convicted in those cases cannot add any value to his cross-examination so as to make any difference.

Furthermore, it is clear from the judgment of the Court of Appeal in *Hilda Jayasinghe v. Francis Samarawickrema (supra)*, that the appellate court set aside the decision of the District Court and directed a fresh trial primarily on the basis that the learned District Judge had misdirected himself on certain factual matters and had erred in considering deeds 4779 (P3) and 4880 (P4) as having been duly executed despite the failure of either of the two arresting

witnesses to give evidence, and the possibility of clarifying matters giving rise to the said convictions were only incidental and were not sought to be imposed by the Court of Appeal as a condition precedent for the adoption of the testimony of Mr. Kahatapitiya. I therefore hold that the District Court clearly erred in refusing to adopt his evidence recorded in the first trial upon proof of his death, and the Court of Appeal aggravated the situation by failing to take into consideration this vital deposition which was already part of the record.

The Quantum of proof in Civil Cases Involving Fraud

I shall now come to the first of the two questions on which special leave to appeal has been granted by this Court, namely, did the Court of Appeal err in holding that P4 was *fraudulently* executed when the same has not been proved with the high degree of proof required to prove fraud? In dealing with this question it is necessary to consider whether the decision of the Court of Appeal turned on mere due execution of the impugned deeds or whether it also involved the question of fraud. It is important to observe at the outset that the Court of Appeal has concluded that the Appellant “had failed to establish *due execution* of his title deeds 4879 (P3) and 4880 (P4)” and that therefore he cannot maintain his action “which is one of declaration of title based upon deeds 4879 (P3) and 4880 (P4)”, and that in arriving at this conclusion the Court has not expressly considered the question of the quantum of proof required to prove a civil case involving fraud.

Learned President’s Counsel for the Appellant submits that the decision of the Court of Appeal involved a finding of fraud, and that the Court had erred in applying the ordinary standard of preponderance of probability to the facts and circumstances of this case. On the other hand, learned President’s Counsel for the Respondents submits that the Court of

Appeal, in arriving at its decision, has not made any finding that there was fraud, and the basis of its decision was that the Appellant has failed to discharge the burden placed on him by law to show that the impugned deeds P3 and P4 had been duly executed, and that this decision did not encompass a finding of fraud. He has further submitted that even in a civil case involving fraud the applicable standard of proof is a balance of probabilities.

In order to determine whether the decision of the Court of Appeal involved a finding of fraud, it is necessary to consider the issues that arose for determination in the case. The 23 issues on which the case went to trial for the second time were settled on 9th May 1988 and are found in pages 450 to 456 of the Appeal Brief. It will be seen that issues 13 to 18, which are reproduced below, seek to establish that Mr. Kahatapitiya perpetrated a fraud on the Respondents and the 3rd Defendant by converting blank papers on which he obtained their signatures and thumb impression into the impugned deeds 4779 (P3) and 4880 (P4) on which the Appellant claims title to the property in suit:

"(13) 1976.03.24 හෝ ඊට ආසන්න දිනකදී විත්තිකරුවන්ගේ සහ මියගිය විත්තිකාරියගේ අත්සන හිස් කඩදාසි කොළ 3කට ඉහත කී කහටපිටිය මහතා විසින් ලබාගෙන ඇද්ද?

(14) එසේ අත්සන් ලබා ගෙන ඇත්තේ අංක 4753 දරන පොරොන්දු ඔප්පුවේ අයිතිය පැමිණිලිකරුට පැවරීමේ න්‍යායෙන්ද?

(15) එසේ හිස් කඩදාසි වලට අත්සන් කර ඇත්තේ කහටපිටිය මහතා කෙරෙහි තිබූ අවල විශ්වාසය මතද?

(16) අංක 1 සහ 2 විත්තිකරුවන් ට ඉහත කී අංක 4880 දරන ඔප්පුවේ සඳහන් ප්‍රතිශ්ඨා මුදල් ලබා ඇත්ද?

(17) ඉහත කී අංක 4880 දරන ඔප්පුව ප්‍රෝධාකාර පැවරීමක්ද?

- (18) එය පැමිණිලිකරු හා එල්. පී. කහටපිටිය නොකාරිස් මහතාගේ වංක සහයෝගී ක්‍රියාවක ප්‍රතිඵලයක්ද?”

These issues demonstrate that the question of fraud loomed large at the trial, and in particular issue 17, which was identical with issue 10 framed at the first trial, specifically raised the question “Was Deed No. 4880 (P4) a fraudulent transfer?” Furthermore, issue 18 sought to assert that the said deed was the product of fraudulent collusion between Mr. Kahatapitiya and the Appellant. It is relevant to note that both these issues were answered in the negative by the learned District Judge in his judgment dated 16th June 1993, by which he granted relief to the Appellant as prayed for in the plaint on the basis that the impugned deeds P3 and P4 were duly executed. It was this decision that was overturned by the Court of Appeal.

In my considered view, it is not possible to decide the question of due execution of the impugned deeds without dealing with the allegation of fraud leveled against the notary, as these issues are so closely interwoven and cannot be extricated from one another. This becomes clear from the following crucial passage in the judgment of the Court of Appeal appealed from:

“Let us now examine the evidence to see whether the plaintiff-respondent had established due execution. As Notary public Kahatapitiya was dead his evidence was not available at the second trial, only the evidence of Dharmasena one of the attesting witnesses was available with regard to due execution of deeds No. 4879 and 4880 (P3) and (P4). Therefore it appears that the plaintiff-respondent [present Appellant] has not established due execution of deeds No. 4879 (P3) and 4880 (P4),

in terms of the decision of Tambiah, J. in Hilda Jayasinghe v. Francis Samarawickrame (supra)."

The Court of Appeal has itself referred to the decision of the Court of Appeal in *Hilda Jayasinghe v. Francis Samarawickrame (supra)*, which arose from the first trial, in regard to the question of due execution of the impugned deeds. That decision is helpful in understanding the background to the questions that arose for determination in the second trial, and shed some light on the question of proof of due execution of the impugned deeds. At 359 of the said judgment, Tambiah, J., after citing a passage from Sarkar's *Law of Evidence*, went on to observe that –

"The two cases (Baronchy Appu⁽⁵⁾ and Seneviratne⁽⁴⁾, supra) illustrate the distinction drawn by Sarkar in the passage cited, between the mode of proof of a document required to be attested and the quantum of evidence required to prove such a document. The principles laid down in both cases are not in conflict with each other and can be reconciled. Seneviratne's case was concerned with the mode of proof, it decided – that the notary is an attesting witness and is competent to prove the execution of the document if he knew the maker of the document. Baronchy Appu's case was concerned more with the quantum of evidence required. The principle to be discerned from the judgment of Lawrie, A. C. J. is that where the execution of a deed is challenged on the ground that it had been signed before it was written, then, where at least one of the two attesting witnesses is alive, the evidence of the notary alone, even where he knew the executants is not sufficient; at least one of the two attesting witnesses should also be called.

The case of the defendants-appellants is that Mr. Kahatapitiya fraudulently obtained their signatures and

thumb impression on blank papers which were subsequently filled up in the form of a deed of sale (P4); that no consideration passed and that the two attesting witnesses were not present at the time of the execution. The circumstances of this case require that one of the two attesting witnesses be called, in addition to the notary. To use the words of Lawrie, C. J., "the case is incomplete" without him." (emphasis added).

What Tambiah, J. was saying in the above passage is that where fraud is alleged against the notary, his evidence standing alone does not satisfy the "quantum of evidence" required by law to prove due execution, and that one or both attesting witnesses, provided they are living and able to testify, must be called to the witness box. Although His Lordship did not expressly say so in that judgment, it follows as a natural corollary to what he did say, that where one or both attesting witnesses have testified, the evidence so elicited has to be assessed adopting the standard of proof applicable to a civil case involving allegations of fraud.

Section 101 of the Evidence Ordinance deals with the burden of proof in cases, and lays down that who ever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist. This provision is based on the rule *ei incumbit probatio qui dicit, non qui negat*, and as Lord Maugham observed in *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corp. Ltd.*⁽¹⁶⁾ "it is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons". Accordingly, the legal burden of proving all facts essential to his claim ordinarily rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings, and

it was therefore the burden of the Appellant in this case to prove due execution of the impugned deeds on which he based his claim to title. As it is apparent from Section 102 of the Ordinance, the Appellant's action would be liable to be dismissed if he fails to discharge this legal burden.

While the legal burden to prove his claim in a civil action generally rests on the plaintiff, it is expressly provided in Section 103 of the Evidence Ordinance that the burden of proof of any particular facts lies on that person who wishes the courts to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person. As the two illustrations provided in Section 103 are from criminal prosecutions, it might be useful to quote from E.R.S.R. Coomaraswamy's *The Law of Evidence* Vol II, Book 1 page 259 in which it is stated that-

“Numerous illustrations may be given from civil cases to illustrate the application of Section 103. Where a deaf and dumb person had executed a deed, conveying immovable property to another, and the notary (since dead) has stated in his attestation that he read over and explained the instructions to such person, the burden on such person, when he challenges the validity of the deed for want of proper understanding as to its purport at the time of execution, is a heavy one.”

This illustration is derived from the decision of this Court in *Subramaniam v. Thanarase* ⁽¹⁷⁾, in which the Supreme Court considered the declaration made in the attestation clause by the notary, who was dead when the case went into trial, that he read over and explained the instructions to the executant would be prima face evidence of the truth of that declaration. This was not a case where fraud was alleged, and the only issue was whether

the executant of the deed, being deaf and dumb, understood the purport of the deed, but nevertheless it is a useful decision that illustrates the principle that a defendant who relies on a particular fact has the burden of proving such fact. Accordingly, in the context of the present appeal, it may be said that while the burden is on the Appellant to prove due execution of the impugned deeds, it is the burden of the Respondents to show that its execution was tainted with fraud.

So much for the burden of proof, but it is now necessary to deal with the *standard* of proof. In this context, it is important to remember that unlike a criminal case, which has to be proved beyond reasonable doubt, a civil claim may be seceded on a preponderance of evidence or on a balance of probabilities. Adverting to this fundamental distinction, Denning, J., in *Miller v. Minister of Pensions*,⁽¹⁸⁾ observed at 373-374 that the standard of proof in a criminal case was proof beyond a reasonable doubt, which carries a high degree of probability, but “does not mean proof beyond the shadow of a doubt” to the exclusion of even “fanciful possibilities.” He went on to observe that by contrast, proof in a civil case –

“ . . . must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, ‘we think it more probable that not’ the burden is discharged, but if the probabilities are equal it is not.”

The English courts have taken the view that the standard of proof required for a criminal offence in civil proceedings is not higher than the standard of proof ordinarily required in civil proceedings, (vide *Hornal v.*

Neuberger Products Ltd.⁽¹⁹⁾ *Re Dellow's Will Trusts*⁽²⁰⁾ *Post office v. Estuary Radio*⁽²¹⁾; *Nishina Trading v. Chayoda Fire Co.*⁽²²⁾ but within that standard, as Denning, L. J., put it in *Hornal v. Neuberger Products Ltd.* (*supra*) at 258, "the more serious the allegation the higher the degree of probability that is required." The degree of proof depends on the subject matter, and as Denning L. J. observed in *Bater v. Bater*⁽²³⁾ at 37 –

"A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking itself if negligence is established. It does not expect so high a degree as a criminal court even when it is considering a charge of a criminal nature; but it still does require a degree of probability which is commensurate with the occasion."

Our Evidence Ordinance does not anywhere draw the distinction between the two standards of proof in criminal and in civil cases, but our courts have recognized and consistently applies the English distinction. The key to the question lies in the definitions of "proved" and "disapproved" in Section 3 of the Evidence Ordinance, which postulate either belief or a consideration of its existence being so probable that a prudent man ought under the circumstances of the particular case, to act on the supposition that it exists or does not exist. It is legitimate to presume that in a criminal case the prudent man would require a very high degree of proof - proof beyond reasonable doubt, whereas in a civil case, he would not require the same high standard, and would be satisfied if the fact is more probable than not.

The first question that arises in this appeal is simply what is the standard applicable to the proof of fraud in civil

proceedings in Sri Lanka? In *Lakshmanan Chettiar v. Muttiah Chettiar*⁽²⁴⁾, which was a civil action filed by a professional money lender against his agent claiming that he had fraudulently and in breach of trust assigned a decree made in his favour to a third party without any consideration, the court had to decide whether the assignment was fraudulent, and Howard, C.J. (with Canakararatne, J. concurring) held that the standard applicable to the proof of fraud was the criminal standard. His Lordship observed at 344, that “fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt” as such a finding “cannot be based on suspicion and conjecture”. This decision was followed in *Yoosooda v. Rajaratnam*⁽²⁵⁾ in which in the context of an inquiry under Section 325 of the Civil Procedure Code, G. P. A. Silva A. C. J., observed at page 13 that –

“Both principle and precedent would support the view that when a transfer is effected for valuable consideration the burden of proving that it was fraudulent rests on the plaintiff in these circumstances. It is an accepted rule that such a burden even in a civil proceeding must be discharged to the satisfaction of a Court. For that degree of satisfaction to be reached, the standard of proof that is required is the equivalent of proof beyond reasonable doubt.”

However, in *Associated Battery Manufacturers (Ceylon) Ltd. v. United Engineering Workers Union*⁽²⁶⁾ at 544, and *Caledonian Estate Ltd., v. Hilaman*⁽²⁷⁾ at 426, it has been observed by this Court that allegations of misconduct in labour tribunal proceedings may be proved on a balance of probabilities. It is clear from these decisions that while the civil standard is generally applicable, the more serious the

imputation, the stricter is the proof which is required. As explained by Lord Nicholls in *re H (Minors)*⁽²⁸⁾ at 586 –

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that on the evidence, the occurrence of the event was *more likely than not*. When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case that *the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability*. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.” (*emphasis added*).

Explaining the principles enunciated by the courts in this regard, Phipson on Evidence (16th Edition – 2005) at page 156, emphasizes that “attention should be paid to the nature of the allegation, the alternative version of facts suggested by the defence (which may not be that the event did not occur, but rather that it occurred in a different way, or at someone else’s hand), and the inherent probabilities of such alternatives having occurred.”

It is necessary to bear these principles in mind in examining the relevant evidence to answer the main question that arises on this appeal: has the Appellant discharged the burden placed on him by law to prove the due execution of the impugned deeds P3 and P4? As already noted, this question is intrinsically linked to another question: have the Respondents discharged their burden to show that the execution of Deed No. 4880 (P4) was tainted with fraud? It is common ground that on 24th March 1976, the 1st and 2nd

Defendant – Appellant-Respondents placed their signatures and the 3rd Defendant-Appellant-Respondent placed her thumb impression on certain sheets of paper which were presented to them by Mr. Kahatapitiya at his residence, and the parties are at variance only in regard to the nature of the transaction and the manner in which the deeds in question were executed.

The Appellant in his testimony claimed that what the parties signed were duly perfected deeds bearing Nos. 4779 (P3) and 4880 (P4) intended to transfer title in the land constituting the subject matter of this appeal to the Appellant. According to him, the Respondents, who were related to him and who were his neighbors, approached him with a view to selling the land in question which he agreed to buy for Rs. 8000/-. The Appellant has also testified that on 24th March 1976, when by prior arrangement, he went to the residence of Mr. Kahatapitiya, the said Respondents and Defendant were already there and the deeds were prepared only thereafter. According to the Appellant, in view of the conveyance in favour of Yasantha Ajith Kahatapitiya effected by Deed No. 4753 (P2) two deeds had to be prepared, one to retransfer the title from Yasantha, the minor son of Mr. Kahatapitiya to the 1st and 2nd Defendant – Appellant-Respondents and the 3rd Defendant, and the other, for the latter to convey the title to the Appellant. At pages 498-499 of the Appeal Brief, his testimony regarding the financial aspect of the transaction was as follows:-

"එදින මම රු. 8000/- ක් දුන්නා මං හිතන්නේ. මම රු. 8000/- ක් අරගෙන ගියා. ඔප්පු ලිව්වා. මම මුදල් දුන්නා ස්ටිවන් ජයසිංහට. (2 වැනි විත්තිකරුට). ඔහු ඒ මුදලින් රු. 3752/- ක් දුන්නා. එල්. පී. කනට්ටිටිය මහතාට. පොරොන්දු සින්නක්කරේට අවශ්‍ය මුදලත්, නොතාරිස් ගාස්තුත්, පොළියත් සඳහා එය දුන්නේ.

His position was that he took with him Rs. 8000/-, which he paid to the 2nd Defendant – Appellant-Respondent, Stephen Jayasinghe out of which Jayasinghe paid Rs. 3,752/- to Mr. L. G. Kahatapitiya as money payable to secure the retransfer of title in terms of P2, which included interest and notarial charges. He further testified that while Yasantha Ajith Kahatapitiya placed his signature on P3 the said Respondents signed and the Defendant placed her thumb impression on Deed No. 4880 (P4) by which they conveyed their title to him by way of sale.

The version of the respondents is that they were under the impression that their title to the property in question had been transferred by Deed No. 4753 dated 12th August 1975 (P2) to Mr. L. G. Kahatapitiya and not to his minor son Yasantha Ajith Kahatapitiya; that on 24th March 1976, they signed printed deed forms commonly used for the making of deeds with several blank spaces, in the expectation that the signed papers will be perfected by Mr. Kahatapitiya to constitute an assignment of what they thought were his rights under the said deed No. 4753 (P2) to the Appellant; that there was no intention to sell the property outright to the Appellant; that in the circumstances no money changed hands at the time of signing these papers; and that the 2nd Defendant-Appellant-Respondent was not present at the time when the 1st Defendant-Appellant-Respondent signed the papers and the 3rd Defendant placed her thumb impression thereon. Both Respondents were consistent in their testimony that what they signed were printed deed papers with unfilled blanks. Elaborating on this position, the 2nd Defendant-Appellant-Respondent stated in evidence (at page 625 of the Appeal Brief) that he signed on “ඔප්පු ලියන හිස් කොළවල” in which there unfilled blanks which he described saying; “හිස්තැන් තිබෙනවා. ඒ හිස්තැන් පුරවා නැහැ.”

The 1st Defendant-Appellant-Respondent testified to the same effect, but went on to assert an additional fact, which if true, might have contributed to her belief that the transaction was an assignment to the Appellant of the rights of Yasantha Ajith Kahatapitiya under Deed No. 4753 (P2) and not an outright sale, namely that the deed formats were in the English language. She described the papers she signed in the following words:

“අපි අත්සන් කලා හිස් ඔප්පු කොල වලට. මුකුත් ලියලා තිබුණේ නැහැ. ඉංග්‍රීසියෙන් එහෙම ලියලා තිබුණු අවිටු ගහපු කොළයක පමණයි. ඒ අවස්ථාවේ මම අත්සන් කළේ. ඒ අවස්ථාවේ මම අත්සන් කළේ උගසට. විකිණීමක් කියා මම දැන සිටියේ නැහැ.”

(page 631 of the Appeal Brief)

The learned District Judge has accepted the Appellant's story and rejected the version presented by the Respondents. An important fact that the learned District Judge took into consideration was that, apart from the signatures of the two attesting witnesses and Mr. Kahatapitiya, nothing was written on Deed No. 4880 (P4) in the English language. Not only was the entire deed P4 in the Sinhalese language, it commenced with the Sinhalese words සින්නක්කරය රු.....” printed in large letters, with the space meant for indicating the amount filled using a typewriter with the figure “8000/=”. Even if one assumes that the amount had not been filled in at the time the deed was signed by the Respondents, the deed format in the Sinhalese language, which they well understood, clearly showed that it is an outright sale. The printed deed format refer to the executants as “විකුණුම්කාර” and also include words such as “මෙයින් සින්නක්කරයේ විකුණා අයිතිකර, හිමිකර, පවරා හාර දුනි. . .”, which clearly militate against the version of the Respondents that they genuinely believed that the transaction was an assignment by Mr. Kahatapitiya of his rights

under Deed No. 4753 (P2), and not an absolute sale of the property.

It is also relevant to note that the learned District Judge has concluded in the light of all the evidence, documentary and oral, placed before the District Court in the second trial, that the executants as well as the attesting witnesses of the impugned deeds had placed their signatures on the deeds in the presence of the notary, and that the said deeds were duly executed. When reversing this decision of the learned District Judge, The Court of Appeal (at page 6 and 7 of the judgment) has highlighted the following three factors as lending credence to the story of the Respondents that deed No. 4753 (P2) was a conditional transfer and signatures on deeds 4879 (P3) and 4880 (P4) were obtained in blank sheets before they were written into deeds on the pretext of assigning the conditional transfer P2 to the Appellant:-

- (1) The execution of deed No. 4753 of 12th August 1976 (P2) as a conditional transfer in the name of son of Kahatapitiya who was a minor, when the respondents needed money from Kahatapitiya and expected Kahatapitiya to be the transferee.
- (2) Before the defluxion of three years specified in the deed, Kahatapitiya calling for repayment of the loan from the respondents.
- (3) Kahatapitiya was found guilty of not forwarding duplicates of deeds and not sending weekly and monthly returns to the Registrar General.

The circumstance in which Mr. Kahatapitiya advanced a loan of Rs. 3,500/- to the Respondents and the 3rd Defendant, utilizing money deposited in a pass book opened in the

name of his minor son, Yasantha Ajith Kahatapitiya, and the execution of the deed P2 in his favor was explained by Mr. Kahatapitiya when he testified in the first trial (vide page 242 of the Appeal Brief). It is unfortunate that the District court refused an application to adopt this evidence under Section 33 of the Evidence Ordinance upon the death of Mr. Kahatapitiya being brought to the notice of Court, and I have to add with great respect, that it is even more unfortunate that the Court of Appeal concluded that these circumstances support the position taken up by the Respondents, without taking into consideration the testimony of Mr. Kahatapitiya. In fact, he has expressly stated in evidence that he informed the Respondents and the 2nd Defendant-Appellant-Respondent that the deed will be executed in his son Ajith's name, which position was denied in the first trial by the Respondents, but was accepted by the learned District Judge as credible. It is significant that Ajith who was born on 13th April 1964, filed his answer dated 22nd September 1986 in the District Court after he attained majority, and specifically admitted in paragraph 4 of the said answer that upon the sum of money advanced by him and interest been repaid, he had on 24th March 1976 by deed No. 4879 (P3) re-conveyed title in the property in question to the Respondents.

In regard to the view expressed by the Court of Appeal, that calling for the repayment of the loan before the expiry of the 3 year period stipulated in P2, supports the position that P3 and P4 were fraudulently executed, I say with great respect that I cannot agree for several reasons. In the first place, Mr. Kahatapitiya has vehemently denied that he demanded the money within a few months of the execution of P2, and it is his position that the Respondent wanted to sell the property outright as they needed the money. In any

event, it is unreasonable to attribute to Mr. Kahatapitiya an intention to defraud the Respondents even if he had wanted the money back before the defluxion of the 3 year period, as any failure on the part of the Respondents to repay the sum advanced with interest within the said period would only have benefited Mr. Kahatapitiya's minor son, who would have become the absolute owner of the property. Furthermore, the fact that Mr. Kahatapitiya was found guilty of failing to comply with the provision of Section 31 of the Notaries Ordinance is altogether irrelevant to this case for the reasons already noted, and in any event, would not affect the validity of deeds P3 and P4 as section 33 of the Notaries Ordinance expressly provides 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"*.

In this connection, it is also relevant to note that the Court of Appeal has considered the discrepancy in the date of attestation of deed No. 4880 (P4) as an additional factor that supports the Respondent's story that Mr. Kahatapitiya fraudulently fabricated the impugned deed P4. Learned President's Counsel for the Respondents has highlighted the fact that on the first page of P4 the date of attestation is given as 24th March 1976, but the attestation clause on the last page gives the date as 24th April 1976, the existence of which discrepancy was admitted by witness Upamalika Wijesooriya, a clerk of the Land Registry, Kalutara, who was called to give evidence by the Appellant himself. However, the said witness has produced marked P9 (at page 556 of the Appeal Brief) the deed attested by Mr. Kahatapitiya bearing No. 4881 which is dated 25th March 1976, which corroborates the evidence of Mr. Kahatapitiya recorded in the first trial (at page 239-240 of the Appeal Brief) that the said discrepancy was caused by a "typing error" Wijesooriya also produced marked "52" the Register maintained at the Land Registry which shows that

deed No. 4880 (P4) was registered on 30th June 1976 ahead of deed No. 4879 (P3) which has been registered only on 8th July 1976.

It is significant that in the plaint filed by the Appellant as well as in his testimony, he has stated that the deed P4 was executed on 24th March 1976, and even the Respondents have admitted the fact that they signed the so called “blank papers” on this date. The only attesting witness who testified at the second trial, Dharmasena, has also stated in his evidence that the deed was executed, signed and attested on 24th March 1976. It is also relevant to note that 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe, has signed an endorsement across the protocol of P4 to the effect that “අද දින සිට මාස දෙකක් (24-5-76) යන්නට ප්‍රථම සම්පූර්ණ භුක්තිය භාර දෙනවා ඇත”, which tends to show that the deed was executed on 24th March 1976. None of this material has been considered by the Court of Appeal.

Learned Counsel who appeared for the Respondents in the original court as well as in the appellate proceedings have argued that all executants of the impugned deed P4 did not sign the deed at the same time and no consideration passed and that the deed was therefore not duly executed. The Respondents have testified that when summoned by Mr. Kahatapitiya to sign the deed, the 2nd Defendant-Appellant-Respondent stayed at home to look after the sister’s baby and sent his sister, the 1st Defendant-Appellant-Respondent, and his mother, who is the original 3rd Defendant, to sign the deed, and that he went to Mr. Kahatapitiya’s residence and signed the deed only after they returned home. Although the learned District Judge has dealt with this aspect of the matter, the Court of the Appeal, surprisingly, has not. During the argument of this appeal, learned President’s Counsel for

the Respondents relied heavily on the following answer given by Dharmasena, the only surviving attesting witness to the impugned deed, to a question put to him under cross-examination (at page 570 of the Appeal Brief) with respect to the persons present at the time of execution of the impugned deeds-

- “ප්‍ර : ඔය අවස්ථාවේ කවුද හිටියේ ?
 උ : මම, කහටපිටිය මහතා, සන්දේර්ස්, හිල්ඩා, රොස්ලින්, කහටපිටිය මහතාගේ පුතා ඔය කට්ටිය හිටියා”

It was stressed by Counsel that the omission, on the part of Dharmasena, to name the 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe, is significant in view of the requirement of Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 that any party making a sale and transfer of immovable property shall place his or her signature “*in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing deed, or instrument be duly attested by such notary and witnesses.*” As against this, learned President’s Counsel for the Appellant has submitted that witness Dharmasena was not questioned specifically regarding the 2nd Defendant-Appellant-Respondent’s presence on that occasion, nor was it put to him in cross-examination that he was not present at the time the other two executants placed their signatures on the deed P4. He has invited the attention of Court to the examination in chief of Dharmasena where he had categorically stated that the three executants of P4 were present when the contents of the deeds were explained to the parties and they placed their signatures thereon. The evidence reads as follows :-

- “ප්‍ර : මෙය අත්සන් කරන අවස්ථාවේ තමා හිටියද ?
 උ : ඔව්. ඔප්පුව කියවා දුන්නා විකුණුම්කරුවන්ට. මමත් අනිත් සාක්ෂිකරුන් සිටියා. ඒ විකුණුම්කරුවන් 3 දෙනා අත්සන් කළා.

මහපරිශීලී සලකුණක් තිබෙනවා රොස්ලින් පෙරේරාගේ එය.” (at page 565 of the Appeal Brief)

Learned President’s Counsel has also emphasized that a few minutes prior to putting the particular question which elicited the answer on which so much reliance is placed by the Respondents, he had been asked in cross-examination (at page 569 of the Appeal Brief) about the signing of the impugned deeds and who were present at that time, and he had stated that all those whose signatures and thumb impressions appear in the deeds were present. It is also significant that the learned Counsel for the Respondents failed to suggest to the Appellant in cross-examination that the 2nd Defendant-Appellant-Respondent was not present at the time the deeds were signed, in the face of the Appellant’s testimony at page 499 of the Appeal Brief, which was as follows:-

“මම ඔප්පු අත්සන් කරන අවස්ථාවේ සිටියා. මුලින් අත්සන් කළේ මම හිතන්නේ ස්ටීවන්. ඊළඟට හිල්ඩා ජයසිංහ. අම්මා අන්තිමට අත්සන් කළේ. අංක 4880 දරණ ඔප්පුවට මම අත්සන් කළා. පිටපත් 3ට අත්සන් කළා. ඒවා හිස් ඒවා නොවෙයි සාක්ෂි වශයෙන් සන්දේශීය සහ ධර්මයෙන් මහතන් අත්සන් කළා.

I must confess that I cannot fault the learned District Judge for disbelieving the story of the Respondents that the 2nd Defendant-Appellant-Respondent did not go with the other executants to sign the deed and remained at home to look after the sister’s baby, as the 2nd Defendant-Appellant-Respondent who is the bread winner to his family, has been an active and vigilant individual, who had after discovering the alleged fraud committed on them by Mr. Kahatapitiya, had gone by himself to the Land Registry in Kalutara to verify the situation about the registration of the impugned deed and

had also complained to the police about the alleged fraud. By nature, he is not the type of person who would baby-sit while his sister and mother were signing an important deed.

In this context, it is noteworthy that the most important reason advanced by the Court of Appeal to set aside the decision of the District Court in the second trial was the insufficiency of evidence that the monetary consideration for the execution of the impugned deeds had been paid. It was the position of the Respondents and the original 3rd Defendant that no payment was made to them or to Mr. Kahatapitiya or his son during the time when they were present at the residence of Mr. Kahatapitiya and signed the blank papers. As against this, the Appellants has testified that he took Rs. 8,000/- with him and he paid that sum to the 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe who paid Rs. 3752/- to Mr. Kahatapitiya and kept the balance sum, which according to my calculation amounts to Rs. 4,248/- . This conflict of testimony presented the District Court with two versions, that of the Respondents that no money changed hands, and that of the Appellant that Rs. 8,000/- was paid, and the District Court has accepted the Appellant's version as the more plausible, only to be reversed by the Court of Appeal.

The Court of Appeal has highlighted the admission made by witness Dharmasena that while he was at the residence of Mr. Kahatapitiya, he did not observe any monetary transaction. At page 577 of the Appeal Brief, Dharmasena answered the question put to him as follows:-

- “ප්‍ර : සල්ලි ගනුදෙනු ගැන තමා දන්නේ නැහැ?
 උ : නැහැ. මම විනාඩි 15ක් පමණ හිටියා. මම අත්සන් කර
 ගියා. ඔප්පුව ලියා අත්සන් කරන තුරු මුල සිට අගටම මම
 හිටියා.”

The Court of Appeal has in its judgment stressed that this evidence is contradictory to the attestation clauses in deeds No. 4879(P3) and 4880 (P4), which state that consideration passed in the presence of the notary. Learned President's Counsel for the Respondents has referred us to the decision in *E.A. Diyes Singho v. E.A. Herath*,⁽²⁹⁾ where *T.S. Fernando J* observed at 494-495 that he is "unable to agree that proof of the existence of a statement in the deed or instrument by the notary that consideration was paid is sufficient to establish the truth of the payment of such consideration", in the context of a case involving the issue of prior registration in which proof of valuable consideration was indispensable for a subsequent deed to receive priority. Consideration may not be an ingredient to prove "due attestation", but in a case such as this, where the question is whether the execution of the impugned deeds was tainted with fraud, proof of payment of the amounts stated as consideration for the execution of the deeds may be equally relevant.

However, it is necessary to bear in mind that according to Dharmasena, he was present at Mr. Kahatapitiya's residence only for about 15 minutes, and that he left the place soon after the deeds were signed. The evidence of the Appellant (at page 523) of the Appeal Brief) which is quoted below is that Dharmasena came while the deeds were being prepared.

- "ප්‍ර : කොයි වෙලාවේදී ලීවේ
- උ : ඊ 7.00 ට විතර. කහටපිටිය මහතාගේ ගෙදරදී.
- ප්‍ර : ඒ වෙලාවේ හිටියේ කවුද?
- උ : මම, විත්තිකරුවෝ, කහටපිටිය මහතා, සන්දෝරිස් ලියන මහත්තයා හිටියා. අපි වැඩ කරගෙන යන විට ධර්මසේන ලියන මහත්තයන් ආවා."

According to the operative part of Deed No. 4880 the Respondents and the 3rd Defendant have acknowledged

receipt of Rs. 8,000/-. Since it is in evidence that Dharmasena came to Mr. Kahatapitiya's residence while the deed was being prepared, it is possible that the consideration was paid before his arrival at a time when the deeds were being prepared or even prior to that. It is therefore unfortunate that the Court of Appeal did not consider that possibility as well as the evidence of Mr. Kahatapitiya led at the first trial that the consideration was paid in his presence, and the testimony of the Appellant to the same effect. It is also significant to note that the Appellant has categorically stated in evidence that he paid the money to the 2nd Defendant-Appellant-Respondent on the date of execution of the deed, and that the Respondents have failed to put to him in cross-examination that this position is false, if that be the case.

I find it difficult to believe the story of the Respondents that they signed the deed papers intending to transfer rights and obligations of Mr. Kahatapitiya under P2 to the Appellant and that no money was paid to them, when the word "සින්නකරය" was prominent in the papers they signed and they were aware that the land was surveyed by surveyor Premaratne a short time before, which should have made them realize that what was taking place was an outright sale. It is, in my view most likely that it is the prospect of getting approximately Rs. 4,248/- from the Appellant that motivated the Respondents and the 3rd Defendant to respond so readily to Mr. Kahatapitiya's request to come to his residence and sign the deed P4. It is also probable, that as claimed by the Appellant, the money was paid to the 2nd Defendant-Appellant-Respondent, which also explains the necessity for the Respondents to make up a story that the 2nd Defendant-Appellant-Respondent was prevented from being present when they signed the deed as he had to look after his sister's baby.

It is my considered opinion that the Court of Appeal should have taken into consideration the evidence of Mr. Kahatapitiya led at the first trial (at page 240 of the Appeal Brief) that the 2nd Defendant-Appellant-Respondent was present at the time of exchanging the deeds, and that he accepted the consideration. The Respondents had not suggested to Mr. Kahatapitiya when he testified at the first trial that the 2nd Defendant-Appellant-Respondent was not present along with the other executants at the time of the execution of the impugned deeds. The Respondents have clung onto a very small part of the evidence of Dharmasena to assert that 2nd Defendant-Appellant-Respondent was not present at the time of the execution of the deeds, whereas on a consideration of the totality of the evidence it appears to be more likely than not that all three executants of P4 along with Yasantha Ajith Kahatapitiya who was the executant of P3 were present, and there was due attestation and execution of both deeds P3 and P4 as required by section 2 of the Prevention of Frauds Ordinance. The Court of Appeal, when applying the standard of balance of probability to the facts in issue in this case, has also failed, in my view, to bear in mind the principle that the more serious the allegation the stronger the evidence that is required to establish the allegation, a matter which is of great importance in a case where the parties who have placed their signatures on deed formats, albeit with some blanks, are claiming that they have been defrauded by the notary.

An important submission that was made by learned President's Counsel for the Appellant is that the decision of the Court of Appeal that the Appellant has failed to prove due execution of the deeds P3 and P4 would have the effect of reviving the title of Yasantha Ajith Kahatapitiya to the property in question. This, no doubt would be altogether absurd as the latter has filed answer and got himself discharged from

the action on the basis that he has no claim as he conveyed his title to the Respondents through P3. None of the Respondents nor any other party has prayed for the setting aside of the deed P2 by which the Respondents and the original 3rd Defendant have conveyed title to Yasantha Ajith Kahatapitiya, and in view of the defluxion of the 3 year period precedent for the re-conveyance, the latter will become the absolute owner of the property, unless the decision of the Court of Appeal is set aside.

While I am compelled by the foregoing to disagree with the assessment of the evidence made by the Court of Appeal and its ultimate decision, in doing so, I take comfort in the following oft-quoted words of Viscount Simon from the decision of the House of Lords in *Watt v. Thomas*⁽³⁰⁾ at 583 which were cited with approval by the Privy Council in *Munasinghe v. Vidanage*:⁽³¹⁾ –

“.....an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is

telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given”.

In this case, which was commenced in the District Court of Kalutara more than 3 decades ago, there have been two trials, and both trial judges have come to the same conclusion in what I would regard as essentially the same factual scenario, even though the stories of the two sides were unraveled through different witnesses. The Court of Appeal has in this case failed to observe the time tested principle enunciated by James L. J. in *The Sir Robert Peel*,⁽³²⁾ at 322 which was quoted with approval by Viscount Sankey L. C in *Powell and Wife V. Streatham Manor Nursing Home*⁽³³⁾ at 248, that an appellate court –

“will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour unless they find some governing fact which in relation to others has created a wrong impression.”

I am of the opinion that in this case too the District Court had to choose between two conflicting versions of facts on the basis of credibility or demeanor of the witnesses who testified at the trial, and the circumstances outlined by the Court of Appeal to differ from the decision of the District Court were, with great respect, neither substantiated by the totality of the evidence presented in the case nor sufficiently convincing. In the factual context of this case, I therefore hold that the

Appellant has discharged the burden placed on him by law to prove the due execution of the impugned deeds, and the Respondents have failed to discharge the burden placed on them by law to establish that P4 was executed fraudulently.

For the foregoing reasons, I am of the opinion that the two questions on which special leave to appeal has been granted should be answered in the affirmative. Accordingly, I allow the appeal, vacate the judgment of the Court of Appeal appealed from and affirm the judgment of the District Court dated 16th June 1993. I make no order for costs of appeal in all the circumstances of this case.

S. N. SILVA, C. J. - I agree

TILAKAWARDANE, J. - I agree

Appeal Allowed.

The Judgment of the Court of Appeal set aside. The Judgment of the District Court dated June 16th, 1993 affirmed.