THE

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

[2011] 1 SRI L.R. - PART 5

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DIGEST

As presented the plates already bear several "Lion" water-marks, as well as pre-engraved secret numbers. The national emblem of the country of use is printed in the corner of the plates. After importation, this information is supplemented by the national license number plate of the corresponding motor vehicle and the plate is issued to the owner."

And sought advice: whether the product should be classified in heading 83.10 or in heading 76.16.

The Secretariat's opinion: The article in question is an aluminium plate which already contains preprinted security information which determines its future use. On the basis of its content and presentation Secretariat conclude that this is a licence number plate presented unfinished but already displaying the essential characteristics of a motor vehicle licence number plate. This interpretation is supported by the second paragraph of the explanatory note to this heading which stipulates that "some plates. . . designed for the subsequent insertion of details" belong in heading 83.10.

The World Customs Organization has described the goods in issue under heading 83.10 not because the blank plate contains any letters, numbers or designs on them (Comments made by the Sri Lanka Customs in advise No TC/99/177 dated 17.12.1999 that if the plates imported bear any letters, Nos or designs they would fall under 8310.00) but because the plate is designed for the subsequent insertion of details.

The above facts show that the Customs Department itself had doubts as to whether the number plates containing security features (such as lion water marks, pre-engraved secret numbers and the national Emblem of Sri Lanka) should be classified in heading 83.10 or in heading 76.16. In

these circumstances the Petitioners' claim that they relied on the advice bearing No TC/99/177 dated 17.12.1999 that the aluminium plate they imported with security features falls under HS code 7616.99 and declared accordingly in the CUSDEC cannot be said to have been done with the intention of defrauding the Revenue. The Supreme Court in *Toyota Lanka (Pvt) Limited v. Director General of Customs (supra)* held that in the absence of stealth, to evade payment of customs duties or dues that the forfeiture provided for in Section 47 would not apply to a situation of a disputed classification of goods or an under payment of short levy of dues or duties.

But now an opinion has been obtained from the World Customs Organization that the aluminium plate with the security features is a licence number plate presented unfinished but already displaying the essential characteristics of a motor vehicle licence number plate. This interpretation is supported by the second paragraph of the explanatory note to this heading which stipulates that "some plates . . . designed for the subsequent insertion of details" belong in heading 83.10. In view of this opinion all the consignments of aluminum plates imported by the 1st Petitioner falls within the classification of Hs Code 8310.00 in the circumstances the duties short levied in the imports of the said 22 consignments of the 1st Petitioner could be recovered as provided for under Section 18 of the Customs Ordinance.

Undervaluation by non declaration of royalty

The principal agreement dated 11th of October 1999 for the manufacture, supply and delivery of retro-reflective number plates with embossed number and security sticker for windscreen was between Erich Utsch AG and the Commissioner of Motor Traffic. The principal contractor by his letter dated 13th January 200 informed the Commissioner

of Motor Traffic that for the purpose of having a local contract with the Department of Motor Traffic and as it is easier for the project implementation and monitoring with a local team, the contractual obligation of Erich Utsch AG was assigned to Utsch Lanka (Pvt) Ltd the 1st Petitioner, a Company incorporated in Sri Lanka under the terms and conditions agreed upon between these two parties. One of the terms of the said agreement is that the Licensor pay the Licensee a royalty fee for the provision of technology, expertise and training for the project by the Licensor. The payment related to the royalty was embodied in an agreement between Erich Utsch AG and the 1st Petitioner dated 21st March 2000 (P5). One of the conditions of the said agreement is the payment of Royalty Fee of ten per cent (10%) per annum of the total turnover of the 1st Petitioner as per the audited accounts.

The charge against the Petitioner is that it has failed in all the instances to declare the royalty payments to the Customs in order to determine the value of the goods imported. As such the Petitioner has undervalued the goods imported and defrauded the revenue by not paying the correct customs duty.

The above charge is in relation to the Customs valuation of the goods imported by the 1st Petitioner. For the purpose of customs duty the value of the goods has to be determined at the time of importation. As provided by Section 51 of the Customs Ordinance it is the duty of the importer or his agent to state the value of the article imported in the 'Sri Lanka Customs - Value Declaration Form' together with the description and quantity of the same. Such value shall be determined in accordance with the provisions of Schedule E, of the Customs Ordinance and duties shall be paid on a value so determined.

The said form in Column 16 requests the declaration of the following particulars:

16. Declare any of the following costs & services and not included in the invoice value in terms of Article 8(1) and 8 (2) of Schedule E for the Customs Ordinance.	
(a) Brokerage and Commission : N/A	(b) Cost of Containers: N/A
(c) Packing Costs: N/A	(d) Cost of goods and services supplied by the buyer: N/A
(e) Royalities and license fees: N//A	(f) Value of Proceeds which accrue to sellers: N/A
(g) Loading, Unloading, Handing Charges: N/A	(h) Insurance EURO 606:12
(In the country of exportation)	
(i) Feight N/A	(j) Others payments, if any: N/A

The Petitioner in the said Value Declaration form declared against the Column Royalties and license fees - N/A (not applicable). On the value declared by the Petitioner in the Value Declaration Form value was determined and the customs duties were paid by the Petitioner.

The Respondents submitted that according to the license agreement between Erich Utsch AG and the 1st Petitioner dated 21st March 200 P5 a payment of 10% royalty for the provision of technology, expertise and training for the project has to be paid to Erich Utsch AG per annum of the total turnover of the 1st Petitioner as per the audited accounts. Hence the 1st Petitioner should have declared in the Value Declaration Form the payment of royalty. Whether a payment of royalty is applicable to customs valuation purpose or not is a matter for customs to decide upon accurate information in consultation with each other. Therefore the failure to

declare the royalty payments has clearly deprived customs of that opportunity and has helped the Petitioner to evade due payment of customs duty.

The question is whether the royalty payment of the Petitioner for the provision of technology expertise and training for the project has to be added to the value of the goods imported? If not is it necessary to declare the payment of royalty in the Value Declaration Form?

As observed above the determination of the value of the goods imported is for the purpose of determining the customs duty. According to Section 51 the value of the goods imported has to be determined in accordance with Schedule E of the Customs (Amendment) Act No. 2 of 2003. Article 1 of Schedule E states: the customs value of any imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to Sri Lanka as adjusted with the provisions of Article 8. Article 8(1) of the said schedule states;

In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:

(a). .

(b)...

(c) Royalties and license fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued to the extent that such royalties and fees are not included in the price actually paid or payable.

.....

There is no issue as to the declaration of the price actually paid to the imported goods. It is admitted that the royalty is not included in the price actually paid. The issue is whether the royalty that has to be paid by the Petitioner for the provision of technology, expertise and training for the project be added to the prices actually paid for the imported goods for the purpose of determining the customs value of the goods in order to determine the customs duty.

It is important to note that the duties of customs shall be levied and paid upon all goods and merchandise imported into or exported from Sri Lanka under Section 10 of the Customs Ordinance at the time of importation or exportation. Therefore the price of the goods has to be determined at the time of importation to facilitate the payment of customs duty at the time of importation. Article 1 of Schedule E states: the customs value of any imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to Sri Lanka as adjusted with the provisions of Article 8. The price of the goods at the time of importation is :- price actually paid with royalty paid or payable **to the goods imported**.

For example if the goods are imported under a foreign trade mark, the value of the right to use the patent, protected design or trade mark, shall be added to the normal price. It is admitted that the goods imported are rectangular aluminum plates of various dimensions, with rounded corners and raised edges, covered with a reflective foil with several lion water marks, pre-engraved secret numbers and the national emblem of Sri Lanka. It is also admitted that no royalty is paid or payable to the technology used in the manufacture of the said blank aluminium plates or for the inscription of lion water marks, pre-engraved secret numbers

and the national emblem of Sri Lanka. Therefore it is evident that the royalty is not paid or payable to anything done or contained in the said plate at the time of importation.

The royalty is paid for the provision of technology, expertise and training for the embossing and printing of motor vehicle number (with two letters, four numbers across the plate separated by a dash with a provincial identification (two) letters) on the aluminium plate imported. Number of imported aluminium plates (goods) used for embossing is independent of the quantity of the goods imported. The payment of royalty is defined under Article 8 of Schedule E, accordingly the royalty and license fees should be related to the goods being valued, and royalty and license fees should be a condition of sale of the goods being valued.

Is royalty related to the goods being valued? The Petitioners' contended that the goods imported are raw materials and consumables required for the manufacture and supply of number plates. The royalty paid under the said license agreement does not relate to the said imported goods as they are not imported pursuant to the license agreements (P5). The royalty that is paid is not in respect of imported goods but in relation to the necessary technology, expertise and training used in the process of manufacturing of number plates and the sale of number plate takes place in Sri Lanka to the Department of Motor Vehicle. The contention of the Respondents is that the technology cannot be used by the importer on any product except the product imported from the exporter. Thus the royalty is clearly related to the goods. A similar position was taken by the Revenue of India in *Commissioner of Customs (Port), vs. M/S Toyata Kirloskar Motor Pvt Appeal (Civil)*[3] "The payments of royalty, according to the Revenue, have a direct nexus to the imported goods

as the same go into the manufacture of the licensed vehicles and spare parts. The Court observed: "The basic principle of levy of customs duty, in view of the aforementioned provisions, is that the values of the imported goods has to be determined at the time and place of importation. The value to be determined for the imported goods would be the payment required to be made as a condition of sale. Assessment of customs duty must have a direct nexus with the value of goods which was payable at the time of importation. If any amount is to be paid after the importation of the goods is completed, inter alia by way of transfer of license or technical know how for the purpose of setting up of a plant from the machinery imported or running thereof, the same would not be computed for the said purpose. Any amount paid for post importation service or activity, would not, therefore, come within the purview of the determination of assessable value of the imported goods so as to enable the authorities to levy customs duty or otherwise."

The goods valued are the 'Rectangular Blank Aluminum Plates' (with rounded corners and raised edges, covered with a reflective foil with several lion water marks, pre-engraved secret numbers and the national emblem of Sri Lanka) and not the finished number plates. There is no royalty payment attached to the imported 'Rectangular Blank Aluminum Plates' at the time of valuation or at any later stage. But the royalty would accrue if and when the numbers are embossed on the plates and sold. The royalty have a direct nexus to the finished product but it does not have a direct nexus to the imported goods.

Is royalty payment a condition of sale? The Petitioner contended that under the license agreement P5 the royalty is paid on the total annual turnover as per the audited

accounts of the 1st Petitioner hence it cannot be said that the royalty is paid as a condition of sale of the goods being valued. The entire transaction between the parties establishes that the payment of royalty is not a pre condition for the sale of raw materials. The submission of the Respondents is that the agreement between the Petitioner and Erich Utsch AG is for the complete transaction as such the importation, embossing and sale are linked together and the failure on the part of the Petitioner to pay the royalty would amount to the refusal of future sale of the aluminum plates. The Respondent further contended that the 'condition of sale' should not be read as 'a condition of contract of sale' *Chief Executive Officer of the New Zealand Customs Service v. Nike New Zealand*(4). The Respondents submitted that in the given circumstances the royalty payment is a condition of sale. In *Commissioner for the South African Revenue Service v. Delta Motors Corporation (Property) Limited*(5) the Court considered the payment of royalty in relation to the customs duty. The Respondent Company was a motor vehicle manufacturer and distributor. It imported vehicle parts completely knocked down (CKD) from Opeal Germany. Four years it paid customs duty calculated on the invoice amount per kit which invoiced amount included not only the purchase price but also an unspecified charge by Opeal for engineering, styling and tooling (EST). The company requested refund of customs duty on the ground that the EST charge paid to Opal and included in the invoiced amount was not part of the price payable for CKD but instead a non-dutyable royalty. The court held "In the present matter the sale of kits to the respondent is regulated by the supply agreement. Nothing in that agreement makes the charges now in dispute payable as a condition of sale. The engineering and styling charges constitute the royalty

payable, not in terms of the supply agreement but the A and D agreement. As for the tooling charges (assuming they amount to royalty or license fees) they too are not payable pursuant to anything contained in the supply agreement. The ETS charges are consequently not payable 'as a condition of sale'. On the contrary, in so far as the supply agreement does apply to these charges it makes them payable even if no kits are sold (so long, of course, as assembled vehicles are sold). It follows further from what has been said already that the EST charges are paid in respect of "assembled vehicles sold and not" in respect of imported kits. The terms of Section 67(1) (c) are accordingly inapplicable and in consequence the EST "charges were not dutiable".

Article 8 (C) of Schedule E of the Customs (Amendment) Act No. 2 of 2003 contain similar provisions of that of Section 67(1) (c) of the Customs and Excise Act 91 of 1964 of the South African Act. In the instant case too, the royalty is paid on the finished product and not on the aluminum plate imported. Even though the finished products were made out of the aluminum plates sold it does not mean that the sale of the aluminum plates has a direct link to the manufacture of the finished product. As I have observed above the number of aluminum plates sold to the licensor need not be equal to the manufacture of the number plates, taking in to consideration the stock in trade, waste and damages etc. The sale of the aluminum plates with security features to the 1st Petitioner was under the terms and conditions of the principal Agreement dated 11th of October 1999 and by the assignment of the contractual obligation of Erich Utsch AG to Utsch Lanka (Pvt) Ltd the 1st Petitioner, by letter dated 13th January 2000. The payment of royalty is not included in any of these agreements. The royalty is paid in relation to an agreement

entered between Erich Utsch AG and the 1st Petitioner on 21st March 2000 (P5) and the royalty is paid not on a fixed rate or based on the purchase price but on the sale of the completed number plates. As such the royalty payment depends on the rate of manufacture of the vehicle number plate. There is nothing to prevent the 1st Petitioner to purchase large quantities of aluminum plates from Erich Utsch AG and after having a substantial stock with it, to start manufacture of the number plates. There is no merit in the submission of the Respondents that the sale of the aluminium plates depends on the payment of royalty.

When considering all the facts and circumstances of this case it is clear that the royalty payment is not related to the imported goods or it is a condition of sale of the imported goods (aluminium plates) therefore the royalty payment need not be added to the price actually paid. Hence the failure to enter the payment of royalty in the Custom Value Declaration Form will not amount to a false declaration to charge the Petitioners under Section 52 of the Customs Ordinance.

In the above circumstances this court issue a writ of certiorari to quash the order of the 1st Respondent dated 16.01.2007 marked P18 (f). Application for a writ of certiorari is allowed as prayed for in prayer (d) of the Petitioner without costs.

Application partly allowed.

ARIYAWATHIE MEEMADUMA V. JEEWANI BUDHIKA MEEMADUMA

SUPREME COURT
AMARATHNGA, J.,
RATNAYAKE, J. AND
EKANAYAKE, J.
S.C.APPEAL NO. 68/2010
W.P./HCCA/COL. 98/2006
D.C. COLOMBO 7402/SPL
OCTOBER 21ST, 2010

Donation of immovable property – Revocation of gifts – Donation given in contemplation of marriage – Impeaching the credit of a witness, not cross – examined by the adverse party – Evidence Ordinance – Section 164 – Using as evidence, of document, production of which was refused on notice – Section 165 – Judges' power to put questions or order production of any document or thing

The District Judge dismissed the Plaintiff Appellant's action on the basis that the Appellant has failed to establish any ground on which donor is entitled to in law to revoke a deed of gift. The appeal filed by the Appellant against the judgment of the District Court too was dismissed by the Civil Appellate High Court. The learned High Court Judge agreed with the view of the learned District Judge that the deed of gift sought to be revoked had been given in contemplation of the Defendant's Respondent's marriage, and had stated, that a donation given in contemplation of the marriage is not revocable, if the contemplated marriage had in fact taken place.

Held:

(1) A deed of gift is absolute and irrevocable. There are however certain exceptions to the rule of irrevocability.

Per Gamini Amaratunga, J., -

> ""A deed of gift is absolute and irrevocable". That is the rule. However, the law has recognized certain exceptions to the rule of

irrevocability. A party applying to Court to invoke the exceptions in his favour has to satisfy Court, by cogent evidence, that the Court would be justified in invoking the exception in favour of the party applying for the same."

"A mere *ipse dixit* like, 'he threatened to kill me' is not sufficient to discharge that burden."

(2) On the evidence available, no reasonable Judge, properly directed on the law relating to the burden of proof which rested on the Appellant, could have given a decision in favour of the Appellant. The conclusion of the trial Judge and the Civil Appellate Court that the Appellant has failed to establish her case is therefore correct in law.

(3) The Appellant's case had been dismissed not on the basis that the deed of gift is irrevocable but on the basis that the Appellant had failed to prove the grounds relied upon by her to revoke the deed of gift.

(4) Sections 164 and 165 of the Civil Procedure Code and Section 165 of the Evidence Ordinance do not require a Judge to step in to fill the gaps of a case presented by a party.

Cases referred to:

1. *Dona Podinona Ranaweera Menike V. Rohini Senanayake* – (1992) 2 Sri L.R. 180

APPEAL from the High Court of the Western Province exercising Civil Appellate Jurisdiction.

Nishantha Sirimanne for the Plaintiff-Appellant

Defendent-Respondent absent and unrepresented

Cur. adv. vult

July 26th 2011

GAMINI AMARATUNGA J.

This is an appeal, with leave granted by this Court, against the judgment of the High Court of the Western Province exercising civil appellate jurisdiction dismissing the plaintiff

appellant's appeal to the High Court against the judgment of the District Court dismissing the plaintiff appellant's action filed against the defendant respondent.

The defendant-respondent is the youngest daughter of the Plaintiff-appellant (hereinafter called the appellant). On 11.3.1999, by a Deed of Gift the appellant gifted premises No. 11A, Mahasen Mawatha, Thimbirigasyaya Road, Colombo 5 to the defendant. That is the house where the appellant lived with her husband and the defendant. This gift is subject to the life interest of the appellant and her husband to that property. On 12.3.1999, the day after the execution of the deed of gift, the defendant married one Sanjeewa Perera. Thereafter the appellant, her husband and the couple continued to live in that house.

On 28.09.2005, the appellant filed action bearing No. 7402/Spl in the District Court of Colombo to revoke the Deed of Gift execution in favour of the defendant on the basis of gross ingratitude on the part of the donee, the defendant.

According to the plaint filed in the District Court, some time after the marriage, the defendant's conduct gradually changed and she began to request the appellant to relinquish the appellant's and her husband's life interest in the property and demand that they should vacate the property giving possession thereof to the defendant, The appellant, among other reliefs, has prayed for judgment and decree revoking the said Deed of Gift No. 2603 dated 11.3.1999.

The defendant who appeared in the District Court on summons has obtained two dates to file answer. When an application was made for a further date to file answer, the learned District Judge has refused to grant further time for

the answer and fixed the case for ex parte trial, which took place later on 20.02.2006. The appellant testified at the trial and marked and produced, among other documents, the Deed of Gift P2, and certified copies of two complaints made by her husband to the Narahenpita Police, P4A and P4B. With her evidence the plaintiff has closed her case.

The learned District Judge, after considering the evidence given by the appellant and the documents produced by her has come to the conclusion that the appellant has failed to establish any ground on which a donor is entitled in law to revoke a Deed of Gift. Accordingly he has dismissed the appellant's action.

A perusal of the judgment of the learned District Judge indicates that he was aware of the grounds on which a deed of gift could be revoked and that he had taken into consideration the contents of the documents P4A and P4B (certified copies of complaints made to the Narahenpita police by the appellant's husband) in assessing the evidence of the appellant. The learned trial Judge has also expressed the view that the deed of gift had been given to the defendant in contemplation of her marriage, but this was not a ground upon which he has based his decision to dismiss the action of the appellant.

The appeal filed by the plaintiff appellant against the judgment of the District Court was dismissed by the Civil Appellate High Court. The judgment of the High Court indicates that it agreed with the view expressed by the trial judge that the appellant had failed to establish any ground on which it is permissible in law to revoke a deed of gift. The High Court referring to the view expressed by the trial Judge that the deed of gift sought to be revoked had been given in

contemplation of the defendant's marriage, has stated, that a donation given in contemplation of the marriage is not revocable if the contemplated marriage had in fact taken place.

After considering the application filed by the appellant seeking leave to appeal against the judgment of the High Court, this Court has granted leave to appeal to the appellant on the following questions of law except question No. (b).

(a) Did the High Court err by failing to consider/appreciate that the petitioner's oral testimony in the District Court of Colombo remained uncontroverted and undisputed?

(c) Did the High Court err by completely failing to consider/ appreciate that the reservation of the life interest of the petitioner and her husband in the said property was a condition attached to the gift and the breach or interference with the said condition was tantamount to gross ingratitude?

(d) Did the High Court err by failing to appreciate that there was sufficient documentary and oral evidence to substantiate the petitioner's claim of gross ingratitude on the part of the respondent?

(e) Did the High Court err by failing to appreciate/consider that when the life interest in a property is reserved, the donation of that property cannot be in consideration of marriage (donation propter nuptias)?

(f) Did the High Court err by misdirecting itself and/or misconstruing and/or completely failing to consider the judgment of Your Lordships' Court in *Dona Podi-*

nona Ranaweera Menike v. Rohini Senanayake [1] which judgment the appellant relied on in support of her case?

(g) Did the Court err by failing to properly construe the statements made by the petitioner's husband to the police and marked in evidence at the trial?

(h) Did the High Court err by failing to consider that the respondent and her husband attempted on several occasions to force the petitioner against her will to renounce her life interest in the said property?

(i) Did the High Court err by failing to appreciate that the conduct of the respondent (and her husband) towards the petitioner, as demonstrated by the petitioner's evidence, constituted gross ingratitude?

(j) Did the High Court err by failing to appreciate/consider that, if the learned trial Judge had any doubts with regard to the truth or veracity of the testimony of the petitioner, he could have clarified the same from the petitioner under and in terms of sections 164 and 165 of the Civil Procedure Code as well as under section 165 of the Evidence Ordinance, but chose not to do so and therefore, cannot subsequently find fault with her testimony?

(k) Did the High Court err by holding that the petitioner has not demonstrated even a single act of gross ingratitude on the part of the respondent?

The learned counsel for the appellant has submitted written submissions in support of the appeal with copies of several judgments dealing with the subject of revocation of deeds of gift.

The first question of law on which leave to appeal was granted is "Did the High Court err by failing to consider/ appreciate that the petitioner's oral testimony in the District Court of Colombo remained uncontroverted and undisputed?" At the ex parte trial, there was no cross-examination of the appellant. There was no other witness testifying at the trial on behalf of the appellant. However it has to be borne in mind that contradictions of the oral testimony of a single witness, not cross examined by the adverse party can emerge even from the contents of the documents produced by the sole witness himself at the trial. In this case this Court has to consider whether the appellant's oral evidence in the District Court remains uncontradicted when one considers the contents of documents 4A and 4B produced by the appellant herself when she gave evidence at the trial. In order to consider that question I shall briefly set out the oral evidence given by the appellant in the District Court.

In her oral testimony the appellant has stated that after marriage her daughter's (the defendant's) conduct gradually changed. The defendant very often troubled the appellant and her husband requesting them to relinquish their life interest in the property and vacate the house and hand over possession of the property to her. The defendant neglected to look after appellant and she (the appellant) sustained herself with her own pension.

Thereafter the appellant was threatened through the defendant's husband. Even death threats were made to the appellant by the defendant and her husband. The daughter and the son in law made such threats and asked them to relinquish their rights to the property and hand it over to the defendant. On 17.08.2005, the appellant's husband complained of this to the Narahenpita police. (A certified copy of that complaint was produced marked 4A)

The appellant has further stated that even thereafter there were death threats to her and to her husband from the defendant and her husband. Regarding those threats a complaint had been made to the Narahenpita police on 28.08.2005. (a copy of the complaint was produced marked 4B) The appellant has concluded her evidence by saying that her daughter did not look after them and had brought pressure on them to relinquish their life interest and that accordingly the defendant was guilty of gross ingratitude.

What is stated above was the evidence on which the appellant claimed a decree revoking the deed of gift. In the back ground of the evidence given by the appellant it is now opportune to examine the contents of P4A and P4B, the police complaints made by her husband.

In that statement, the husband of the appellant has stated that in order to admit a son of their son to a school they inquired from their daughter (the defendant) whether she could re-convey the property (donated to her by the deed of gift) and the daughter agreed to re-convey the property to the appellant. However the daughter's husband objected to this and attempted to assault them. They said that the house belonged to them and that they would not give it back. The son in law threatened that he would kill the son of the appellant and serve six years in jail and come out. They demanded Rs. Five million to re-convey the property. After this incident the daughter and the son in law left the house on the following day. (i.e. 17.08.2005)

According to this statement of the appellant's husband the trouble commenced when they requested the daughter to re-convey the property to them to enable them to facilitate their son to admit his child to a school. In document 4A there

is no allegation whatsoever that the defendant on her own initiative asked the parents to relinquish their life interest in the property. Their alleged demand for Rs. five million to re-convey the property had been made only when the appellant and her husband requested the daughter to re-convey the property to the appellant. In the whole of the statement P4A there is no allegation that the defendant daughter ever threatened to kill her parents if the life interest was not relinquished.

The contents of P4A completely cuts across the evidence of the appellant who, in her evidence had tried to make out that the troubles between her and her daughter arose as a result of the daughter's persistent requests that the parents should relinquish their life interest in the property gifted to her.

According to the police complaint marked P4B, on the night of 25.8.2005 the appellant and her husband had received three anonymous telephone calls threatening that their son would be killed. The caller was not identified. In any event the death threat made by the phone was that the appellant's son would be killed. No threat was made regarding the lives of the appellant and her husband.

The contents of document P4A completely cuts across the appellant's evidence given in the District Court and it contradicts her evidence to the fullest possible extent. I do not know why the appellant has produced document P4A in evidence, but by producing it, the appellant has, perhaps unconsciously, let the cat out of the bag!

In the light of the contents of P4A, no one can say that the appellant's evidence in the District Court stands uncontradicted and uncontroverted. The learned District

Judge in his judgment has specifically referred to the different version given in document P4A with regard to the manner in which the dispute between the parties arose. The learned Judges of the Civil Appellate High Court have quoted with approval the learned District Judge's observations with regard to the different version given in document P4A.

A deed of gift is absolute and irrevocable. That is the rule. However the law has recognized certain exceptions to the rule of irrevocability. A party applying to Court to invoke the exceptions in his favour has to satisfy court, by cogent evidence, that the court would be justified in invoking the exception in favour of the party applying for the same. In this case even if the appellant's evidence in the District Court is considered alone (without any reference to the contents of documents P4A and P4B) her evidence falls short of the standard of proof required to invoke any recognized exception to defeat the rule of irrevocability. A mere ipse dixit like "he threatened to kill me" is not sufficient to discharge that burden.

When the appellant's evidence given in the District Court is viewed in the light of the contents of P4A, the position is worse. The contents of P4A casts serious doubts on the truthfulness of the evidence given by the appellant. On the evidence available in this case, no reasonable judge, properly directed on the law relating to the burden of proof which rested on the appellant, could have given a decision in favour of the appellant. The conclusion of the learned trial Judge and the Civil Appellate High Court that the appellant has failed to establish her case is therefore correct in law.

It appears to me that questions of law (a),(c),(d),(g),(h) and (k) on which leave to appeal has been granted have

been framed on a misapprehension of the strength of the appellant's case presented to the District Court. I answer all those questions in the negative.

With regard to questions No. (e) and (f) it is sufficient to state that the appellant's case had been dismissed not on the basis that the deed of gift is irrevocable but on the basis that the appellant has failed to prove the ground relied upon by her to revoke the deed of gift.

With regard to question No(j), it is sufficient to state that sections 164 and 165 of the Civil Procedure Code and section 165 of the Evidence Ordinance do not require a judge to step in to fill the gaps of a case presented by a party. I accordingly answer that question in the negative. In the result I dismiss the appeal.

RATNAYAKE J. - I agree.

EKANAYAKE J. - I agree.

Appeal dismissed.

MULTI PURPOSE CO-OPERATIVE SOCIETY, MADAWACHCHIYA VS. KIRIMUDIYANSE AND OTHERS

COURT OF APPEAL
RANJIT SILVA.J
LECAMWASAM.J
CA (PHC) 189/04
H.C. ANURADHAPURA 55/2002
NOVEMBER 4, 2010
DECEMBER 10, 2010

Writ of Certiorari - Constitution Article 140 - Court of Appeal (Appellate Procedure) Rules of 1990-91- Affidavit mandatory - Defective affidavit - Is there a valid application for writ?- Buddhist not affirming - Oaths and Affirmation Ordinance No. 9 of 1985 Civil Procedure Code - Section 438 - Judicial review available - Fair hearing

The Respondent-Petitioner filed a writ application in the High Court seeking mandates in the nature of Certiorari/Mandamus to quash the disciplinary findings of the Co-operative Employees Commission and the Society. The High Court granted the reliefs prayed for. The respondents appealed to the Court of Appeal.

The appellant contended that there was no valid writ application before the High Court as the deponent had not 'affirmed'- (this was not raised before the High Court). The appellant further contended that there was undue delay in presenting the writ application to the High Court. It was also contended that in any event no writ lies as it is a simple master and servant contract.

Held:

Per Ranjith Silva.J

"On a consideration of the impugned affidavit I find that the provisions of Section 438 of the Civil Procedure Code have been complied with. The jurat expressly sets out the place and the date on which the affidavit was signed. The affidavit has been signed before a Justice of the Peace. There is specific reference in the jurat that the affidavit

was duly signed by the deponent after having read and understood the contents."

(1) There is no magic in the word "affirm". A particular word should not be allowed to vitiate or invalidate an affidavit which is otherwise regular on the face of it. The words solemnly sincerely and truly connote that the deponent is publicly admitting the truth of the contents in the most responsible manner. The absence of a particular word "affirm" referred to in the statute cannot and should not be allowed to stand in the way of justice. The words must be given a purposive and meaningful construction instead of trying to split hairs on technicalities.

Per Ranjith Silva. J:

"The rationale is that the fundamental obligation of a deponent is to tell the truth and the purpose of an oath or affirmation is to enforce that obligation".

(2) Delay/laches of a party does not bestow a right or privilege on the other to indulge in delay/laches but it is not ethical, proper, just or fair to allow the appellant to rely on the delay on the part of the petitioner in filing the writ application, when they themselves delayed for more that 21 years in framing charges and proceeding against the respondent.

(3) Remedy of judicial review is available where an issue of public law is involved. It is not correct to assume that there is no public law element in an ordinary relationship of master and servant and that accordingly in such a case judicial review would not be available.

(4) Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee public law rights at least making him a potential candidate for administrative law remedies.

(5) The investigation team determined that it was not necessary for the respondent to lead evidence and thereafter had prevented him from leading any evidence - this is a blatant violation of the Petitioner's right to a fair hearing.

APPEAL from the judgment of the High Court of Anuradhapura.

Case referred to:-

1. *Chandrawathie vs. Dharmaratne and others* 2001 BLR
2. *Ratwatte vs. Thilanga Sumathipala and others* 2001 1 Sri LR 55
3. *Imaya vs. Orix Leasing Co. Ltd* 1999 3 Sri LR 197
4. *Gamage Palitha Wickramasiri vs. Pathirannahalage Nandawathie and another* CA 312/91 (F)
5. *De Silva vs. L.B. Finance Ltd* 1993 1 Sri LR 371 (distinguished)
6. *Rustomjee vs. Khan* - (1914) 18 NLR 120 at 123
7. *Mohamed vs. Jayaratne and others* 2002 3 Sri LR 181
8. *Kaluthanthrige Don John Patric vs. Kaluthanthrige Dona Mercy* CALA 290/2002
9. *Issadeen vs. Commissioner of National Housing and others* 2003 2 Sri LR 10
10. *Lanka Diamond (Pvt.) Ltd vs.Wilfred Vanell and two others* 1997 1 Sri LR 360
11. *Malloch vs. Aberdeen Corporation* 1971 1 WLR 1578
12. *Koralagamage vs. Commander of the Army* 2003 3 Sri LR 169
13. *Ratnayake vs. Ekanayake, Commissioner General of Excise and others* 2002 2 Sri LR 299
14. *Lanka Loha Holdings (Pvt.) Ltd vs. Attorney General* 2002 3 Sri LR 29

Pubudu Alwis for 2nd respondent-appellant

P.K. Prince Perera for Petitioner-respondent

January 27th 2011

RANJITH SILVA, J.

The Petitioner Respondent hereinafter referred to as the Petitioner filed a writ application in the Provincial High Court of Anuradhapura seeking mandates in the nature of a Writ of Certiorari and a Writ of Mandamus to quash the disci-

plinary findings of the 1st Respondent and 2nd Respondent Appellant, who shall hereinafter be referred to as the Appellant and to compel the Appellant to pay his entitlements including arrears of salary.

After arguments the Learned High Court Judge by his Judgment dated 24th of March 2004 granted relief to the Petitioner as prayed for in the petition. Being aggrieved by the said judgment the Appellant has preferred this appeal to this Court.

At the stage of arguments and in their written submissions as well, the Appellant relied on several grounds of appeal. Some of them are;

(1) that there was no valid writ application before the Provincial High Court of Anuradhapura,

(2) that there was undue delay in filing the writ application in the High Court,

(3) that there was suppression of facts,

(4) that the Petitioner had not acted with uberima fides,

(5) that the Petitioner had no capacity to invoke writ jurisdiction.

No valid writ application before the Provincial High Court

This objection was not urged in the High Court when the matter was argued in that court. For the first time the Appellant has put forward this argument in this court. In their written submissions as well as oral submission the Appellant contended that the Petitioner Respondent did not comply with rule 3 (1) of the Court of Appeal (Appellate

Procedure) Rules of 1990 made by the Supreme Court and published in the government gazette number 645/4 dated 15th January 1991 wherein it is laid down that in order to invoke the writ jurisdiction of the Court of Appeal granted to it under article 140 and 141 of the Constitution the application shall be by way of petition supported by an affidavit.

Respondent contended that filing of an affidavit was mandatory but the affidavit filed by the Respondent is defective and therefore there was no valid affidavit in the eye of the law and thus there was no valid application for writ in the High Court. The contention of the Appellant is that the Respondent being a Buddhist has not affirmed to, either in the head/ recital of the affidavit or in the jurat, in other words the affidavit filed of record has not been properly affirmed to by the deponent (Petitioner) as required in terms of section 5 of the Oaths and Affirmations Ordinance No. 09 of 1895 according to which a Buddhist has to affirm to the contents of an affidavit. In support of his contention the Appellant has cited the following authorities.

In *Chandrawathie Vs Dharmaratne and Others*(1) the Supreme Court held that if the affirmation is not in the head of the affidavit or the jurat clause it is defective and is fatal.

In Clifford *Ratwatte Vs Thilanga Sumathipala and Others*(2) it was held that if the deponent states that he is a Christian and affirms the affidavit instead of swearing, the affidavit is defective.

In *Inaya Vs Orix Leasing Co. Ltd*(3) in the affidavit before court the defendant being a Muslim had failed to solemnly and sincerely and truly declare and affirm the specific averments set out in the affidavit. The recital merely states

that they make a declaration and in the jurat there is no reference as to whether the purported affidavit was sworn to or affirmed. It was held that although technicalities should not be allowed to stand in the way of justice the basic requirements of the law must be fulfilled.

It appears that the Counsel for the petitioner has either been oblivious to this argument of the Appellant or had conveniently avoided responding to the same. Of all the grounds of appeal taken by the Appellant I am of the view that this is the only substantial argument that has been taken by the Appellant which deserves the attention of this court. The rest of the grounds of appeal urged by the Appellant pose no problem as they could be disposed of comfortably as I find no merit in any of them. Yet I would be dealing with every one of them succinctly in chapters to follow.

In *Gamage Palitha Wickramasiri Vs Pathirannahelage Nandawathie and another*[4] Weerasuriya, J. having referred to and discussed fully the relevant sections of the Civil Procedure Code namely SS 168, 181, 182, 437 and 438 with regard to the reception of evidence of witnesses professing different religions held that the same shall apply to evidence on affidavits as well. Further having referred to several authorities including *De Silva vs L.B.Finance Ltd*[5] held that there was a failure on the part of the deponent to comply with the requirement in terms of section 168 of the Civil Procedure Code as the deponent, being a Christian, had affirmed to the matters in the affidavit. It is to be observed that, in *De Silva vs L.B.Finance Ltd (supra)*, referred to above, the affidavit was somewhat in line with the impugned affidavit in the instant matter before us. With great respect to those eminent judges I'm reluctantly compelled to disagree with them for the following reasons.