ACTALINA FONSEKA AND OTHERS
v.
DHARSHANI FONSEKA AND OTHERS

SUPREME COURT
H. A. G. DE SILVA, J.
G. P. S. DE SILVA, J. AND KULATUNGA, J.
S.C. APPEAL NO. 23/87
S.C. SPECIAL L.A. NO. 147/86
C.A./L.A. NO. 62/84
D.C. GAMPAHA NO. 24975/M
APRIL 27, 1989.

Last Will – Probate – Separate suit to recall probate on ground of fraud, alleged forgery of last will – Non-disclosure of heirs – Sufficiency of cause of action to maintain suit – Civil Procedure Code, section 46.

The plaintiffs – respondents filed an action against the defendants – appellants to have the probate issued in another case No. 1322/T recalled on the ground that it had been obtained by fraud – the Last Will propounded in that case being a forgery and all the heirs of the testator not having been made parties.

Held –

The plaint discloses a cause of action founded on fraud by forging a will and non – disclosure of heirs. The law does not require that the plaint should make out a prima facie case nor carry the evidence by which the claim would be proved. Hence the case must be heard.

Per Kulatunge J.,

"I am of the view that categories of fraud are not closed and that it should be left to the Court to decide whether any particular contrivance constitutes a fraud on the Court having regard to the facts and circumstances of such case".

If the real grievance of the defendant – appellant is that the plaint does not contain sufficient particulars or even in a case where it is alleged that the plaint does not disclose a cause of action the correct procedure under s.46(2) of the Civil Procedure Code is to move, before pleading to the merits, to have the plaint taken off the file.

Cases referred to:

1. *Adoris* v. *Perera* 17 NLR 212
2. *Reid* v. *Samsudin* 1 NLR 292
3. *Biyanwila* v. *Amarasekera* 67 NLR 488
4. *Mudali Appuhamy* v. *Tikarala* 2 CLR 35

5. *Tissera* v. *Gunatilleke Hamine* 13 NLR 261
6. Tissera v. *Gunatillake* 15 NLR 379
7. *Priestman* v. *Thomas* (1884) 9 P.D. 210
8. *Srirangammal* v. *Sandammal* 23 M 216, 219
9. *Jonesco* v. *Beard* [1930] AC 298
10. *Flower* v. *Lloyd* 10 Ch. D 327
11. *Laxmi Narain* v. *Mohd. Shafi* 1949 EP 141

APPEAL against the judgment of the Court of Appeal.

H. L. de Silva, P.C. with *Geethananda de Silva* and *Miss. L. N. A. de Silva* for appellants.

S. Gunasekera for respondents.

Cur. adv. cult.

June 6, 1989.

KULATUNGA, J.

The Defendants-Appellants appealed to the Court of Appeal against the order of the learned District Judge made on 30th April, 1984, in which he answered the preliminary issue No. 5 in favour of the Plaintiffs-Respondents and directed that the trial should proceed on the remaining issues. The Court of Appeal by its judgment dated 2nd September, 1986 dismissed the appeal and directed the return of the record to the District Court to proceed with the trial. The Defendants-Appellants have appealed to this Court against the judgment of the Court of Appeal.

The Defendants-Appellants contend that the above action in which the Plaintiffs-Respondents have sought to obtain a declaration that the probate issued in DC Gampaha case No. 1322/T is void on the ground of fraud is not maintainable on the facts pleaded in the plaint. I am of the opinion that the instant case is not one that may be disposed of on the issue of law only and that the appropriate course would be to allow the case to proceed to trial. The question which was argued at length before us really arises under issues Nos. 2 and 3 which are issues of both law and fact and can only be decided after hearing the evidence in the case. I now proceed to set out the matters relevant to this appeal.

According to the averments contained in the plaint in the action which is the subject matter of this appeal instituted on 22nd September, 1982, the 1st Plaintiff-Respondent is the only daughter of the deceased Merennege Kithsiri Wijesoma Fonseka who was a divorcee and the 2nd Plaintiff-Respondent was his wife by habit and repute. The plaint alleges that the deceased died of a sudden heart attack on 3rd November, 1977, and had no opportunity of making a last will.

It is alleged that on 28th September, 1977, the 1st, 2nd and the 3rd Defendants-Appellants forged a will purporting to be by the deceased devising his entire estate to the 4th, 5th and 6th Defendants-Appellants who are the children of the deceased's sister, the 3rd Defendant-Appellant.

It is also alleged that the 1st and the 2nd Defendants-Appellants instituted DC Gampaha case No. 1322/T joining only the 3rd, 4th, 5th and 6th Defendants-Appellants when they knew that the 1st Plaintiff-Respondent is the only daughter and the 2nd Plaintiff-Respondent is his wife by habit and repute and fraudulently obtained an Order Nisi on 12th May, 1978 and probate on 17th March, 1981 in their favour.

The plaint further alleges that the 1st, 2nd and 3rd Defendants-Appellants fraudulently propounded the said forged will and obtained probate in DC Gampaha case No. 1322/T by misleading the Court and seeks a declaration accordingly and for a decree declaring the probate void.

The Defendants-Appellants in their answer only admit that the 1st Plaintiff-Respondent is the daughter of the deceased and deny the other averments. The answer proceeds to state that even assuming the truth of all the facts averred therein the plaint does not disclose a cause of action.

The following issues were adopted when the action came up for trial:

(1) Was the 2nd Plaintiff the wife of Merennege Kithsiri Wijesena Fonseka by habit and repute from 1965 until his death?

(2) Did the 1st, 2nd and 3rd Defendants forge the signature of

Merennege Kithsiri Wijesena Fonseka and execute a will on 28th September, 1977?

(3) Did the 1st, 2nd and 3rd Defendants propound the said will in DC Gampaha case No. 1322/T and fraudulently obtain an Order Nisi dated 12th May, 1978 and probate dated 17th March, 1981 having misled the Court?

(4) If the above issues are answered in the affirmative, is the Plaintiff entitled to the reliefs prayed for?

(5) In any event as the Order Nisi has been issued and it has been made absolute can the Plaintiffs maintain this action on the facts pleaded in the Plaint?

By consent of parties, issue No. 5 was heard as a preliminary issue and the learned District Judge answered it in favour of the Plaintiff-Respondents and ordered the action to proceed on the remaining issues. This order was affirmed by the Court of Appeal.

Mr. H. L. de Silva, PC learned Counsel for the Defendants-Appellants submitted that the Full Bench decision in *Adoris v. Perera* (1) is exactly in point. I am unable to agree. In that case the Plaintiffs who were not parties to the testamentary action, sued for the recall of the probate of the will of Ran Etana granted to her husband, the defendant. The ground of action assigned in the plaint was that the will produced in Court "was not the act and deed of Vithanage Ran Etana, and probate should not have been granted in respect thereof".

It was held that the plaintiffs could not maintain the action, because, if the circumstances were such that probate could be recalled under Section 536 of the Civil Procedure Code (which was not the case), application should have been made for the purpose by way of summary procedure in the testamentary action, and apart from Section 536 and 537, because the plaint does not aver such fraud as is necessary to impeach a judgment.

De Sampayo A.J. agreed that when the issue of probate has followed upon an Order Nisi the provisions of Section 537 do not apply, and all parties are concluded by the issue of probate and added:-

"There might, of course, be fraud in connection with the

obtaining of probate even upon an Order Nisi, in which case an independent action might in analogy to the English practice be brought to set aside the probate. There is, however, no fraud alleged in this case".

I think that the dismissal of the action in *Adoris v. Perera* (1) in limine was warranted by the provisions of Section 46(2)(i) of the Civil Procedure Code on the ground that it was a suit for the recall of the probate which was barred by the provisions of Sections 536 and 537 of the Code. The power under Section 46(2)(i) can be exercised at any stage, whether before or after the commencement of the trial - *Reid v. Samsudin* (2). No fraud was alleged in the plaint and as such it could only have been entertained after an amendment consequent upon an order under Section 46(2). During the argument of the appeal Counsel for the Plaintiffs-Respondents applied to be allowed to rectify the plaint but this was not entertained by the Full Court.

In the instant case, the pleadings are entirely different and in my view complies with Section 40 of the Civil Procedure Code. As required by Section 40(d) it contains a plain and concise statement of the circumstances constituting the cause of action. It alleges the forgery of a will and its use in the testamentary case without disclosing the 1st Plaintiff-Respondent who is the only daughter of the deceased and who along with the 2nd Plaintiff-Respondent appears to have been residing with the deceased at the time of his death. It alleges that the Defendants misled the Court to granting probate.

Mr. H. L. de Silva, PC cited the decision in *Biyanwila v. Amarasekera* (3) which held that the requirements of Section 524 of the Civil Procedure Code to mention the names of the heirs of the deceased are only directory which only means that the failure to disclose an heir would not make the probate void on account of such non-compliance. However, such failure is a relevant fact in determining whether probate had been obtained by fraud.

Learned Counsel also submitted that notice of Order Nisi was advertised in the Newspaper as required by Section 532. That may be adequate in law. However, for determining whether probate was obtained by fraud it would be relevant to know whether having regard to the circumstances of the plaintiffs, such notice afforded to them an adequate opportunity of being aware of the case and whether the

Defendants-Appellants kept the Plaintiff-Respondents out of the case being aware of the fact that the Plaintiff-Respondents were not likely to have read the Newspaper and become aware of the testamentary case.

On the allegations contained in the plaint the Court has to determine upon evidence whether the Plaintiff-Respondents were deliberately kept in the dark about the existence of the testamentary action to make it appear to the Court that there was no opposition to the grant of probate, whether the will is a forgery and whether probate had been obtained by fraud.

The law does not require that the plaint should make out a prima facie case which is what the Defendants-Appellants appear to insist on, nor are the Plaintiffs required to state their evidence by which the claim would be proved. The plaint in the action discloses a cause of action and if as it appears to me, the real grievance is that it does not contain sufficient particulars, the defendants should, before pleading to the merits, move to have the plaint taken off the file for want of particulars – *Mudali Appuhamy v. Tikarala* (4). Under Section 46(2) of the Civil Procedure Code this is the correct procedure even in a case where it is alleged that the plaint does not disclose a cause of action.

Although the above findings are sufficient to dispose of this appeal, in deference to the submission of the learned Counsel for the Defendants-Appellants, I wish to deal with some of the points taken by him.

Learned Counsel submitted that the Court of Appeal placing reliance on a statement of Monir "The Principles and Digest of the Law of Evidence" (4th Edition - Volume I), has misconceived the law as to the kind of fraud which may vitiate a decree. This statement which also appears in the 14th Edition of that work at page 639 is "If the claim in the previous suit was false and the falsity of the claim was necessarily known to the party putting forward the claim, the decree in that suit is liable to be set aside". Counsel argued that Monir made an incorrect statement of the law with reference to cases cited as authority for that statement.

I do not think that Monir has mis-stated the law. The author does not say that a false claim knowingly made would necessarily vitiate a

decree. All that he has stated is that the decree in such a case is 'liable' to be set aside. Whether the decree is void and may be set aside would depend on the totality of the evidence in the case, and any such decision would have to take into account the entirety of the rules applicable in this sphere. The relevant principles have been fully stated in Monir (14th Edition) pages 634 - 641.

The most salient principles are as follows:-

(a) In order to get rid of a former judgment it is not sufficient for a person to prove constructive fraud, he must prove actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and the obtaining of that judgment by that contrivance.

(b) Fraud must be extraneous to the decree, it must be fraud vitiating the proceedings in which the decree was passed. The decree should have been obtained by fraud practised upon the Court.

(c) It must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon and not such as has been or must be deemed to have been dealt with by the Court.

(d) It is not possible to show that the Court in the former suit was mistaken, it may be shown that it was misled. In other words where the Court has been intentionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment.

(e) The decree cannot be set aside merely on the ground that it has been procured by perjured evidence. It is not sufficient to allege that the judgment was obtained by false evidence as the judgment sought to be vacated must be taken to have decided the question whether the testimony of any witness was true or false and whether the document produced in evidence was genuine or not.

The Court of Appeal in its judgment refers to the rules (b), (c) and (d) above and was fully seized of the applicable principles and as such has not misconceived the law.

Learned Counsel for the Defendants-Appellants submitted that in substance the allegation in this case is that probate had been obtained on perjured evidence. I cannot agree. An allegation that a will was forged intentionally to mislead the Court to granting probate for the administration of an estate which has in fact devolved on intestate heirs and that probate has been obtained by persons who forged such will without disclosing the heirs has to be viewed differently from an allegation that probate has been obtained by mere perjury. If it were otherwise it is not clear why our Courts have held that the proper procedure to impeach probate obtained on a forged will is by separate action - *Tissera v. Gunatilleke Hamine* (5); *Adoris v. Perera* (1); *Biyanwila v. Amarasekera* (3). If the Plaintiff succeeds in such action he cannot apply for letters of administration but would be entitled to sue for his share of the estate without obtaining letters - *Tissera v. Gunatilleke* (6).

Woodroffe and Amir Ali's Law of Evidence 14th Edition at page 1264 cites the following case. 'B' in an action brought in the Probate Division had propounded a will and 'A' had propounded the substance of a later will alleging that the earlier will had been obtained by undue influence. A compromise was effected under which the alleged earlier will was admitted to probate. Afterwards 'A' discovered that the last mentioned alleged will was a forgery and that 'B' was a party or privy to the forgery and brought an action to get the compromise declared as having been procured by fraud and obtained judgment in that action - *Priestman v. Thomas* (7).

In *Srirangammal v. Sandammal* (8) the plaintiff sued for the partition of the property comprised in the estate of the deceased. The Plaintiff derived title to the property upon a sale of the property to him in execution of a decree obtained by him against the deceased on a promissary note allegedly executed by her. The Defendants successfully resisted the action on the ground that the former decree was obtained by fraud and was null and void in that the promissary note upon which it was obtained was a forgery and the Plaintiff had no rights as purchaser under it. The Court held that the defendants were entitled to set up this defence under Section 44 of the Evidence Act.

Mr. H. L. de Silva PC, submitted that the fraud should relate to the actual business of the Court and the ground of setting aside a decree should be strictly limited to frauds such as the suppression of

process, concealment of the knowledge of the suit or disabling a party from defending it. I am of the view that categories of fraud are not closed and that it should be left to the Court to decide whether any particular contrivance constitutes a fraud on the Court having regard to the facts and circumstances of each case.

In *Jonesco v. Beard* (9) cited by the learned Counsel for the Defendants-Appellants, the House of Lords held that the proper method of impeaching a completed judgment on the ground of fraud was by action in which the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires. If, however, for any special reason departure from the establishment practice is permitted, the necessity for stating the particulars of the fraud and the burden of proof are in no way abated and all the strict rules of evidence apply.

This was a decision in appeal from an order of the Court of Appeal setting aside a judgment and ordering a new trial on the ground that the judgment had been obtained by fraud. At the hearing before the Court of Appeal affidavit evidence was filed in support of the appeal. It was on these affidavits that the new trial was ordered. Having examined the available evidence the House of Lords reversed the order of the Court of Appeal.

In *Flower v. Lloyd* (10) the fraud alleged in the action was that the Defendants had wilfully and with corrupt intention deceived and misled an inspector who had conducted an inspection of the defendants process on an order of Court. The Vice-Chancellor considered the fraud to be established and gave judgment for the Plaintiff. The Court of Appeal having examined the evidence reversed the judgment of the Vice-Chancellor on the ground that the charge of fraud had not been substantiated.

James L.J. (Obiter) dwelt at length on the dangers of setting aside a final judgment by a fresh action on the ground that perjury had been committed in the first action - in particular the danger of prolification of litigation which might go on ad infinitum. However, Bagallay L.J. observed -

"Whilst I am fully sensible of the evils and inconveniences which must arise from reopening what are apparently final judgment between litigant parties, I desire to reserve myself an opportunity of fully considering the question how, having regard to the general

principles and authority, it will be proper to deal with cases, if and when any such will arise, in which it shall be clearly proved that a judgment had been obtained by the fraud of one of the parties which judgment, but for such fraud, would have been in favour of the other party. I should much regret to feel myself compelled to hold that the Court has no power to deprive the successful but fraudulent party of the advantages to be derived from what he has so obtained by fraud".

I think that the observations of Bagallay L.J. are appropriate to the case before us. The decisions cited are generally those in which the allegations of the parties have been tried. It is very rarely that a suit is rejected in limine and on this basis too I take the view that the case before us is one which should be heard lest the Plaintiffs would be left with a grievance that they have been deprived of the opportunity of a trial.

In the circumstances of this case there is no warrant for the apprehension as expressed by James L.J. in *Flower v. Lloyd* (10) that our decision would encourage frivolous litigation. Having regard to the hazards and expenses of litigation in our time it may be assumed that ordinarily no person would embark on litigation unless he has a serious grievance. We should be slow to demise such a grievance in limine.

It is also relevant to note that fraud like any other fact, can be proved by circumstantial evidence and if the circumstances are such as from which no other inference except that of fraud can be deduced, it would not be right to throw out the plea merely because no direct proof of it was furnished. *Laxmi Narain* v. *Mohd Shafi* (11). I would therefore leave it to the District Court to hear the evidence and reach a decision having regard to all the circumstances.

For the above reasons, I affirm the judgment of the Court of Appeal and dismiss the appeal with costs.

H. A. G. DE SILVA, J. – I agree.
G. P. S. DE SILVA, J. – I agree.

Appeal dismissed