COURT OF APPEAL

Hilda Jayasinghe
V.
Francis Samarawickrema

CA 469/78 (F) — DC Kalutara 2443/L

Deed fraudulently executed – Necessary witnesses to prove execution – section 68 and 69 of Evidence Ordinance

The Defendant-Appellants were Mother, Son and Daughter.

By Deed No. 4753 dated 12.8.75 the Defendant-Appellants transferred their ancestral home to Ajith minor son of Mr. Kahatapitige Attorney at Law and Notary Public for a sum of Rs. 3,500/- on condition that the property be transferred back to Defendant-Appellants on the expiry of three years on payment of Rs. 3,500/- with 8% interest. By Deed No. 4879 of 24.3.76 Ajith the minor son of the Notary Public re-transferred the property to defendant-appellants on payment of Rs. 3,500/-. By Deed 4880 of 24.3.76 the Defendant-Appellants sold the same land to Plaintiff Respondent for Rs. 8,000/-. These two deeds too were attested by Mr. Kahatapitige Attorney at Law and Notary Public.

Defendant Appellants alleged that through the machinations of the Attorney at Law and Notary Public both Deeds Nos. 4879 and 4880 of 24.3.76 were fraudulently executed by obtaining the signatures of the Defendant Appellants by misrepresentation of facts and by obtaining their signatures and thumb impression on blank sheets of paper. They also alleged that no consideration passed and that the two attesting witnesses were not present at the time they placed their signature and thumb impression.

Mr. Kahatapitige the Notary gave evidence but no attesting witness was called.

Held that the circumstances of this case required that one of the two attesting witnesses be called to prove execution of the deed

APPEAL from Judgment of the District Court of Kalutara.

Before:	Ranasinghe, J. (President, Court of Appeal), & Tambiah, J.
Counsel:	Miss Maureen Seneviratne with K.V.P. Jayatilleke, Hilton Seneviratne and Miss W.D.U. Weerasinghe for the Defendant-Appellants J.W. Subasinghe, Senior Attorney, with D.J.C. Nilanduwa for the Plaintiff-Respondent
Argued on:	17th 19th, 20th and 1st 30th November, and 1st December, 1981, and 1st March, 1982. *Cur. adv. vult.*
Decided on:	3rd May, 1982.

TAMBIAH. J.

The 3 defendants-appellants are mother (3rd defendant) son (2nd defendant) and daughter (1st defendant). The subject matter of this action is their ancestral and residential property called "Pokunuwattekattiya", situated in the Kalutara District, in extent 11.94 perches and containing plantations, fruit trees and tiled house.

Mr L.G. Kahatapitiya, Attorney-at-Law and Notary, lives in the premises adjoining the defendants-appellants' land. Mr Kahatapitiya himself says in evidence that he had known the defendants-appellants from their birth; that he had in the past attested 2 deeds for them and they have trust in him.

Deed No. 4753 of 12.8.75 (P2) is a conditional transfer by the defendants-appellants of their property in favour of Yasantha Ajith Kahatapitiya, a son of Mr Kahatapitiya, who was then a minor of about 11 years and 4 months old. The consideration was Rs. 3,500/- and the property was to be re-transferred on payment of the principal sum of Rs. 3,500/-, with 8% interest, before the lapse of 3 years. The deed was attested by Mr Kahatapitiya.

According to Deed 4879 dated 24.3.76 (P3), long before the expiry of the said 3 years, the son Ajith re-transferred the property to the defendants-appellants on payment to him of Rs. 3,500/-. He has signed this deed. It was attested by Mr Kahatapitiya and in his attestation he says the consideration was paid before him. The two attesting witnesses are Mr Kahatapitiya's clerks, I.A. Dharmasena and D.A.S. de Silva.

By Deed 4880 of 24.4.76 (P4) the defendants-appellants sold their property to the plaintiff-respondent for Rs. 8,000/-. This deed too was attested by Mr Kahatapitiya and he says in his attestation that the consideration has been paid in full in his presence. The two attesting witnesses are the same two clerks. This deed contains the signatures of the 1st two defendants-appellants, and the 3rd defendant-appellant has placed her thumb impression on the deed. Deed (P4) was registered on 30.6.76 and deed (P3) was registered on 8.7.76.

The document (P6) is a protocol of deed (P4) and bears an endorsement - "Acknowledge full consideration. Complete possession would be handed over before the lapse of 2 months from date hereof." Below the endorsement is the signature of the 2nd defendant-appellant.

The plaintiff-respondent filed this action under the Administration of Justice (Amendment) Law No. 25 of 1975 for a declaration of title, ejectment, possession and damages. He claimed title to the land on Deed (P4). In the summary of facts relied upon by him, he stated that on the day deed P4 was executed, the defendants-appellants promised to hand over possession in 2 months; they have not done so and they are in unlawful possession. In his list of witnesses, he listed himself, Mr Kahatapitiya and the two attesting witnesses.

In their answer, the defendants-appellants stated that they obtained a loan of Rs. 3,500/- from Mr Kahatapitiya by transferring their property on a deed of conditional transfer (P2) and that Mr Kahatapitiya had entered his son's name on the deed without their knowledge; that they signed blank sheets of paper intending to assign the conditional transfer to the plaintiff, and they did so because of the implicit trust they had in Mr Kahatapitiya; that they did not give instructions to Mr Kahatapitiya to prepare a deed of sale in favour

of the plaintiff-respondent. They accused Mr Kahatapitiya and the plaintiff-respondent of acting in collusion and effecting a fraud. They sought to add Mr Kahatapitiya as a defendant. They prayed for a dismissal of the action and invalidation of the deed (P4). They too listed the plaintiff-respondent and Mr Kahatapitiya as their own witnesses.

Before the trial commenced, on an application on behalf of the defendants-appellants, the son Ajith Kahatapitiya was added as the 4th defendant and Mr Kahatapitiya was appointed as guardian-ad-litem.

At the trial, parties raised the following issues:-

(1) Did the plaintiff become owner of the land mentioned in the Schedule to the Plaint on Deed No. 4880 of 24.3.1976?
(2) Have the defendants undertaken to hand over possession by leaving the premises in two months' time?
(3) Are the defendants presently occupying the said property unlawfully and without permission?
(4) If so, what damages can be claimed from 1.6.1976?
(5) Is the plaintiff entitled to the reliefs claimed in the plaint?
(6) Was a sum of Rs. 3,500/- obtained on Deed of conditional transfer No. 4753 of 12.8.1975, attested by L.P. Kahatapitiya, Notary?
(7) Is the buyer on Deed No. 4753, Asantha Ajith Kahatapititya, a minor?
(8) Is it lawful for the said minor to retransfer the rights acquired on Deed 4753?
(9) If the answer to issues 7 & 8 is in the negative, is the plaintiff entitled to rights on Deed 4880?
(10) Was Deed No. 4880 a fraudulent transfer?
(11) Did the defendants receive the amount mentioned in Deed 4880?

(12) If the answer to issues 10 and 11 is in the affirmative, is Deed 4880 an invalid one?
(13) If the answers to these issues are in favour of the defendants, can the plaintiff maintain this action?

Issues 1 to 5 were raised on behalf of the plaintiff-respondent; issues 6 to 12 were raised on behalf of the defendants-respondents.

The surveyor Premaratne and Mr. Kahatapitiya were the only witnesses for the plaintiff-respondent. The surveyor produced his plan (P1) which was prepared for the purpose of executing Deed (P4) and he stated that at the survey, he informed the defendants-appellants that Mr. Kahatapitiya was making a plan to sell the land. In Court, however, he was unable to identify the defendants-appellants.

In regard to Deed (P2), Mr. Kahatapitiya stated that he informed the defendants-appellants that he was writing the deed in his son's name; he had 3 sons. He withdrew the money from his son Ajith's book and paid Rs. 3,500/- to the defendants-appellants.

Mr. Kahatapitiya testified to the circumstances in which the deeds P3 and P4 came to be executed. Before the expiry of 3 years mentioned in Deed (P3), the defendants-appellants wanted him to buy the property; he replied, it was of no use to him and to sell it to the plaintiff-respondent, who had already bought 7 perches of a land, adjoining this land; from a sister of the 1st and 2nd defendants-appellants. The defendant-appellants spoke to the plaintiff-respondent and thereafter the plaintiff-respondent informed him that he had decided to buy the property for Rs. 8,000/- and instructed him to prepare the deed. He prepared two deeds, P3 and P4. Both were executed on the same day at the same time, at his house. The full 8000/- rupees was paid to the 2nd defendant-appellant, who accepted the money and gave his son Ajith his money. The defendants appellants promised to hand over possession in 2 months' time. Ajith was a minor at the time P3 was executed and he did not get the Court's permission to retransfer the land on P3, as it was not necessary, he stated.

The deed (P4), however, bears the date 2.4.76. According to Mr. Kahatapitiya it is a typing mistake and it should be 24.3.76. He produced a photostat copy (P6) of the protocol of deed P4 in which the correction has been made and his Register of Deeds (P5) wherein the date 24.3.76 has been entered. Obviously, the date 24.4.76 is a mistake. Even the defendants-appellants do not dispute that it was on 24.3.76 that they signed the blank papers.

Mr Kahatapitiya denied the following suggestions made under cross-examination (1) the defendants-appellants knew nothing about Deed P3. (2) that he sent the deeds P3 and P4 for registration after

the 2nd defendant-appellant's complaint to the Police on 29.6.76. (3) that he obtained the signatures and thumb impression of the defendants-appellants on blank papers and then prepared Deed P4. (4) that he obtained the 2nd defendant-appellant's signature on a blank sheet of paper and then made the endorsement on document P6. (5) that he gave the impression to the defendants-appellants that what they were signing was an assignment of the conditional transfer to the plaintiff-respondent. (6) that no consideration passed on P4.

Mr. Kahatapitiya admitted in evidence that there were 6 pending cases against him for failure to send the duplicates of deeds to the Registrar-General's office, for registration.

The 2nd defendant-appellant gave evidence. He did not deny the execution of Deed P2 and its genuineness except to say that Mr Kahatapitiya did not tell them in which of his son's name the deed was being executed. He admitted receiving Rs. 3,500/- on Deed P2. He was not aware of Deed P3. According to him, 7 months after the execution of deed P2, Mr. Kahatapitiya wanted the money back and the defendants-appellants told him there was time to redeem the land. Mr. Kahatapitiya said he needed the money and he would assign the conditional transfer to the plaintiff-respondent. On the night of the 24th, the plaintiff-respondent informed them that Mr. Kahatapitiya wanted them; the 1st and 3rd defendants-appellants went and on their return told him that they had signed some blank deed papers. He went thereafter; he too was asked to sign some blank deed papers. He asked "why blank papers", and Mr. Kahatapitiya said "it is night, getting late, for me to go back, and that he would write those deeds." When he signed there was nothing written on the deeds. He was under the impression that Mr. Kahatapitiya was assigning the conditional transfer to the plaintiff-respondent and would get the money from him. He was not aware when he signed that the land was being sold to the plaintiff-respondent. No money was given. Because of the trust they had in Mr. Kahatapitiya they signed blank sheets. At the time they signed, both clerks of Mr. Kahatapitiya were not there. He admitted his signature on the protocol P6, but said that at the time he signed, it was a blank sheet. Deeds P3 and P4 were prepared without their knowledge; the blank sheets they signed have been transformed into the deed P4.

The 2nd defendant-appellant, under cross-examination, stated that on 29.6.76, he complained to the Police (D3) because the

plaintiff-respondent wanted possession of the land and was worrying them to quit. In the complaint D3, he stated that on 24.3.76, they were taken to the house of Mr. Kahatapitiya and Mr. Kahatapitiya told them that it was necessary to assign the conditional transfer to the plaintiff-respondent and obtain money and they were asked to place their signatures. They have been deceived.

The 2nd defendant-appellant admitted that he worked at the Kalutara Bodhiya and was dismissed, as an electrician was not necessary. Earlier he went to Hingurakgoda and did farming; he had no intention of going there again in March '76 and doing farming again. He denied he told Mr. Kahatapitiya to take the land and give him money as he had lost his job and wanted to go to Hingurakgoda. He admitted his signature on Deeds P3 and P4 and identified the signature of the 1st defendant-appellant and the thumb impression of the 3rd defendant-appellant, on Deed P4. He denied that they agreed to leave the premises in 2 months.

The 1st defendant-appellant in her evidence accepted the genuineness of deed P2 and admitted receipt of Rs. 3,500/-. In regard to deed P4, she admitted her signature on it but said that nothing was written on the documents when she signed. Her mother too affixed her thumb impression. The plaintiff-respondent was present when she signed. On deed P4, they did not intend to sell the property; it was written fraudulently. Mr. Kahatapitiya said he was assigning the conditional transfer to the plaintiff-respondent as he wanted the money. They had confidence in Mr. Kahatapitiya and they agreed.

The learned District Judge accepted Mr. Kahatapitiya's version and rejected the evidence of 1st and 2nd defendents-appellants; he entered judgment for the plaintiff-respondent as prayed for. He has answered issues 1 to 8 in plaintiff-respondent's favour and issues 10 and 11 against the defendants-appellants. He has given reasons for rejecting the defendants-appellants' version.

I find that 2 matters which weighed with the learned District Judge, in rejecting the defendants-appellants' version, are not borne out by the evidence in the case. He observed - "It is difficult to think that however much confidence they had in Kahatapitiya, that they would have gone suddenly in the night and signed a few blank sheets of paper without any question." The 2nd defendant-appellant's evidence on this matter is that he questioned Kahatapitiya "why blank papers" and he was given a reply.

The learned trial Judge also stated - "The defendants themselves have given a certificate to say that Kahatapitiya could be trusted. They have not shown cause for him to change suddenly. I think these defendants wanted to sell all these properties and get money to go to Hingurakgoda. I think they changed this plan as they spent this money ...." Mr. Kahatapitiya in his evidence did not mention a word about any plans by the defendants-appellants to sell their property and go away to Hingurakgoda. Only a suggestion was put to the 2nd defendant-appellant in cross-examination that he told Mr Kahatapitiya to take the land and give him money as he had lost his job and wanted to go to Hingurakgoda and this was denied by the witness. He added that they have no place to go to, after selling their land and that if they were to sell the land they would not have mortgaged it. In regard to these 2 matters, the learned trial Judge has misdirected himself on the facts.

Learned Attorney for the defendants-appellants relied strongly on the case of *Baronchy Appu v. Poidohamy* (2 Browns's Reports 221) and submitted that it was necessary for the plaintiff-respondent to have called the two attesting witnesses to the deed P4 to testify. Learned Senior Attorney for the plaintiff-respondent, on the other hand, cited to us the cases of *Kiribanda v. Ukkuwa* (1892, 1 S.C.R. 216), *Somanather v. Sinnetamby* (1899, 1 Tambiah 38), and *Seneviratne v. Mendis* (6 C.W.R. 211) where the two earlier cases were cited with approval, and submitted that the notary is an attesting witness and is competent to prove the execution of the deed where the grantor was known to him. In this case the defendant-appellants were well known to Mr Kahatapitiya and there was no need to call the two attesting witnesses.

In *Baronchy Appu's* case (supra) the defendant alleged that she did not execute the document sued on and that she signed blank sheets of paper on which there was nothing written. The plaintiff himself testifed and also called the notary. I reproduce a good portion of the judgment of Lawrie, A.C.J. (at P.222)

> "It has, I think, been decided that when a deed is impeached as having been obtained by fraud it is not necessary to prove its execution by calling the attesting witnesses. The bare execution of the deed is held to be admitted by the party who seeks to avoid the effect of the signature by alleging that it

was obtained by fraud. I felt doubtful whether this was a case falling under that rule; for here the defendant says that she did not execute the document sued on; that she signed blank sheets of paper on which there was nothing written. If she did so, she did not bind hereself in any way; for, though the law recognisess the right of the holder of a signed stamped piece of paper to fill it up, as a bill of exchange or promissory note, I have not heard (query) that the law recognises the validity of a deed which was signed before it was written, and I am inclined to think that the evidence of at least one of the attesting witnesses was necessary to prove that it was a document which was signed, and not a blank sheet of paper.

The defendant undertook to prove that she did not sign the document. She led some evidence to that effect, which does not seem to me wholly worthless. The plaintiff gave evidence himself. He called the notary. I do not know why he did not call the attesting witnesses.

I feel that the case is incomplete without them, and would set it aside and remit it for further investigation."

Moncreiff, J. agreed with the judgment.

In *Arnolis v. Mutu Menika* (2 NLR 199) the defendant impeached the mortgage bond sued on as a forgery. The plaintiff called the notary and one of the two attesting witnesses to prove the bond. Bonser, C.J. said "Mr. Drieberg, the acting District Judge of Ratnapura, held that as a matter of law it was necessary to call both the attesting witnesses. I am unable to agree with that statement of the law. A deed can be proved by the evidence of one witness, though as a matter of precaution it may be advisable in many cases to call all the witnesses."

In *Seneviratne's case* (supra) Schneider, A.J. observed (at pgs 212, 213)-

"But as a long argument took place upon the point whether the notary is an attesting witness, I should like to make a few observations upon that point. The language of Section 2 of the Ordinance No. 7 of 1840 and in particular the words "the

execution of such writing, deed or instrument be duly attested by such notary and witnesses" to my mind leave no room for doubt or contention that the notary is an attesting witness in precisely the same sense as the other two witnesses mentioned in that section. This was the view taken in *Kiri Banda .v. Ukkuwa* and in *Somanather v. Sinnetamby.* It was argued that when it is enacted in section 68 of the Ceylon Evidence Ordinance 1985 that a document required by law to be attested is not to be used in evidence until one attesting witness at least has been called "for the purpose of proving its execution", the witness meant was not the notary but one of the other attesting witnesses. I do not quite agree with this contention. It would be correct if qualified. The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in Section 2 of No. 7 of 1840, means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution. If the notary knew the person signing as maker he is competent equally with either of the attesting witnesses to prove all that the law requires in Section 68 - if he did not know that person, then he is not capable of proving the identity as pointed out in *Ramen Chetty v. Assen Naina* (1909) 1 Current Law Reports 256) and in such a case it would be necessary to call one of the other attesting witnesses for proving the identity of the person. It seems to me that it is for this reason that it is required in Section 69 that there must be proof not only that "the attestation of one attesting witness at least is in his hand writing" but also "that the signature of the person executing the document is in the hand writing of that person." If the notary knew the person making the instrument he is quite competent to prove both facts - if he did not know the person then there should be other evidence."

Baronchy Appu's case (supra) was decided on 12th August, 1901. Learned Senior Attorney submitted that the judgment in this case must be regarded as given per incuriam, since the earlier decisions in the cases of *Kiri Banda* (supra) and *Somanather* (supra) were not referred to and the provisions of s. 2 of the Prevention of Frauds Ordinance have not been considered.

S. 68 of the Evidence Ordinance lays down that documents required by law to be attested shall not be used as evidence unless at least one attesting witness is called to prove its execution, if he is alive and subject to the process of the Court.

> "This is not the same thing as saying that a document required to be attested by more than one witness shall be proved by the evidence of only one witness. S. 68 only lays down the mode of proof and not the quantum of evidence required. More than one attesting witness may be necessary to prove a document according to the circumstances of a case" (Sarkar's Law of Evidence, 10th Edn. p. 591).

The two cases *(Baronchy Appu and Seneviratne, 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 executant 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 had 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.

There is a further circumstances in this case which has to be considered. In the course of his submissions learned Senior Attorney

not only submitted that Mr Kahatapitiya, as notary, is an attesting witness and therefore competent to prove the execution of the deed (P4), he also stated that the plaintiff-respondent had called his best witness, viz., Mr Kahatapitiya, and his testimony should be accepted because he is not only a notary, but an attorney-at-law, Justice of the Peace, an Unofficial Magistrate, and one who frequently acted for the official Magistrate. Learned Counsel for the defendants-appellants made an application to this Court to admit new evidence touching his conduct as Notary Public. The new evidence relates to 5 cases in the Magistrate's Court of Kalutara, bearing numbers 43613, 7320, 32243, 43614 and 7321. In 4 of these cases, Mr Kahatapitiya was charged and fined for offences committed by him, under the Notaries Ordinance, after he concluded his evidence at the trial in this case, on 1st March 1978. In case No. 32243, the offence was committed earlier, but the case was concluded and he was fined after the conclusion of his evidence. The offences relate to his failure to send duplicates of deeds executed and attested by him, to the Registrar of Lands, Kalutara. Mr Kahatapitiya had himself admitted in evidence that there were cases pending against him.

We allowed the application of learned Attorney for the defendants-appellants to admit this new evidence. These items of evidence could have an important bearing on the credibility of Mr Kahatapitiya, particularly because the conduct of Kahatapitiya which is being impugned in this case, is also his conduct as a Notary. It is only fair and justice requires that Mr Kahatapitiya be afforded an opportunity to explain his conduct and the circumstances in which he came to be charged and fined in these cases.

For reasons stated, I set aside the judgment of the learned District Judge and remit the case for a fresh trial. Costs to abide the result. There were several other matters that were raised at the hearing of this appeal. It is unecessary to decide them, in view of the order I have made for a fresh trial.

RANASINGHE. J. — I agree.

Judgment set aside
and case sent back
for re-trial.