

BEATRICE DEP
v.
LALANI MEEMADUWA

COURT OF APPEAL.
ISMAIL, J. AND
YAPA, J.
C.A. 188/90(F)
MC. MT. LAVINIA 517/ZL
JULY 11, 1997, SEPTEMBER 19, 1997.

Civil Procedure Code section 773 – Transfer of premises by judgment Creditor after judgment – Title paramount – Defendant becoming owner – Admission of fresh evidence in appeal.

The plaintiff-respondent instituted action against the defendant-petitioner seeking a declaration of title and ejectment of the defendant-petitioner from the premises in question. Judgment was entered in her favour. Writ pending appeal was allowed but the order was set aside by the Court of Appeal. After judgment the plaintiff -respondent (through her Attorney) gifted the premises to her father who in turn gifted same to the petitioner.

The petitioner sought to have documents which relate to the transfer of title to her admitted as evidence at the hearing of the appeal.

Held:

(1) In order to justify the reception of fresh evidence or a new trial three conditions must be fulfilled:

- i) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
- ii) Evidence must be such that if given it would probably have an important influence on the result of the case, although it need not be decisive.
- iii) The evidence must be such as is presumable to be believed or in other words it must be apparently credible although it need not be incontrovertible.

(2) The deeds and documents sought to be admitted at the hearing of the appeal do not touch the matters at issue on which the judgment was delivered at the trial court and these documents would have no effect on the judgment in appeal.

APPLICATION filed to admit additional documentary evidence at the hearing of the appeal in terms of section 773 of the Civil Procedure Code.

Cases referred to:

1. *Hettiarachchi v. Mary Motha* CA 1329/82 – CALA 141/82, – CAM 5.11.86.
2. *Carolus v. Piyadasa* – CALA 182/90, – CAM 16.7.93.
3. *Jandiris v. Deva Renta* – 33 NLR 200.
4. *Piyaratne Unnanse v. Nandina* – 37 NLR 109.
5. *Endiris de Silva v. Aronolis* 33 – CLW 39.
6. *Ramasamy v. Fonseka* – 62 NLR 90.
7. *Lada v. Marshall* – 1954, 3 All ER 745 at 748.
8. *Ratwatte v. Bandara* – 70 NLR 231.

Ms. Maureen Seneviratne, PC. with *Shammil Perera* for defendant-appellant-petitioner.

Tilak Marapone, PC. with *N. Ladduwahetty* and *J. Fernando* for plaintiff-respondent-respondent.

Cur. adv. vult.

October 3rd, 1997.

ISMAIL, J.

This order relates to two applications filed dated 8/11/96 and 2/6/97 by the defendant-appellant-petitioner to admit additional documentary evidence at the hearing of this appeal in terms of section 773 of the Civil Procedure Code.

The plaintiff-respondent-respondent (hereinafter referred to as the "respondent") filed an action No. 517/ZL in the District Court, Mt. Lavinia against the defendant-appellant-petitioner (hereinafter referred to as the "petitioner") seeking, *inter alia*, a declaration of title to the premises No. 30/1, de Saram Road, Mt. Lavinia and ejectment of the petitioner from the said premises. Judgment

was entered against the petitioner after trial on 6.6.90 and the appeal from the said judgment is now ready to be taken up for hearing.

Pending this appeal the respondent filed an application in the District Court for execution of writ and by his order dated 14.3.91 the learned District Judge had allowed the application after an inquiry.

The petitioner filed an application in revision No. 239/91 together with a leave to appeal application No. 58/91 against the said order. The order dated 14.3.91 allowing writ of execution was set aside and the learned District Judge was directed to reconsider the application as it was submitted that the premises have now been transferred to the petitioner by way of gift upon deed No. 8814 dated 7.5.91.

Consequent to this order the petitioner filed papers in the District Court setting out the following matters for consideration at the fresh inquiry;

1. "that the premises in suit in the case had been gifted by the respondent to the respondent's father Giridara Arachige Martin Wijeratne by deed of gift numbered 8763 dated 25th February '91 and attested by Lakshman Panditaratne Notary Public.
2. that the said Giridara Arachige Martin Wijeratne had thereafter by deed of gift numbered 8814 dated 7th May '91 attested by Lakshman Panditaratne Notary Public gifted the premises in suit to the petitioner.
3. that the respondent had given her power of attorney numbered 12253 attested by George Valentine Bateson of Hertfordshire to one Lalith Wijeratne to execute the aforesaid deed of gift numbered 8763 dated 25th January 1991."

The petitioner has also produced these documents but the learned District Judge dismissed her application after an inquiry by his order

dated 27.10.94. The respondent then applied for the execution of writ which was allowed and the petitioner was ejected from the premises on 18.11.94.

The petitioner filed an application No. 779/94 to have the said order dated 27.10.94 revised but later withdrew it and filed a fresh revision application No. 149/95. This Court allowed the application by its judgment dated 6.10.95 and set aside the order of the District Judge allowing writ and directed that steps be taken to restore the petitioner to possession of the premises.

The respondent failed in his attempt to obtain special leave to appeal to the Supreme Court in application No. SC/Spl/LA 324/95 against this judgment.

It appears that Giridara Arachige Martin Wijeratne gifted the premises in suit No. 30/1, de Saram Road, Mt. Lavinia to the petitioner by deed No. 8814 dated 7.5.91 reserving to himself the life interest. By deed No. 1573 dated 12.3.97 attested by U.A. Premasundera NP he has cancelled and revoked the life interest which he had reserved for himself. The petitioner now seeks to have the aforesaid documents marked Y1 and Y4 which relate to the transfer of title to her admitted as evidence at the hearing of this appeal.

It was submitted on behalf of the petitioner that she could not produce the aforesaid deeds and documents at the trial as she had obtained title to the premises after the judgment was delivered but before the execution of the decree. It was further submitted that these documents which now establish a title paramount in the petitioner were considered by this Court in the previous revision applications and that justice of the case requires that this Court accept the aforesaid documents at the hearing of this appeal in terms of section 773 of the Civil Procedure Code.

Learned Counsel for the petitioner relied on the judgment of this Court in *Hettiarachchi v. Mary Motha*.⁽¹⁾ The question that arose for

consideration in that case was whether loss of title *pendente lite* and the consequent denial of the right of the execution of the decree is applicable where the loss of title takes place after decree but before its execution. It was held that as the plaintiff's rights have become extinguished by title paramount *pendente lite*, "it must necessarily affect the plaintiff's further interest in the action and the right to the execution of the decree".

In *Carolis v. Piyadasa*⁽²⁾ this principle was extended and it was held that "upon loss of title *pendente lite* there should be a similar consequence in an action based on letting and hiring, as in the case of an action for vindication, in the absence of any other interest of the landlord in the property".

Learned Counsel for the respondent had objected to these documents being admitted at the hearing of this appeal. He submitted that the views expressed in these judgments were relevant to the inquiry into the application for the execution of writ. However, they have no relevance to the present application by which it is sought to admit title deeds to the premises in suit executed in favour of the petitioner after judgment has been entered granting the respondent declaration of title to the said premises.

The relevant provisions in section 773 of the Civil Procedure Code empower the Court of Appeal, where necessary, to receive and admit new evidence additional to, or supplementary of the evidence already taken in the original Court touching the matters at issue as justice may require. Documentary evidence touching the matters at issue have been admitted in terms of these provisions in certain instances.

In *Jandiris v. Deva Renta*⁽³⁾, a deed No. 2898 of 19.10.1848 (XI) was not produced at the trial and its absence led to trial judge to raise the relevant question as to how T, a usufructuary mortgagee in 1848 could convey a dominium to M in 1855. After the judgment the plaintiff searched the record in another District Court action and discovered the deed and applied for leave to produce it at the

hearing of the appeal. This deed established that T had the right to convey to M in 1855 one fourth of the land. The Court decided to admit the document under this power which was then referred to in section 40 of the Courts Ordinance No. 1 of 1889. Macdonnell CJ stated as follows: "Certainly, this power must be exercised with every caution, partly because the Supreme Court is not in civil matters a Court of trial but of appeal and review, and chiefly perhaps because of the danger that evidence not produced below but sought to be produced to it for the first time, will be manufactured for the occasion. This is a very real danger which was fully before us in considering the application to admit X, but we consider that in the present case the danger was reduced to a minimum. For one thing, the evidence was documentary and not oral, and for another, the document sought to be put in did not come from the custody of the plaintiffs or from anyone connected with them but from the custody of a Court of record and from among the records of that Court".

In *Piyaratne Unnanse v. Nandina*⁽⁴⁾, an official document the existence of which was not known to a party during the trial was admitted in appeal. In *Endiris de Silva v. Aronolis*⁽⁵⁾, the records of two Village Tribunal cases relevant to the subject-matter of the appeal and discovered after the appeal had been filed were permitted to be admitted.

However, the matter put in issue in the present case upon the pleadings filed in December 1980 was whether the plaintiff-respondent is the owner of the premises bearing assessment No. 30/1, de Saram Road, Mt. Lavinia under and by virtue of deed No. 346 dated 22.8.73 attested by S. Gnanapandithen NP. This issue has been answered in the plaintiff-respondent's favour and judgment has been entered for her on 6.6.90 as prayed for in his plant. The deed of gift No. 8814 by which the petitioner now claims title to the property has been executed on 7.5.91. This deed and the other documents sought to be admitted as evidence at the hearing of this appeal would have no impact on the judgment to be considered in appeal.

In *Ramasamy v. Fonseka*⁽⁸⁾, it was held that fresh evidence would not be permitted to be adduced unless it is of a decisive nature; it must be such that, on a new trial being ordered, it would almost certainly prove that an erroneous decision had been given.

In *Lada v. Marshall*⁽⁷⁾ at 748, Denning, L.J. said, "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible". These conditions were taken into account and applied in *Ratwatte v. Bandara*⁽⁹⁾.

I am of the view that the deeds and documents sought to be admitted at the hearing of this appeal do not touch the matters at issue on which the judgment was delivered in the trial court and that these documents would have no effect on the judgment in appeal.

For these reasons the application to admit the deeds and documents Y1 to Y4 referred to in the two applications filed dated 8.11.96 and 2.6.97 is refused.

YAPA, J. – I agree.

Application refused.