# PEIRIS AND ANOTHER
## vs
## SIRIPALA

COURT OF APPEAL
RANJITH SILVA. J
SALAM. J
CA 49/2001(F)
DC HOMAGAMA 1798/CD
FEBRUARY 2, 2009
MAY 6, 21, 2009

*Declaration - Deed void - fraudulent - Civil Procedure Code Section 35(1) - Joining of causes of action without leave of Court-Fraud alleged-Corroboration necessary?-Burden of proving fraud-Beyond reasonable doubt or balance of probability?* Non est factum?

The plaintiff-respondent instituted action seeking a declaration that the deed of transfer 4881 - be declared void on the basis that the defendant-appellants have unlawfully and fraudulently manipulated the transfer of the entire land to the 1st appellant. The trial Judge held in favour of the plaintiff-respondent.

It was contended by the defendant-appellant that the cause of action to have the impugned deed declared null and void cannot be joined with a cause of action for a declaration of title to the immovable property without leave of Court first had and obtained.

**Held:**

(1) The plaintiff respondent in the issues raised had confined himself to have the impugned deed set aside and had not proceeded to raise an issue with regard to declaration of title. Once issues are raised and accepted by Court the case goes to those issues raised.

Even if the respondent had formulated issues on both causes of action, such procedure is perfectly in order. The law permits one to adopt such a cause and is not repugnant to Section 35(1). There is no misjoinder as there is in reality only one cause of action. A prayer for invalidation of a deed is consequential to a prayer for declaration of title.

**Held further:**

(2) Corroboration is not the *sine quo non* in matters where fraud is alleged.

Per Ranjith Silva, J.

> "In Roman Law fraud is defined as *omnis calliditas, fallacia, machination, adcircumveniendum alterem adhibita* meaning any craft deceit or machination used to circumvent deceive or ensnare another person, an alienation alleged to be in fraud of creditors is voidable, it is valid till it is set aside".

(3) The standard of proof remains on a balance of probability although the more serious the imputation the stricter is the proof which is required.

(5) The defendant-appellants and a witness gave uncontroverted evidence on behalf of the appellants with regard to the circumstances under which the impugned deed was executed. The evidence is insufficient to prove fraudulent misrepresentation or undue influence. The evidence is insufficient to show that the plaintiff-respondent was tricked or gypped by the appellants to execute the impugned deed-it appears that the trial Judge had been obnoxious to those important facts.

**APPEAL** from the judgment of the District Court of Homagama.

**Cases referred to:-**

1. *Godamune Punnakiththi Thero vs. Thelulle Narada Thero* - CA 65/90- De 1418/L
2. *Dharmasiri vs. Wickrematunge* 2002 2 Sri LR 218
3. *Fernando vs. Lakshman Perera* 2002 2 Sri LR at 413
4. *Haramanis vs. Haramanis* 10 NLR 332
5. *Madar Saibo vs. Sirajudeen* 17 NLR 97
6. *Yousf vs. Rajaratnam* (1970) 74 NLR at 9
7. *Associated Battery Manufacturers Ltd vs. United Engineering Workers Union 1975* - 77 NLR 541 at 544
8. *Foster vs. Mackennon* 1896 LR 4. CP 704
9. *Luwis vs. Clay* - (1898) 67 LJQ 224

*Ranjan Suwandaratne* for appellant.

*Nihal Jayamanne* PC for respondent.

cur.adv.vult

June 18, 2009

**RANJITH SILVA. J.**

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted action bearing number 1978/ CD in the District Court of Homagama, against the 1st and the 2nd Defendant Appellants (hereinafter referred to as the Appellants) seeking *inter alia* for a declaration that the deed of transfer bearing number 4881 marked as P2 be declared void on the basis that the Appellants have unlawfully and fraudulently manipulated the transfer of the entire land to the first Appellant. After trial the Learned District Judge by his judgment dated 04.01.2001 held in favour of the Respondent. Being aggrieved by the said judgment the Appellants have preferred this appeal to this Court.

One of the main legal arguments of the Appellants, put forward in their submissions was based on section 35 (1) of the Civil Procedure Code. The relevant issue is issue number 6. The Appellants argued that a cause of action to have the deed P2 declared null and void cannot be joined with a cause of action for a declaration of title to immovable property without leave of court first had and obtained. Appellants argued that the Respondent should have dropped one of the causes that is, the Respondent should have either maintained the cause of action for a declaration of title or should have abandoned that cause of action and maintained a cause of action for a declaration that the aforementioned deed P2 was a fraudulent deed and therefore was void. But this argument appears to be unfounded and untenable for the reason that the Respondent had in his issues raised

at the time, confined himself to the cause of action to have deed number 4881 (P2) declared void and had not proceeded to raise an issue with regard to declaration of title. In this regard I would like to refer to issue number 1-5. 12.13 and 14 which are found at pages 78, 79 and 80 of the brief. In any of the said issues the Respondent has not prayed or claimed a declaration of title to the premises, but has only prayed that the impugned deed P2 be declared void.

It was not necessary for the Respondent to seek a declaration of title as the Appellants have admitted that the plaintiff became entitled to this land on deed number 6027 of 3rd of January 1997 (P1). In this regard I would like to refer to admission number 2. Once issues are accepted by court the case goes to trial on those issues and the case is tried and determined on the admissions and issued raised at the trial. The pleadings become crystallized in the issues and the pleadings recede to the background. Therefore the contention put forward by the Appellants goes overboard. *(Vide Godamune Pannakiththi Thera Vs Thelulle Narada Thero*[1] *and Dharmasiri Vs Wickramathunga*[2]*)*

On the other hand, assuming without conceding that the Respondent had formulated issues on both causes of action namely declaration of title and for a declaration that deed P2 is void, I find such procedure to be perfectly in order. The law permits one to adopt such a cause and is not repugnant to section 35 (1). There is no misjoinder as there is in reality only one cause of action. A prayer for invalidation of a deed (in this case P2) is consequential to a prayer for declaration of title. It is to prevent the Respondents from alienating the land or in order to prove that he still retains title and that he has not alienated his rights. In this regard I would like to refer to the case reported in *Fernando Vs Lakshman Perera*[3] at 413.

**The facts**

The original owner of the land more fully described in the schedule to the plaint was the father of the Respondent, Weerakkodige Don Pubilis who gifted the said land containing in extend 2 Roods, to the Respondent by deed of gift bearing number 6027 dated 3rd of January 1996 which is marked as P1. According to the Respondent he was eighty years of age at the time, a bachelor and an epileptic from his early childhood, with a short memory and nervous debilities related to the functions of the brain and was under treatment for the said debilities and ailments. According to the Respondent his right Eye had been removed after an eye surgery and his eye sight was weak. It is common ground that the Respondent resided in the house situated on this land all by himself and that the Respondent allowed and permitted the Appellants who were husband-and-wife to stay in a part of the Respondents house without any payments as rent or lease. The Respondent had given such permission on sympathetic grounds and as the applicants had pleaded with him to provide them with shelter. On or about 11th of July 1991 the Respondent conveyed the said land and premises to the Appellants on a deed of transfer executed before a Notary Public by the name of A. A. Karunaratne. After some time according to the Appellants, the Respondent chased away the first and second Appellants from the said premises and thereafter filed this action against the Appellants. But the version of the Respondent was that the appellants voluntarily moved to a different premise.

The version of the Respondent was that the Appellants who were feigning affection towards the Respondent from the very beginning, pleaded with the Respondent to give them 10 perches of land from and out of the said land to the Appellants and persuaded him on the 11th of July 1991 to go to a Notary Public by the name of A. A. Karunaratne on the pretext

of alienating only 10 perches of land and that the Appellants have fraudulently got a deed of transfer executed in respect of the entire property for a consideration of rupees 25,000., that after the purported transfer the Appellants moved out of the plaintiff's premises even without informing the plaintiff and took residence elsewhere. The position of the Respondent was that, as an act of benevolence he decided to gift 10 perches out of the land to the Appellants as the Appellants were looking after him for some time.

It was further contended on behalf of the Respondent that the notary who executed the deed P2 was involved in executing a forged Last Will on a previous occasion. In proof of this fact the Respondent produced the Judgment in T/1643 of the District Court of Panadura marked as P4. at the trial in the District Court.

As against this contention, it was contended on behalf of the Appellants that the Respondent had agreed to sell the land to the Appellants for 70,000 rupees and that in order to save a part of the Stamp fees they mentioned 25,000 rupees as consideration in the deed P2. It was also contended on behalf of the applicants that no fraud was practiced on the Respondent and that the complainant, for nearly 1 year never complained to the police or to any other authority that the Appellants got the conveyance executed in fraud of the Respondent. It was further contended on behalf of the Appellants that the Respondent chased away the Appellants from the said premises and as an afterthought filed action against them at the instigation of the neighbours, some of them who were related to the Respondent.

The Respondent in his evidence alleged that at the request of the first Appellant he agreed to give 10 perches

out of eighty perches from his land, as an act of charity and that consequently the Respondent went together with the Appellants before a notary. The Respondent has also admitted that he signed the deed in question before the said notary. The Respondent alleged the after some time, he became aware that the notary had misled him and got a deed of transfer executed for 80 perches instead of a deed of gift for 10 perches. The Respondent admitted that he had not taken any steps whatsoever against the said notary not even a complaint to the police, although the Respondent in his plaint and in evidence has made serious allegations against the Appellant and the notary public. The Respondent did not produce a single complaint made to the police or any other authority against the notary prior to the institution of the action. This conduct of the Respondent shows that there was nothing at the time to complain and that all these allegations are afterthoughts. This conduct of the Respondent is an indication that the Respondent, having conveyed the said property voluntarily, changed his mind subsequently due to reasons best known to him probably at the instigation of the neighbours and the relatives and instituted action in order to reclaim what he conveyed to the Appellants. It appears that the Learned District Judge had been oblivious to these important facts. Especially so in the face of the evidence of the Respondent wherein he had stated that he has several relatives living in the neighbourhood and that he instituted action in consequence to a request made by one of his relatives. In his evidence the Respondent has disclosed that even the gift of 10 perches he had kept a secret from his relations.

Generally corroboration is not the *sine qua non* in matters where fraud is alleged. However the fact that the respondent's position was not corroborated by any other

evidence cannot be disregarded in the light of the overwhelming evidence placed by the appellants in regard to the transaction in question. On the contrary the Appellants gave evidence and a witness to the said deed in question has also testified in court in support of the contention of the Appellants. The appellants, in their evidence have stated about the payments made in consideration of the conveyance executed in their favour. Although it was not necessary under the circumstances to lead evidence to show or prove the execution of the deed the appellants have led evidence to prove the execution of the deed P2 despite the fact that it may not be up to the required standard. The Respondent has admitted having gone to the notary and having signed the document. Therefore the execution of deed P2 was never in dispute. I hold that it is not necessary to prove the execution of P2, because the Respondent had admitted the execution of the contentious deed P2. From the arguments, what I deduce is that the Respondent is attempting to prove fraudulent misrepresentation on the part of the Appellants. This fact is augmented by the defence of *non est factum* the Respondent has relied on, of which I shall be dealing with in a separate chapter. Although a wise man in his normal senses would not have donated the entire property that he owns, under certain circumstances, in a frail moment or weak moment could get emotional and transfer everything that he has and that is not impracticable or improbable. Such an act cannot be branded as preposterous or impossible.

**NON EST FACTUM**

This defence has no application to the facts and circumstances of this case. One could have recourse to this defence only if the application of the defence is warranted

by the facts. In this case the evidence is insufficient to prove even on a balance of evidence that the Appellants practiced deception or fraud on the Respondent. In this case the only evidence available in order to prove fraudulent misrepresentation or deceit is the evidence of the Respondent. The other witnesses merely referred to the facts that the Appellant was a recipient of janasaviya and that the notary who executed P2 was suspended. On the other hand the 1st and the 2nd appellants and a witness gave uncontroverted evidence on behalf of the Appellants with regard to the circumstances under which the impugned deed was executed. The evidence is insufficient to prove fraudulent misrepresentation or undue influence. The evidence is insufficient to show that the Respondent was tricked or gypped by the Appellants to execute deed P2.

In Roman Law fraud is defined as *omnis calliditas, fallacia, machination, adcircumveniendum, alterem, adhibita meaning* any craft, deceit or machination used to circumvent, deceive or ensnare another person. Wood Renton J. in *Haramanis Vs Haramanis*[4] held that an alienation alleged to be in fraud of creditors is voidable; that is to say that it is valid till it is set aside. In *Madar Saibo Vs Sarajudeen*[5] it was held that a fraudulent, unlike a deed executed by a person not competent in law to enter into a contract is, under the Roman Dutch Law, is valid until it is set aside or cancelled, and when it is cancelled, the cancellation refers back to the date of the deed.

In Sri Lanka the earlier view was that the burden of proving fraud in regard to a civil transaction must be satisfied beyond reasonable doubt (Vide *Yoosoof Vs Rajaratnam*[6]). But the law as it stands to day is that the standard of proof remains on a balance of probabilities although the more serious the imputation, the stricter is the proof which is

required. (*Associated Battery Manufacturers Ltd Vs United Engineering Workers Union*[7])

Therefore I hold that there is no basis for the application of the defence of *NON EST FACTUM*. The decisions is *Foster Vs Mackinnon*[8] and *Lewis Vs Clay*[9] cited by the counsel for the Respondent has no application to the facts and circumstances of the instant case.

For the reasons adumbrated I hold that the Learned District Judge has come to an erroneous conclusion on the facts and the law and therefore the impugned Judgment should not be allowed to stand. I allow the Appeal and set aside the Judgment dated 04.01.2001, but make no order for costs.

**SALAM, J** - I agree.

*Appeal allowed.*