

ASLIYA UMMA
v.
THINGAL MOHAMED

SUPREME COURT
DHEERARATNE, J.,
PERERA, J. AND
GUNASEKARA, J.
S.C. APPEAL NO. 127/96
C.A. NO. 178/84(F)
D.C. KALMUNAI NO. 925/L
FEBRUARY 11, 1999

Vindictory action – Claim for cancellation of "fraudulent" deeds – Proof of execution of the plaintiff's deed – Section 68 of the Evidence Ordinance – The legal effect of the failure by the Notary to observe statutory provisions applicable to the extension of a deed – Sections 31 and 33 of the Notaries Ordinance.

The original plaintiff and his wife gifted their daughter the 1st defendant, 5 acres of paddy land by a deed dated 5.9.1966. The gift was stated to be irrevocable. On 8.2.1968 the 1st defendant married the 2nd defendant. The plaintiff stated that by a deed of revocation executed on 9.6.1969 to which the plaintiff, his wife and the 1st defendant were parties and attested by V. Sandrasegara, Notary Public, the earlier gift was revoked. However, it was later found that the deed of revocation bore the date 19.6.1969; and that by a deed dated 11.6.1969 the 1st defendant purported to gift the said 5 acres of land to the 2nd defendant who by deed dated 4.3.1970 purported to transfer it to the 3rd defendant. The plaintiff filed action for a declaration of title to the land and for cancellation of the deeds dated 11.6.1969 and 4.3.1970 and further prayed that he be quieted in possession of the land. Only the 3rd defendant contested the action.

One Abdul Gafoor the clerk to the Notary Sandrasegara in whose handwriting the deed of revocation was prepared and who signed it as an attesting witness and also knew the parties well was called as a witness. In the course of his testimony he said that it was the practice of Notary Sandrasegara to get him to first write the protocol in full and obtain the signatures of the parties to the fully written protocol and the other two copies in blank.

The plaintiff alleged that the 1st to the 3rd defendants acting collusively influenced Notary Sandrasegara to alter the date in the deed of revocation to read as 19.6.1969. The District Judge gave judgment for the plaintiff.

Held:

1. The question of due execution of the deed of revocation did not arise at the trial. In any event at the time of the trial the Notary was dead and the execution of the deed was proved in terms of section 68 of the Evidence Ordinance by calling Gafoor.
2. There was no issue raised at the trial on the question of the 1st defendant's consent to the deed of revocation. In any event the evidence of the plaintiff and Gafoor as well as a document signed by the 1st defendant before the Assistant Commissioner of Agrarian Services agreeing to enter the plaintiff's name in the paddy lands register as the owner of the land in dispute established her consent to the revocation.
3. The failure of the Notary to observe the provisions of section 31 of the Notaries Ordinance in executing the deed of revocation did not make it invalid; for in terms of section 33 of the Ordinance, the deed shall not be deemed to be invalid by reason only of such failure.
4. The evidence established that the deed of revocation was executed on 9.6.1969.

Per Dheeraratne, J.

"It was quite clear that words and figures indicating nine in the protocol had been altered to read as nineteen. The alterations were not in the handwriting of Abdul Gafoor"

Case referred to:

1. *Solicitor-General v. Ava Umma* (1968) 71 NLR 512 at 575.

APPEAL from the judgment of the Court of Appeal reported in (1996) 2 Sri LR 62.

Faiz Musthapha, PC with *Sanjeewa Jayawardena* for the appellant.

S. Mahenthiran with *MCM Muneer* for the respondent.

Cūr. adv. vult.

March 26, 1999.

DHEERARATNE, J.

The plaintiff was the owner of a paddy-field called Puddiyadivayal, in extent 10 acres and 2 roods. He, upon deed No. 690 dated 5.9.1966 attested by A. A. Majeed, Notary Public, in which his wife too joined, gifted the divided southern portion in extent 5 acres of the said field (the 5-acre field), to their daughter Nafeela Umma the 1st defendant. The gift was stated to be irrevocable. On 8.2.1968, the 1st defendant married Uthuma Lebbe Mohammedthambi the 2nd defendant. By deed No. 557 (the deed of revocation), attested by V. Sandrasegara, Notary Public, to which the plaintiff, his wife and the 1st defendant were parties, the earlier deed of gift No. 690 was revoked. The plaintiff stated that this deed of revocation was in fact attested on 9.6.1969, although it bore the date 19.6.1969. The 1st defendant, upon deed No. 20722 dated 11.6.69 attested by S. Gnanamuttu, Notary Public, purported to gift the said 5-acre field, to her husband the 2nd defendant, who in turn, purported to transfer the said 5-acre field upon deed No. 21162 dated 4.3.1970 attested by the same Notary to Ismail Lebbe Thingal Mohamed the original 3rd defendant.

The plaintiff filed this action on 31st January, 1973, seeking, *inter alia*, a declaration that he was the owner of the said 5 acre field; for cancellation of deed No. 20722 of 11.6.1969 and deed No. 21162 of 4.3.1970, both attested by S. Gnanamuttu, Notary Public; and that he be quieted in possession of the said field. The case of the plaintiff was that the 1st to 3rd defendants, acting fraudulently and in collusion, influenced V. Sandrasegara Notary Public, illegally, to falsify the deed of revocation by post-dating it to read 19.6.1969 instead of 9.6.1969. It could be seen that if the deed of revocation was attested on 9.6.1969 as contended by the plaintiff, the 1st defendant had no title in the 5-acre field to gift to her husband the 2nd defendant, and consequently no interests would pass on to the 3rd defendant. The original plaintiff's action was contested only by the 3rd defendant. The learned trial judge in an admirably well-considered judgment, having held that the deed of

revocation was in fact attested on 9.6.1969 and not on 19.6.1969, gave judgment in favour of the plaintiff as prayed for. The Court of Appeal set aside the judgment of the learned District Judge primarily on the basis that – (1) the plaintiff had failed to prove due execution of the deed of revocation by calling the Notary; (2) that the 1st defendant had not consented to the revocation of the gift; and (3) that the deed of revocation was invalid. The present appeal to this Court is the sequel.

As I have mentioned earlier, the 1st and 2nd defendants did not contest the action. In view of what the Court of Appeal said about the failure to prove due execution of the deed of revocation, I would refer to some averments in the answer of the 3rd defendant. In paragraph 2 he stated ". . . the said deed of revocation No. 557 dated 9th June, 1969 and attested by V. Sandrasegara, Notary Public, is bad in law and in fact. . . ". Again in paragraph 3 he stated ". . . the averments contained in paragraph 6 of the plaint is wrong and misleading since the revocation of the donation was on 19.6.1969 but the donation made by the 1st defendant Ahamed Lebbe Nafeela Umma to her husband the 2nd defendant was on 11.6.1969 . . . ". The question of due execution of the deed of revocation did not arise and the trial proceeded on the issues mentioned below; I have indicated the answer to each of those issues given by the learned District Judge, within brackets.

Plaintiff's A :

- (1) Did the plaintiff execute the deed of revocation No. 557 attested by V. Sandrasegara with the concurrence of Nafeela Umma? (Yes).
- (2) Was that deed executed on (a) 9.6.69 or (b) 19.6.69? (On 9.6.69).
- (3) If issue No. 2 (a) is answered in the affirmative was the 2nd defendant aware of the said execution on 11.6.69? (Yes).
- (4) If issue No. 3 is answered in the affirmative, was the 3rd defendant also aware of deed No. 557 of 9.6.69? (Yes).

- (5) If issue No. 4 is answered in the affirmative, did the 3rd defendant obtain a transfer of the property in dispute by deed No. 21162 of 4.3.70 attested by S. Gnanamuttu NP well knowing that the 2nd defendant fraudulently obtained the deed of donation from Nafeela Umma? (Yes, but not necessarily fraudulently).
- (6) If the deed of revocation referred to had been executed on 9.6.69, has the date thereon been subsequently altered to prevent the plaintiff from gaining prior registration in terms of the Registration of Documents Ordinance ? (Yes).
- (7) If the above issues are answered in the affirmative is the plaintiff entitled in law to have the deed of gift bearing No. 20722 of 11.6.69 attested by S. Gnanamuttu NP set aside? (No).
- (8) If issue No. 7 is answered in the affirmative, is the plaintiff also entitled to have the deed of transfer in favour of the 3rd defendant bearing No. 21162 of 4.3.70 also attested by S. Gnanamuttu set aside on the ground of fraud? (No).
- (9) If the above issues are answered in the affirmative, is the plaintiff entitled to judgment as prayed for in the plaint? (The plaintiff is entitled to judgment as prayed for in the plaint).

3rd defendant's :

- (10) Is the deed No. 690 of 5.9.66 deed of donation, a deed of gift irrevocable? (Yes).
- (11) If issue No. 10 is answered in the affirmative, did the deed of revocation convey any title to the plaintiff? (Yes).
- (12) Did deed No. 20722 of 11.6.69 convey the land described in the schedule B to the plaint to Uduma Lebbe Mohamedthambi? (No).
- (13) Has the 3rd defendant bought the said land by deed No. 21162 of 4.3.70 from the 2nd defendant? (No).
- (14) If issue is answered in the affirmative, has the plaintiff a cause of action against the 3rd defendant? (Yes).

Plaintiff's :

- (15) Even if issue No. 10 is answered in the affirmative was the plaintiff entitled to have the deed of gift revoked with the concurrence of the donee Nafeela Umma? (Yes).

Even if due execution of the deed of revocation was required, section 68 of the Evidence Ordinance provides : "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence". The Court of Appeal overlooked the fact that the evidence in the case disclosed that the V. Sandrasegara NP was dead at the time the trial commenced and his clerk Abdul Gafoor, in whose hand-writing the deed was, and who signed the deed as a witness, gave evidence identifying the signatures of the plaintiff, his wife, the 1st defendant, and of the Notary, all of whom he undoubtedly knew well. As observed by T. S. Fernando, J. in *Solicitor-General v. Ava Umma*⁽¹⁾ the proof of the execution of the documents mentioned in section 2 of the Prevention of Frauds Ordinance No. 7 of 1940 means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of the Notary and two or more witnesses present at the same time who attested the execution.

According to the evidence of Abdul Gafoor which the learned trial judge accepted, Notary Sandrasegara was in the habit of getting him first to write the protocol in full and obtaining the signatures of the parties in the fully written protocol and in the other 2 copies in blank. Although none can grant sanction to such wayward ways, that in fact was what occurred in the notarial practice of Notary Sandrasegara. Section 33 of the Notaries Ordinance (chap. 110 NLE) reads : "no instrument shall be deemed to be invalid by reason only of the failure of any Notary to observe any provisions of any rule set out in section 31 in respect of any matter of form". (proviso omitted).

It was quite clear that words and figures indicating nine in the protocol had been altered to read as nineteen. The alterations

were not in the hand-writing of Abdul Gafoor. In addition, the document dated 16.6.69 (P12A) signed by the 1st defendant and sent to the district registrar, Batticaloa, objecting to registering a deed, obviously a reference to the deed of revocation, supported the position that the deed of revocation was in fact executed on 9.6.69. This document P12A was received in the office of the district registrar on 17.6.69. This document clearly shows that the deed of revocation was not executed on 19.6.69. As the learned trial judge correctly observed the 1st defendant was both a dutiful daughter and a plaintiff wife.

Although the Court of Appeal thought that the 1st defendant did not give her consent to the deed of revocation there was no issue raised at the trial in that respect. The evidence of plaintiff and Abdul Gafoor was to the contrary. Moreover, the document dated 14.6.72 (marked P8) signed by the 1st defendant before the Assistant Commissioner of Agrarian Services, shows that she was agreeable to enter the name of her father in the paddy lands register as the owner of the land in dispute.

There is no doubt that the plaintiff could not have revoked the gift given to his daughter unilaterally. The learned trial judge rightly thought that the intention of the parties to the deed of revocation must be given effect to. According to the evidence led at trial coming principally from the plaintiff and witness Abdul Gafoor, both of whom the learned trial judge believed, the learned trial judge came to the conclusion that the 1st defendant voluntarily divested herself of the interests in the said paddy-field, in favour of her father.

For the above reasons we allow the appeal, set aside the judgment of the Court of Appeal and affirm the judgment of the original Court. The appellant will be entitled to a sum of Rs. 10,000 as costs.

PERERA, J. – I agree.

GUNASEKERA, J. – I agree.

Appeal allowed; judgment of the District Court affirmed.