

KANDASAMY
v.
SINNATHAMBY

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND T. D. G. DE ALWIS, J.

C. A. 647/76.

D. C. POINT PEDRO No. 9703.

APRIL 1 AND 2, 1985.

Partition action – Deed of gift – Secondary evidence of contents of deed and fact of registration – Priority of registration – Acceptance of gift – Failure to raise it in the issues – s. 65 of Evidence Ordinance.

In his suit for partition of a land, plaintiff claimed his interests by inheritance from one Sellammah who he claimed held half share of the corpus by virtue of a deed of gift P1 executed in 1948 by one Eliyathamby who admittedly at one time owned the whole land. The 1st defendant claimed the whole land in opposition to the plaintiff on the footing of a transfer of the entire corpus by Eliyathamby in 1967. The questions argued were whether the deed of gift P1 was a genuine deed and whether it yielded to the 1st defendant's transfer deed from Eliyathamby by virtue of prior registration. The question whether there had been a valid acceptance of the gift P1 was also raised.

The original and duplicate of P1 were not available but the plaintiff placed the evidence of the attesting Notary who testified to the due execution of the deed and also produced his protocol before Court.

Held –

(1) The Notary's evidence which was accepted by the trial Court establishes the due execution of the impugned deed of gift. As the original and duplicate of the deed were not available, secondary evidence including the protocol was admissible under s. 65 of the Evidence Ordinance.

(2) In regard to the registration of the impugned deed of gift although the registration entries and several other relevant documents in the Land Registry were missing still particulars in the Day Book maintained under the Registration of Documents Ordinance by the Land Registry of deeds tendered for registration and deeds registered and the entry of the grantee's name as owner in the Index are admissible as secondary evidence in proof of the contents of the lost or missing folio in the continuation of which the 1st defendant's own deed was registered and of the fact of registration of the deed P1 in the missing folio.

(3) Accordingly the deed of gift relied on by the plaintiff prevails over the deed relied on by the 1st defendant both by priority of execution and priority of registration.

(4) Although lack of acceptance of the deed of gift was pleaded in the answer no issue on it was raised at the trial. There was acceptance on the face of the deed. The question that acceptance has not been proved was raised when written submissions were filed but this is too belated to be entertained.

Quaere : Is the protocol of a deed kept by the attesting Notary an original document in terms of the Evidence Ordinance?

Case referred to :

(1) *Hemapala v. Abeyratne* [1978-79] 2 Sri LR 222

APPEAL from the District Court of Point Pedro

A. *Mahendrarajah, P.C.* with S. *Mahenthiram* for 1st defendant-appellant

K. *Rajaratnam* for plaintiff-respondent.

Cur. adv. vult.

June 18, 1985.

T. D. G. DE ALWIS, J.

The plaintiff filed this action for the partition of the land called Palavadai described in the schedule to the plaint. The plaintiff set out title to this land as follows :-

By virtue of deed No. 21593 dated 20.8.1930 one Thangatchipillai widow of Kathiripillai was the original owner of this land. She by deed No. 11672 dated 4.7.1932 (P 6) transferred the same to Kathiripillai Eliyathamby and wife Sellammah. Sellammah on deed No. 1403 dated 14.11.1945 (1 D 3) donated her half share to her husband Eliyathamby. Thereafter the said Eliyathamby by deed No. 1735 dated 13.3.1948 (P 1) donated a half share to his wife Sellammah. Sellammah died leaving as her heirs two brothers and a sister, namely Sathasivam the 2nd defendant, and Ponnampalam and Sellatchipillai. Ponnampalam and Sellatchipillai by deed No. 4985 dated 15.7.1967 (P 7) transferred their interests to Sinnathamby the plaintiff. Eliyathamby by deed No. 124 dated 29.3.1967 (1 D 8) transferred his interests to Kandasamy the 1st defendant. Accordingly the plaintiff allotted 2/6 share to himself, 3/6 share to the 1st defendant, and 1/6 share to the 2nd defendant.

The 1st defendant whilst admitting that Kathiripillai Eliyathamby became entitled to the entirety of the land by virtue of deed No. 11672 (P 6) and deed No. 1403 (1 D 3), as stated in the plaint, denied that deed No. 1735 (1) by which the plaintiff states that Eliyathamby gifted a half share to his wife Sellammah was a genuine deed, and hence as stated in deed No. 124 (1 D 8) the entirety of the land passed to the 1st defendant.

Thus the main question that came up for adjudication was whether deed No. 1735 was a genuine deed. When the defendant pleaded that deed No. 1735 was not a genuine deed, I believe that what the defendant meant was that it was not a deed executed by Eliyathamby. The 1st defendant pleaded a further matter, namely, that deed No. 1735 was void as against deed No. 124 by virtue of priority of registration. The other matter pleaded in the 1st defendant's answer was that Sellammah left an administrable estate, and that the plaintiff could not maintain this action without administering her estate. Issues were raised to cover these three positions, and these three positions only, and the learned District Judge held with the plaintiff on all these three points. In appeal the question of non-administration of Sellammah's estate was not pursued, and no arguments in that behalf were addressed to us.

The evidence is that Sellammah died in 1959, and till her death she lived on this land with her husband Eliyathamby. The obvious likelihood is that the original of deed No. 1735 would have been in the house and in the control of her husband Eliyathamby. Eliyathamby who purported to transfer the entirety of the land after his wife's death to his nephew the 1st defendant, who now lives with him in the house on this land would not make available to the plaintiff the original of deed No. 1735. The plaintiff applied to the Land Registry for a certified copy of this deed, but found that the duplicate of this deed which would be in the Land Registry if it was tendered for registration was not available there. The plaintiff hence sought to prove the execution of deed No. 1735 by the production of the protocol kept by the Notary. The Notary Mr. Kananpathipillai gave evidence regarding the execution of deed No. 1735, and he stated that instructions to draw up that deed were given to him by Eliyathamby whom he knew by that time, having done some professional work for him earlier, and he also testified that Eliyathamby signed that deed as the donor. This evidence has been accepted by the learned District Judge. Learned

counsel for the defendant-appellant has not been able to adduce any substantial grounds for us to differ from the findings of the learned District Judge regarding the evidence of the Notary Mr. Kanapathipillai. Thus it has been established that the original and the duplicate of deed No. 1735 have been destroyed or lost. That such a deed was executed has been proved by the evidence of the Notary and by the production of the protocol of that deed. Arguments were addressed to us that the protocol kept by the Notary cannot be considered an original document, and hence the execution of the deed cannot be proved by the production of the Protocol. It is the standard practice in this country that a notary executes a deed in triplicate, and all three copies are attested by him. Usually, as in the case of this deed, the executant declares that he has set his hand to three copies of the same tenor. The question would then arise whether in terms of section 62 of the Evidence Ordinance read with explanation 1 thereto, all three copies of a deed including the protocol are not original documents in terms of the Evidence Ordinance. But however it is not necessary to decide that question in this case because in any event the original and the duplicate contemplated in the Notaries Ordinance have been lost or destroyed, and hence secondary evidence, in fact any secondary evidence, of its contents is admissible under the provisions of section 65 of the Evidence Ordinance. Thus the protocol of deed No. 1735 is admissible as secondary evidence of the contents of deed No. 1735. The defendant produced two deeds namely deed No. 1225 dated 15.8.1955 (1 D 6) and deed No. 1409 dated 21.4.1956 (1 D 7), both of which are mortgage bonds for this very same land given by Eliyathamby and his wife Sellammah wherein no title is pleaded from deed No. 1735. Those deeds were produced to show that deed No. 1735 was not a genuine deed. It is now sought to be argued that these deeds show that there was no acceptance of deed No. 1735 by Sellammah. I shall refer to the question of acceptance later. But the fact remains that at the time of the production of these two deeds 1 D 6 and 1 D 7, the question of acceptance was not in the contemplation of the parties. But if the intention of the defendant at the time he produced these two deeds was to show that deed No. 1735 was not a genuine deed, he has failed by their production to dislodge the learned District Judge's confidence in the evidence of the Notary Mr. Kanapathipillai. The execution of deed No. 1735 has therefore been proved.

On the question of registration all the relevant extracts of encumbrances from the Land Registry have been produced. The earliest registration in respect of this land is in Volume A 57, folio 255, which is continued at A 126/293, which is continued at A 211/175, which is continued at A 431/144, which is continued at A 206/175.

The first deed in the chain of title proved in this case, namely deed No. 21593 dated 20.08.1930 is registered at Volume A 211, folio 175, which is a due continuation from the original registration. The next two deeds in the chain of title, namely, deed No. 11672(P 6) and deed No. 1403 (1 D 3) are registered in the same folio. This folio is continued at A 371/144. But the original of this folio like the duplicate of deed No. 1735 (P 1) and several other documents in the Land Registry pertaining to this case is missing. These documents have most probably been destroyed by an interested party. Folio A 371/144 is continued at folio A 206/175. This is the folio in which deed No. 124 dated 29.03.1967 (1 D 8) is registered. This is the deed by which Eliyathamby transferred the entirety of the land to the 1st defendant. In these extracts of encumbrances which have been produced from the Land Registry deed No. 1735 in favour of Sellammah does not appear. On the strength of these documents of registration the first defendant has sought to claim title by virtue of priority of registration.

This claim of the 1st defendant could have been met by the plaintiff only if deed No. 1735 (P 1) had been registered in the missing folio A 377/144. This deed was executed by the Notary, Mr. Kanapathipillai on 13.03.1948. But however the Notary did not submit it for registration that month because by the time he sent his duplicates for that month for registration this deed, being a deed of gift, had not yet been accepted.

When a deed is presented for registration, the first thing that the Registrar does is to enter the particulars of that deed in a Day Book maintained under the Registration of Documents Ordinance. In the Day Book the date and the time of receipt of a deed are entered in serial numbers. This is to prevent the registration of deeds submitted for registration later than the deed submitted earlier passing undetected. The other particulars entered in the Day Book are the nature of the deed, its number and date, the name of the attesting

Notary, and the value on the deed. After registration there is provision in the Day Book to enter the Division, Volume and Folio in which the deed has been registered. The Day Book entry will thus be very satisfactory secondary evidence to establish the contents of a lost or destroyed folio of the Register of Lands.

The plaintiff has been able to produce a certified extract of the Day Book relevant to the deed P 1. This document has been produced marked P 2. In P 2 the time of receipt of deed No. 1735 is given as 1.45 p.m., the serial number is given as 10049, the nature of the deed is given as 'gift', the number and date of the deed are given as 1735 dated 13.03.1948, and the name of the Notary is given as P. Kanapathipillai. Thus this Day Book entry is proof of the fact that deed of gift P 1 has been sent for registration. There is also an entry in the Day Book extract P 2 that this deed has been registered at folio A 377/144. That is the missing folio from which the folio in which the deed in favour of the defendant is registered is a continuation. However P 2 does not contain the date of the Day Book entry. It was submitted by counsel for the appellant that it may be possible that this Day Book relates to a later date, and some interested party got deed P 1 registered in some vacant space in the register at folio A 371/144, and thereafter had that folio and the page carrying the date of the Day Book entry destroyed in order to prevent the detection of his fraud, and to claim due registration. But there is ample documentary evidence that belies such a possibility. The 1st defendant himself produced marked 1 D 20, pages 112 to 118 of the Day Book for the period 21.05.1948 to 25.05.1948. This document shows that first the date is entered across the page, and under that date all the entries for the day are entered; thereafter the next date is entered also across the page and under that date all the entries for that day are entered, and so on. Document 1 D 20 ends at 25.05.1948, and the evidence of the officer from the Land Registry is that some pages of the Day Book prior to the entry of deed No. 1735 have been removed. The last serial number under date 25.05.1948 is No. 10001. The Day Book extract P 2 begins at serial No. 10040, and deed No. 1735 itself is at serial No. 10049. Hence it appears that the date of P 2 must be just a few days after 25.05.48. The donee on P 1 signed the acceptance on 19.05.48, and the deed has been sent for registration shortly after 25.05.48. The registration of the 1st defendant's deed is in 1967, nineteen years later. Furthermore the plaintiff produced marked P 4 an extract to the index

to the land register in respect of this land. That is the index for the period 29.10.38 to 17.07.51. There it is shown that Sellammah has been registered as the owner of this land and that the registration is at folio A 377/144, and that was long before the defendant's deed was executed. It is patently clear that in spite of all the obstacles placed in his way, the plaintiff has proved the due execution and due registration of deed P 1. Deed P 1 prevails over deed 1 D 8 both by priority of execution and priority of registration.

After the trial was concluded counsel for the parties filed written submissions. There for the first time counsel for the 1st defendant submitted that the plaintiff had failed to prove that the deed of gift had been accepted. It should be observed that in the course of the trial this question was never raised. The only question raised by the 1st defendant regarding the deed of gift P 1 was whether it was a deed executed by Eliyathamby. The only issue raised by the 1st defendant on deed P 1 is :

"Did K. Eliyathamby execute deed No. 1735 dated 02.12.1948?"

There is acceptance on the face of deed P 1, and the only challenge by the defendant to the plaintiff was to prove the execution of deed P 1 by Eliyathamby. This the plaintiff has done, and I do not think that it is open for the defendant thereafter to raise any other matter about deed P 1. My view on this matter finds support in the judgment in the case of *Hemapala v. Abeyratne* (1). There it was held that where a defendant had put the plaintiff to proof of a deed in the answer, but no issue was raised at the trial as regards its due execution and the deed was marked in evidence, and when the case for the plaintiff was closed his counsel read the deed in evidence with other documents, it was too late to raise the plea in appeal that no evidence has been called to prove the due execution of the deed in terms of sections 68 of the Evidence Ordinance.

In this case the evidence of the Notary, Mr. Kanapathipillai and the evidence of the officers of the Land Registry were led first, and through them the protocol of deed No. 1735, and the certified copies of the Day Book, the Extracts of encumbrances, and the copy of the Index of the Land register had been produced. The 1st defendant then had the opportunity of raising the only other defence available to him, namely the defence of acceptance as an issue. This he has not done,

and thereafter he cannot be allowed to do so without notice to the plaintiff. For these reasons I hold that the 1st defendant cannot be permitted to raise this belated plea that the plaintiff has failed to prove the signature of Sellammah as the acceptor on deed P1.

In the result the appeal of the 1st defendant is dismissed with costs fixed at Rs. 525.

H. A. G. DE SILVA, J. – I agree.

Appeal dismissed.
