

**MALLIKA FERNANDO**

**v.**

**NAGESH FERNANDO**

COURT OF APPEAL  
JAYAWICKRAMA, J.  
C.A. 979/97  
D.C. COLOMBO 16894/L  
FEBRUARY 16, 2001  
MARCH 26, 2001

*Civil Procedure Code - S.147 - Raising of Issues - Issue of Law - Validity of a Deed - Registration of condominium property - Is it imperative - Apartment Ownership Law - S.3(1), 20(1) - Should the validity of the Deed be decided, on both of law and of fact.*

**Held :**

- (i) The registration of condominium property is not imperative under the Apartment Ownership law.
- (ii) Non registration will not invalidate a deed, though it may lead to other legal consequences, it will not affect the legal rights of the owners of such property.
- (iii) The entire question regarding the Issues 11, 12, 13 rests on the question of validity of Deed 854, whereby both the Plaintiff and the Defendant get rights by way of gift to which they have affixed their signatures. This is a matter which the Court has to decide after a proper trial.

**Application** in Revision from an Order of the District Court of Colombo.

**Cases referred to:**

1. *Pure Beverages Ltd., vs. Shamil Fernando* - 1997 - 3 SLR 202.
2. *Muthukrishnan vs. Gomes* - 1994 - 3 SLR 1.

Romesh de Silva, P.C., with Geethika Gunawardena for Defendant Petitioner.

Ranjan Suwandarathne for Plaintiff Respondent.

*cur adv vult.*

May 15, 2001

**JAYAWICKRAMA, J.**

This is an application to revise and set aside the order of the learned Additional District Judge of Colombo dated 28. 11. 1997 wherein the learned Additional District Judge answered issues No. 11, 12 and 13 in favour of the Plaintiff-Respondent and fixed the case for hearing of evidence.

The Plaintiff instituted this action against the Defendant who is the Plaintiff's step mother seeking *inter alia* for a declaration of title to the 1<sup>st</sup> and the 2<sup>nd</sup> floors of the three storied building bearing No. 110/1 described in the schedule to the plaint.

When the trial taken up on 15. 03. 1996 admissions and the issues were recorded and on 15. 09. 1997 it was decided that issues No. 11, 12 and 13 be answered as questions of law. Thereafter written submissions were tendered by both parties and the learned Additional District Judge answered the issues in favour of the Plaintiff and decided to proceed with the trial. The question to be decided by the learned Additional District Judge in respect of issues 11, 12 and 13 was that whether the Deed No. 854 dated 25. 01. 1992 by which the Plaintiff claims title to this property was a valid deed in view of the provisions of the Apartment Ownership Law No. 11/73. Deed No. 854 is a deed of gift whereby the donor, the father of the Plaintiff and the husband of the Defendant gifted the ground floor with two garages to the Defendant and her minor son and the 1<sup>st</sup> and the 2<sup>nd</sup> floors to the Plaintiff. These deeds were signed by the Plaintiff and the Defendants as donees accepting the gift. The Defendant who was a signatory to the deed is challenging the validity of this deed.

On behalf of the Defendant issues were raised challenging the validity of deed No. 854 on the basis that it was not registered under the provisions of section 3 of the Apartment Ownership Law.

Learned Counsel for the Defendant-Petitioner submitted that it was common ground that the said property is not a condominium property and therefore the said donor Cyril Fernando had no right to transfer the 1<sup>st</sup> and 2<sup>nd</sup> floors to the Plaintiff. He further submitted that in law a person who owns the land owns every thing that stands on it and the owner of the land owns all rights up to the sky and down below. He further contended that the owner of the land owns all constructions standing on it and that under the Roman Dutch Law whatever was built on the ground of another became the property of the owner of the ground. He further contended that in the circumstances it is clear that one cannot give title separately to the ground floor, 1<sup>st</sup> floor and 2<sup>nd</sup> floor. The learned Counsel further contended that it is for that very reason that the Apartment Ownership Law was brought into effect and under that law it was possible to register condominium units and by such registration of condominium units it was possible to divest oneself's title and/or to hold title to condominium units.

Learned Counsel for the Plaintiff-Respondent submitted that the Petitioner has failed to disclose the fact that when the said case came up for trial before a new Additional District Judge on 15. 09. 1997 that the parties have already adopted the issues raised before the previous trial judge with permission of Court and raised two consequential issues No. 16 and 17 and thereby the Petitioner has suppressed the most crucial material and hence the Petitioner is not entitled to apply for discretionary relief from this Court. The learned Counsel for the Plaintiff-Respondent further submitted that the learned Additional District Judge has carefully considered the submissions made by the parties and answered the issues correctly.

It is to be noted that the entire question regarding the issues No. 11, 12 and 13 rests on the question of the validity of deed No. 854 whereby both the Plaintiff and the Defendant gets rights by way of a gift to which they have affixed their signatures. Therefore it cannot be considered as a preliminary objection on a question of law as this is a matter which the Court has to

decide after a proper trial. The registration of condominium property is not imperative under the Apartment Ownership law. Section 3(1) clearly states that any person claiming to be an owner of any condominium property "may" make application for the registration of a plan of the condominium property. Thus registration is at the discretion of the owner of any condominium property. If a owner does not register a condominium property under the provisions of the Apartment Ownership Law, he may become guilty of an offence under section 21 of the law but it will not affect the owner's rights in respect of the property. An owner may register any condominium property under this law and after registration under section 20(1) of the above law, he may make an application to the District Court to terminate the condominium status of such property and if the District Court allows that application and makes an order terminating the condominium status then the owners of such property shall be deemed to be co-owners of the property in proportion to their respective interests. On a reading of the provisions of the Apartment Ownership Law it is clear that non-registration of condominium property will not invalidate a deed. Non-registration of condominium property may lead to other legal consequences but will not affect the legal rights of the owners of such property. In any case such a question has to be decided by the District Court after a trial. Therefore one cannot say in this instance that the case may be disposed of on the issues of law only.

According to section 147 of the Civil Procedure Code when issues both of law and of fact arise in the same action, and the Court is of opinion that the case may be disposed of on the issues of law only, it shall try those issues first. In this case it is very clear that this case cannot be disposed of on the question of the validity or otherwise of deed No. 854 as the Additional District Judge has observed that this is a matter the Court has to decide after leading of evidence at the trial. In *Pure Beverages Ltd. vs. Shamil Fernando*<sup>(1)</sup>, it was held that "if an issue of law arise in relation to a fact or factual position in regard to which parties are at variance that issue cannot and ought not to be

tried first as a preliminary issue of law. It also needs to be stressed that in a trial of an action the question as to how or in what manner the issues have to be dealt with or tried is primary a matter best left to the discretion of the trial Judge, and a Court exercising appellate or revisionary powers ought to be slow to interfere with that discretion except perhaps, in a case where it is patent or obvious that the discretion has been exercised by the trial Judge not according to reason but according to caprice." In **Muthucrishnan vs. Gomes**<sup>(2)</sup>, it was held that under section 147 of the Civil Procedure Code for a case to be disposed of on a preliminary issue, it should be a pure question of law which goes to the root of the case. It was further held in that case that the Judges of original Courts should as far as practicable, go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading of evidence (apart from formal evidence) can dispose of the case.

In the instant case the validity of deed 854 cannot be decided without leading evidence to that effect. Even though this deed admittedly has not been registered under the provisions of the Apartment Ownership Law the owners could become co-owners of the property on the termination of condominium status. In this case as the Defendant too has signed and accepted the gift in deed No. 854 from which she herself has benefited cannot be invalidated without leading of evidence at a trial. It is question that the Court has to decide whether the Defendant is estopped from denying the validity of the deed as she herself was a signatory to that deed. Thus it is very clear that the non-registration of condominium property under the Apartment Ownership law will not invalidate a deed. These are matters which has to be decided by a Court of law after trial. Thus it cannot be stated that such a complicated question could be decided as a preliminary legal question whereby the case may be disposed of on the issues of law only. The validity of deed No. 854 has to be decided on both of law and of fact. The learned Additional District Judge in a well considered order has decided to proceed with the trial on the

issues raised by the parties. I do not see any valid reason to interfere with the order made by the learned Judge. The learned Judge has considered the provisions of the Apartment Ownership Law and the facts in this case very clearly and come to a correct decision. Therefore this application for revision is dismissed with costs fixed at Rs. 5,000/= payable by the Defendant-Petitioner to Plaintiff-Respondent.

*Application dismissed.*