IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal

Obawath Kankanamage Jinadasa
No.18, Bowala Road,
Mulgampola,
Kandy

Plaintiff

SC Appeal 208/2017
SC/HCCA/LA 238/2016
WP/HCCA/GAM/153/2010 (F)
DC Gampaha Case No. 859/L

Vs

1. Malwa Waduge Bandusoma
2. Manic Pura Hewage Seetha,
   Both of No. 385, 12/1,
   Shanthi Mawatha,
   Kirillawala.

Defendants

AND

1. Malwa Waduge Bandusoma
2. Manic Pura Hewage Seetha,
   Both of No. 385, 12/1,
   Shanthi Mawatha,
   Kirillawala.

Defendant-Appellants

Vs

Obawath Kankanamage Jinadasa
No.18, Bowala Road,
Mulgampola,
Kandy

Plaintiff-Respondent

AND NOW

1. Malwa Waduge Bandusoma
2. Manic Pura Hewage Seetha,
(Appearing by her Power of Attorney holder
Malwa Waduge Bandusoma)
Both of No. 385, 12/1,
Shanthi Mawatha,
Kirillawala.

Defendant-Appellant-
Petitioner-Appellants

Vs

1. Obawath Kankanamage Jinadasa (deceased)
No.18, Bowala Road,
Mulgampola,
Kandy

1A. Manic Pura Waduge Chulani
No.18, Bowala Road,
Mulgampola,
Kandy

Plaintiff-Respondent-
Respondent-Respondent

Before: Sisira J. de Abrew J
Vijith. K. Malalgoda PC J &
Gamini Amarasekara J

Counsel: S.N. Vijithsingh for the Defendant-Appellant-Petitioner-Appellants
Sudarshani Corray for the Plaintiff-Respondent-Respondent-Respondent

Argued on : 21.7.2020

Written submission
tendered on : 17.8.2018 by the Defendant-Appellant-Petitioner-Appellants
19.11.2018 by the Plaintiff-Respondent-Respondent-Respondent

Decided on: 9.9.2020

Sisira J. de Abrew, J
Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed this action against the 1st and the 2nd Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellants) seeking a declaration, inter alia, that the Plaintiff-Respondent is the owner of the property in question and to eject the Defendant-Appellants from the property in question. The learned District Judge by her judgment dated 30.8.2010 held in favour of the Plaintiff-Respondent. Being aggrieved by the said judgment of the learned District Judge, the Defendant-Appellants filed an appeal in the Civil Appellate High Court. The learned Judges of the Civil Appellate High Court by their judgment dated 19.4.2016 dismissed the appeal of the Defendant-Appellants. Being aggrieved by the said judgment of the learned Judges of the Civil Appellate High Court, the Defendant-Appellants have

appealed to this court. This court by its order dated 31.10.2017, granted leave to appeal on questions of law set out in paragraphs 12(i),(ii),(iii) and (iv) of the Petition of Appeal dated 27.5.2016 which are set out below.

(i) Whether the learned High Court Judges of the Civil Appellate High Court of Gampaha erred in law by not considering the question that although Princy Smarawickrama did not have the title to the property in question at the time of entering into a lease agreement, since she had the possession of the same, she had the right to lease out the possession of the said property to the Petitioners by Deed of Lease bearing No. 2396 executed on 28.10.1992?

(ii) Despite the aforesaid question No. (i) Whether the learned High Court Judges of the Civil Appellate High Court of Gampaha erred in law by not considering that the lease agreement entered by Princy Samarawickrama with the Petitioners would become effective from 28. 10.1992 for the remainder of the lease for 99 years by applying the principle of exceptio rei vinditae et traditae or from 03.04.1997 once Princy Smarawickrama got the title back?

(iii) Honourable High Court Judges of the Civil Appellate High Court of Gampaha erred in law by holding that after the demise of the life interest holder Princy Samarawickrama the lease agreement would come to an end without considering the fact that the lease agreement is valid for 99 years and would only come to an end after the lapse of 99 years?

(iv) Whether the Honourable Judges of the Civil Appellate High Court of Gampaha erred in law in not considering the evidence placed before them in the correct and proper perspective in all the circumstances of this case?

It has to be noted here that the 1A Plaintiff-Respondent Manic Pura Waduge Chureen, the 2nd Defendant-Appellant Manic Pura Hewage Seetha and Manic Pura Hewage Anulawathi are sisters and daughters of Princy Samarawickrama. Facts of this case may be briefly summarized as follows.

Princy Samarawickrama by Deed of Gift No. 3647 dated 3.5.1988 marked P6 gifted the property in question to her daughter Anulawathi reserving her life interest to the property in question. However, Anulawathi by deed No.2831 dated 3.4.1997 marked P7 transferred the property in question to her mother Princy Samarawickrama. Therefore, it is seen that during the period commencing from 3.5.1988 to3.4.1997, the owner of the property in question was Anulawathi and not Princy Samarawickrama. However, Princy Samarawickrama leased the property in question to one of her daughters Manic Pura Hewage Seetha who is the 2nd Defendant-Appellant by Lease Agreement No.2396 dated 28.10.1992 (marked V1) for a period of 99 years. Thus, when Princy Samarawickrama executed the abovementioned Lease Agreement No.2396 dated 28.10.1992 (marked V1), she was not the owner of the property in question but she was holding the life interest to the property in question. However, said Princy Samarawickrama by Deed of Gift No 123 dated 2.12.1998 marked P8, gifted the property in question to one of her daughters Manic Pura Hewage Chureen who is the 1A Plaintiff-Respondent. (However, in the caption her name has been typed as Manic Pura Waduge Chulani). It has to be noted

here that when Princy Samarawickrama executed the said Deed of Gift No 123 dated 2.12.1998 marked P8, she was the owner of the property in question and she did not retain the life interest to the property in question. Thereafter said Manic Pura Hewage Chureen by Deed of Gift No.14523 dated 20.8.2003 marked P9 gifted the property in question to her husband Obawath Kankanamage Jinadasa who was the original Plaintiff-Respondent in this case. However, Princy Samarawickrama continued to occupy the property in question even after she gifted it to her daughter Chureen.

The Plaintiff-Respondent claims the property in question on the strength of the Deed of Gift No 123 dated 2.12.1998 marked P8 and the Deed of Gift No.14523 dated 20.8.2003 marked P9. The Defendant-Appellants claim the property in question on the strength of Lease Agreement No.2396 dated 28.10.1992 (marked V1). At the time that the Lease Agreement No.2396 dated 28.10.1992 (marked V1) was executed Princy Samarawickrama was not the owner of the property in question but was only holding the life interest to the property in question. At the time of the execution of the said Lease Agreement No.2396 dated 28.10.1992, the owner of the property was Anulawathi. At the time that the Deed of Gift No 123 dated 2.12.1998 marked P8 was executed Princy Samarawickrama was the owner of the property in question.

The most important question that must be decided in this case is whether Lease Agreement No.2396 dated 28.10.1992 (marked V1) has been proved in court. I now advert to this question. As I pointed out earlier, when Princy Samarawickrama signed the Lease Agreement No.2396 dated 28.10.1992 (marked V1), she was not the owner of the property in question and that she was only having the life interest to the property. Thus, Princy Samarawickrama is

alleged to have signed the Lease Agreement No.2396 dated 28.10.1992 (marked V1) apparently relying on the life interest to the property. The Lease Agreement No.2396 dated 28.10.1992 (marked V1) is for a period of 99 years. Princy Samarawickrama is a mother of at least three daughters. Her life interest to the property in question exists only up to her death. Thus, can it be believed that she executed a lease agreement for a period of 99 years knowing very well that she would not live for next 99 years? Therefore, this story of 99 year lease does not tally with the test of probability. In my view it is difficult to believe that Princy Samarawickrama executed a Lease Agreement No.2396 dated 28.10.1992 (marked V1) for a period of 99 years.

The Notary Public who attested the Lease Agreement No.2396 dated 28.10.1992 (marked V1) is W.D. Padmasiri Perera. He, in his attestation of Lease Agreement No.2396 dated 28.10.1992 (marked V1), does not say that he knows Princy Samarawickrama. The two attesting witnesses Weerapulige Donald Ackmon and Abdul Carder have not given evidence. W.D. Padmasiri Perera, the Notary Public in his evidence says that he does not know Princy Samarawickrama personally. He further, in his evidence, says that he, in his attestation, has not stated that he knew Princy Samarawickrama and if he knew her, it would have been stated in the attestation. Under these circumstances the question arises whether Lease Agreement No.2396 dated 28.10.1992 (marked V1) has been proved. In considering this question Section 68of the Evidence Ordinance is relevant. Section 68of the Evidence Ordinance reads as follows.

> *"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."

In Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560 Basnayake CJ held as follows.

"A Notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance."

In Marian Vs Jesuthasan 59 NLR 348 Sinnetamby J held as follows.

"Where a deed executed before a notary is sought to be proved, the Notary can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant."

In Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560 Basnayake CJ delivered the judgment on 6.7.1956. In Marian Vs Jesuthasan 59 NLR 348 Sinnetamby J delivered the judgment on 20.7.1956. Therefore, it is seen that Sinnetamby J delivered the judgment after Basnayake CJ delivered the judgment in Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560. I would like to follow the judgment in the case of Marian Vs Jesuthasan (supra).

In the case of Ramen Chetty Vs Assen Najna [1909] Current Law Reports of Ceylon 256 Hutchinson CJ and Middleton J held as follows.

"The evidence of the Notary who attested a document, to the effect that the signatory and the witnesses signed in his presence and in the presence of one another, is not sufficient to prove the document, where the

signatory was not known to the Notary. To prove a document, whether notarially attested or otherwise, it must be proved that the signature of the signatory is in his handwriting."

Section 31(9) of the Notaries Ordinance reads as follows

"He shall not authenticate or attest any deed or instrument unless the person executing the same be known to him or to at least two of the attesting witnesses thereto ; and in the latter case, he shall satisfy himself, before accepting them as witnesses, that they are persons of good repute and that they are well acquainted with the executant and know his proper name, occupation, and residence, and the witnesses shall sign a declaration at the foot of the deed or instrument that they are well acquainted with the executant and know his proper name, occupation, and residence."

Sinhala version of Section 31(9) of the Notaries Ordinance reads as follows.

යම් ඔප්පුවක් හෝ නීත්‍යානුකූල ලේඛනයක් ලියා අත්සන් කරන තැනැත්තා හෝ ඔප්පුවට හෝ නීත්‍යානුකූල ලේඛනයට සාක්ෂි දරන සාක්ෂිකරුවන් යටත් පිරිසෙයින් දෙදෙනකු තමා දනිතහොත් මිස ඒ ඔප්පුවේ හෝ නීත්‍යානුකූල ලේඛනයේ තත්‍යභාවය සහතික කිරීම හෝ එය ලියා සහතික කිරීම ඔහු විසින් නො කළ යුතු ය: තව ද පසුව සඳහන් කළ අවස්ථාවේ දී ඒ සාක්ෂිකරුවන්, සාක්ෂිකරුවන් වශයෙන් පිළිගැනීමට පෙර ඔවුන් හොඳනමක් ඇති අය බවට ද ලියා අත්සන් කරන්නා හොඳින් හඳුනන බවට ද ඔහුගේ නියම නම, රක්ෂාව සහ පදිංචි ස්ථානය ඔවුන් දන්නා බවට ද නොතාරිස් සැහිමට පත් විය යුතු අතර, ලියා අත්සන් කරන්නා තමන් හොඳින් දන්නා බවට සහ ඔහුගේ නියම නම, රක්ෂාව සහ පදිංචි ස්ථානය තමන් දන්නා බවට ඒ සාක්ෂිකරුවන් විසින් ඔප්පුවෙහි හෝ නීත්‍යානුකූල ලේඛනයෙහි පහතින් ප්‍රකාශනයක් අත්සන් කළ යුතු ය.

Applying the principles laid down in the case of Marian Vs Jesuthasan (supra) and Ramen Chetty Vs Assen Najna (supra), I hold that when a deed executed

before a Notary Public is sought to be proved in evidence, the Notary Public can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance only if the following matters are satisfied.

1. There must be evidence from the Notary Public to the effect that he knew the executant personally at the time the executant placed his signature on the deed OR that he (the Notary Public) knew the attesting witnesses personally and the attesting witnesses knew the executant personally.

2. There must be evidence from the Notary Public to the effect that the signature found in the deed is the signature of the executant.

3. There must be evidence from the Notary Public to the effect that two attesting witnesses placed their signatures in his presence.

In the present case, although the Defendant-Appellants sought to prove the Lease Agreement No.2396 dated 28.10.1992 (marked V1), they did not call any of the attesting witnesses to give evidence. The Notary Public who attested the said deed says, in his evidence, that he does not know the executant personally.

When I consider all the above matters, I hold that the Lease Agreement No.2396 dated 28.10.1992 (marked V1) has not been proved in accordance with Section 68 of the Evidence Ordinance and it cannot be used as evidence in this case.

The next question that must be considered is whether the Deed of Gift No.123 dated 2.12.1998 (P8) executed by Princy Samarawickrama has been proved or not. I now advert to this question. The Notary Public who attested the Deed of Gift No.123 dated 2.12.1998 is T.H.D. Upul Deshappriya. He has, in his attestation, stated that he knows the donor Princy Samarawickrama, donee Manic Pura Hewagw Churanee and two attesting witnesses Ranasinghe

Archchige Don Somapala Ranasinghe and Manic Pura Hewagw Sriyani. T.H.D. Upul Deshappriya the Notary Public in his evidence too has stated that he knows the donor and donee in Deed of Gift No.123 dated 2.12.1998 and that the donor, the donee, and the two attesting witnesses placed their signatures in his presence. Manic Pura Hewagw Sriyani, one of the attesting witnesses in Deed of Gift No.123, in her evidence says that she is a daughter of Princy Samarawickrama and she signed as a witness in Deed of Gift No.123 dated 2.12.1998. When I consider all the above matters, I hold that Deed of Gift No.123 dated 2.12.1998 has been proved and it is an act and a deed of Princy Samarawickrama. Therefore, I hold that Princy Samarawickrama has gifted the property in question to her daughter Manic Pura Hewagw Chureen by Deed of Gift No.123 dated 2.12.1998. When Princy Samarawickrama gifted the property in question to her daughter Manic Pura Hewagw Chureen by Deed of Gift No.123 dated 2.12.1998, she did not retain the life interest of the property in question.

Manic Pura Hewagw Chureen, by Deed of Gift No.14523 dated 20.8.2003 marked P9 has gifted the property in question to her husband Obawath Kankanamage Jinadasa who is the original Plaintiff in this case. According to paragraph No.10 of the Answer of the Defendant-Appellant, the Deed of Gift No.14523 dated 20.8.2003 has been challenged on the basis that Deed of Gift No.123 dated 2.12.1998 was not an act and a deed of Princy Samarawickrama. I have earlier held that Deed of Gift No.123 dated 2.12.1998 was an act and a deed of Princy Samarawickrama. Thus, the Defendant-Appellant cannot challenge the Deed of Gift No.14523 dated 20.8.2003.

Further, the Defendant-Appellants argue that since the life interest of the property in question was reserved by Princy Samarawickrama when she executed the Deed of Gift No.3647 dated 3.5.1988 (P6) giving the property in question to her daughter Anulawathi, the life interest of the property in question was remaining with her and that the Defendant-Appellants are entitled to the benefit of the Deed of Lease Agreement No.2396 dated 28.10.1992 (V1) at the time of institution of this action. This argument does not hold water since this court holds that the said Deed of Lease Agreement No.2396 dated 28.10.1992 (V1) was not proved and further, no life interest of the property in question was retained by said Princy Samarawickrama when she executed the Deed of Gift No.123 dated 2.12.1998 (P8).

Considering all the above matters, I would like to make the following observation. Any act performed, on the strength of life interest to a property, by the life interest holder such as leasing of the property comes to an end with the demise of the life interest holder or when the life interest holder renounces the life interest to the property.

In the present case, Princy Samarawickrama by Deed of Gift No. 3647 dated 3.5.1988 gifted the property in question to her daughter Anulawathi retaining the life interest to the property in question. Princy Samarawickrama acting on the life interest to the property in question is alleged to have executed deed of Lease Agreement No.2396 dated 28.10.1992 for a period of 99 years in favour of the 2nd Defendant-Appellant. Thereafter, said Anulawathi, by deed No.2831 dated 3.4.1997, transferred back the property in question to Princy Samarawickrama and thereby she again became the owner of the property in question. Thereafter, Princy Samarawickrama as the owner of the property in question, by Deed of

Gift No.123 dated 2.12.1998 gifted the property in question to her daughter Manic Pura Hewage Chureen who is the 1A Plaintiff-Respondent **without retaining the life interest to the property in question**. Thus, when Princy Samarawickrama executed the Deed of Gift No.123 dated 2.12.1998, she has renounced her life interest to the property in question. I have already held that it was not proved that Princy Samarawickrama executed the deed of Lease Agreement No.2396 dated 28.10.1992 for a period of 99 years. She has, by Deed of Gift No 123 dated 2.12.1998, renounced her life interest to the property in question. Since the Lease Agreement No.2396 dated 28.10.1992 which is alleged to have been executed by Princy Samarawickrama has not been proved, when she signed the Deed of Gift No.123 (2.12.1998) full title goes to the donee of Gift No.123. Thus, the Defendant-Appellants will not be entitled to the benefit of the Lease Agreement No.2396 dated 28.10.1992 alleged to have been executed by Princy Samarawickrama.

Considering all the aforementioned matters, I hold that the Plaintiff-Respondent has proved that the owner of the property in question is the Plaintiff-Respondent.

For the above reasons, I hold that the judgment of the learned District Judge deciding the case in favour of the Plaintiff-Respondent is correct and that the learned Judges of the Civil Appellate High Court were correct when they dismissed the appeal affirming the judgment of the learned District Judge.

I have earlier held that the Lease Agreement No.2396 dated 28.10.1992 (marked V1) has not been proved. Therefore, any rights alleged to be emanating from the said Lease Agreement cannot be considered by courts. In view of the conclusion reached above, I answer the above questions of law in the negative.

For the aforementioned reasons, I affirm the judgment of the learned Judges of the Civil Appellate High Court dated 19.4.2016 and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

Vijith. K. Malagoda PC J

I agree.

Judge of the Supreme Court.

Gamini Amarasekara J

I agree.

Judge of the Supreme Court.