NAMALEE AND OTHERS
VS.
JINORIS

COURT OF APPEAL.
WIJEYARATNE, J.
CA 1120/2003 (F)
DC PANADURA 1554/L.
OCTOBER 31, 2005.
DECEMBER 12, 2005.

Action to set aside Deed-Misdirection on the preliminary facts-Evidence Ordinance Section 101, Section 102- Burden of proof of the fraud asserted? - Corroboration?- Failure of defendant to give evidence of inferences?- Civil Procedure Code, Section 163

The Plaintiff-respondent instituted action seeking to set aside a deed of gift. It was the position of the plaintiff-respondent that, the 2nd defendant-appellant on the pretext of helping the plaintiff-respondent to obtain compensation for the portion of the land acquired made false and fraudulent representations to the plaintiff-respondent who is an old and feeble person and got him to sign the impugned deed without knowing that he is signing documents to convey a land belonging to him. The defendant-appellant denied the position taken up by the plaintiff-respondent. The trial Court held with the plaintiff-respondent.

HELD:

(1) There was a serious misdirection on the primary facts which vitiate the judgment.

(2) The trial Judge failed to observe the character of the witness who tended to change his version to suit the occasion.

(3) If the statement of claim alleges a case of fraud, and the right to relief rests upon that fraud only, the action will be dismissed, if the fraud as alleged is not proved and the onus of proving fraud lies upon the person who alleges it and does not lie on the defendant to prove the negative.

(4) The trial Judge erred in awarding damages, when he concluded that damages are not proved.

(5) The trial Judge has failed to consider that the plaintiff-respondent has failed to make out a case of fraud as alleged and therefore there is no legal obligation on the part of the 2nd defendant or any other defendant-appellant to explain by adducing evidence, what is not established.

APPEAL from the judgment of the District Court of Panadura.

Cases referred to :

1 *Ranchagoda vs. Viola* – 1999-2 Sri LR 1

2 Citizen Standard Life Insurance *Company vs. Gillery Taxes – Civil Appeal* – 521 SW 2d.

3 *Toker vs. Toker* – 1863. The Law Times Vol. VIII page 525

4 *Dona Caralina vs. Jayakody*-33 NLR 165

5 *Edrick de Silva vs. Chandradasa de Silva* – 70 NLR 169 at 174

Nihal Jayamanne PC with *Ajith Munasinghe* for 1st and 2nd defendant-appellants.

Ranjan Suwandaratne with Mahinda Nanayakkara for plaintiff-respondent.

Cur.adv.vult.

March 3, 2006.

WIJEYARATNE, J.

The plaintiff-respondent instituted action against the 1st to 3rd defendant-appellants seeking a declaration that deed of Gift No. 167 dated 12.08.1999 attested by Lilan Indith Weerasuriya, Notary Public is a fraudulent deed which does not convey any right or title to the 1st defendant and the same is void and has no force or effect in law and to eject the defendants from the premises described in the schedule to the plaint and recover damages. The plaint further sought injunctive relief preventing the defendants from building thereon. The cancellation of the deed was sought on the premises described morefully in paragraphs 6 and 7 of the plaint and paragraphs 7 and 8 in the

accompanying affidavit of the plaintiff-respondent to wit; that the 2nd defendant-appellant on the pretext of helping the plaintiff-respondent to obtain compensation for the portion of the land acquired made false and fraudulent representations made to the plaintiff-respondent who is an old and feeble person, got him to sign these documents without knowing that he is signing a document to convey the land described in the schedule and believing that the 2nd defendant-appellant genuinely attempted to help him sign these documents which he later found to be in the form of a deed of gift bearing No. 167 referred to above.

The plaintiff-respondent obtained an order from the Court enjoining the defendants-appellants from building on the land in suit and upon service of such order, notice of injunction and the summons in the case the defendants filed answer refuting the allegations and stating that deed No. 167 was a genuine deed whereby the plaintiff-respondent voluntarily gifted the land in suit to his niece, the 1st defendant-appellant who is the daughter of the 3rd defendant-appellant and the wife of the 2nd defendant-appellant. They also showed objections to the issue of interim injunction. The Court after inquiry into the matter of application for interim injunction refused the same and vacated the enjoining order already issued. Thereafter when the case came up for trial, the parties having recorded four admissions, suggested several issues for trial and on the subsequent date recorded a further admission to the effect that the plaintiff-respondent did not dispute the signature appearing on page three of the impugned deed No. 167 marked P7 or V3.

Thereafter the plaintiff-respondent, two official witnesses and the plaintiff-respondent's daughter testified for the prosecution reading in evidence documents marked P1 to P10. At the close of the Plaintiff-Respondent's case, on behalf of defendants-appellants evidence of the surveyor who surveyed the land and prepared the plan referred to in the deed, an official from the local authority which approved the plan and the attesting notary and one attesting witness were adduced. Upon conclusion of proceedings the learned District Judge having answered the several issues the way he did, entered judgment in favour of the plaintiff-respondent granting all the reliefs claimed including damages which the learned District Judge himself held not to have been proved. Being aggrieved by the said judgment dated 29.09.2003 the defendants-appellants lodged this appeal.

When the appeal was argued it was urged on behalf of the appellants that the learned District Judge has failed to consider, analyze and evaluate evidence in their correct perspective, made erroneous findings not supported by any evidence, acted on assumptions rather than on evidence and erred in fact and law especially with regard to the burden of proof and corroboration.

On a perusal of evidence on record and the Judgment, it is apparent that the learned District Judge has proceeded on the basis that the land in suit abuts Galle-Colombo Main Road (*Vide* Page 1 and 9 of the Judgment) and lost sight of the fact that the land in suit is situated at Kesbewa and misdirected himself on the primary fact of location of the land which vitiated the judgment impugned. In *Ranchagoda vs. Viola*[1] the Supreme Court held :

"The District Judge had failed to appreciate that according to the plaintiff lots 1 and 2 which found the subject matter of the action were not paddy lands. This was a serious misdirection on the primary facts which vitiate the judgment of the District Court."

The learned District Judge answered issue No. 2 to the effect whether the plaintiff was old and feeble, in the affirmative when the evidence on record touching the fitness or health condition is limited to the bare statement of the plaintiff-respondent only and there is absolutely no other evidence led on the subject. The unequivocal evidence of the plaintiff-respondent was that about the time he signed the documents, though he was of the age of 75 years he was in good health and he cycled distance over 1 ½ miles daily to reach the land in suit. With this specific statement of the plaintiff and in the absence of any other evidence the learned District Judge misdirected himself as to the health condition of the plaintiff-respondent that led him to answer the issue to the effect that he was feeble and based on such erroneous conclusion, he proceeded to consider evidence of alleged misrepresentation and fraud.

The Plaintiff-Respondent had presented the plaint on the basis that the 2nd defendant who is his close relation made false representation that he would facilitate obtaining compensation for the land acquired and fraudulently obtained his signature to these documents which later

turned out to be the impugned deed of Gift No. 167. However when called upon to describe the incident of his signing documents the plaintiff-respondent stated that the 2nd defendant-appellant who kept a bottle of kerosene oil under the chair, threatened to set fire to the deeds and compelled him to sign the documents without any examination. He categorically stated that he signed the documents through fear (Page 217 of the brief.) He thereby clearly speaks of threat and duress which if proved would affect the validity of the documents so signed. The learned District Judge has completely lost sight of this aspect of the whole episode as described by the plaintiff-respondent.

In the first place it changes the character of the action as pleaded, a case of false representation amounting to fraud being converted to a case of threat and duress. However even such threat and duress as spoken to by the witness cannot be accepted by a prudent person in view of the fact that he has not mentioned any such threat in two police complaints P 6 and P 8. Nor has he mentioned to any one in authority or otherwise, not even his daughter, of such threat and duress brought upon himself by the 2nd defendant-appellant. As such the learned District Judge correctly analyzing his evidence should have observed the character of the witness tending to change his version to suit the occasion and such tendency would affect his credibility specially in discharging the burden of proof of the fraud he asserts and wishes the Court to give Judgment on in terms of section 101 and 102 of the Evidence Ordinance.

Law of Contracts by C. G. Weeramantry Vol. 1 Page 319 states :

"The onus of proving fraud lies upon the person who alleges it and it does not lie on the defendant to prove the negative."

KERR on the Law of Fraud. 7th Edition page 670 state :

"If the statement of claim alleges case of fraud, and the title to relief rests upon that fraud only, the action will be dismissed, if the fraud as alleged is not proved."

In the case of *Citizen Standard Life Insurance Company Vs. Gillery Taxes*[2] it was held:- "Statements of a cause of action for 'fraud' include

false representation of a present or past fact made by defendant, action in reliance thereupon by plaintiff, and damages resulting to plaintiff from such misrepresentations."

In *Toker vs. Toker*[3] : "There is no general presumption against the validity of gifts as such, and in the absence of any special relation" in which influence is presumed the burden of proof is on the person impeaching the transaction, and he must show affirmatively that pressure or undue influence was employed.

Considering the evidence for the plaintiff-respondent in the light of the above statements on law, the plaintiff-respondent has not established the element of fraud on the part of the 2nd defendant-appellant in the execution of the impugned deed of gift No. 167; nor is there evidence of any other defendant-appellant being guilty of fraud.

On the matter of probability of the 2nd defendant-appellant making such false representations, the plaintiff-respondent's own witness Nandasiri representing the Divisional Secretary's Office gave unequivocal evidence that the matter of obtaining compensation for the land acquired, was personally attended to by the plaintiff-respondent himself who made relevant applications in his own hand writing and collected the amounts payable to him. This creates serious doubt as to there being any necessity for the plaintiff-respondent to seek assistance from any third party, be it the 2nd defendant-respondent or any other person to collect his dues and when there is no such need, it is highly improbable that he would have done any thing, including signing any document at the threat of a third party. The learned District Judge has failed to consider the effect of the evidence of Nandasiri on the probability of the version given by the plaintiff-respondent.

So far as the execution of the impugned deed of gift No. 167, the learned District Judge has seriously misdirected himself on facts and proceeded on the basis of assumptions. Firstly the learned District Judge states that the plaintiff-respondent had no reason to gift the property without reserving life interest or without any monetory consideration being paid. The Learned District Judge has not considered the effect of V2 the signature on which document the plaintiff-respondent admits is "like his signature" but offers no

explanation as to how such a document came into existence. On the other hand, the learned Judge without any supporting evidence concludes that the plaintiff-respondent who gifted land on deed No. 159 within three months has no reason to gift the land in suit on deed No. 167. The gift of deed No. 159 is without reservation of any life interest and the plaintiff-respondent who clearly admitted having executed deed No. 159 had every reason to make such gift not only to his niece the 1st defendant-respondent but also in favour of the 2nd defendant-appellant as well, has escaped the attention, consideration and evaluation on the part of the learned Judge. His conclusion therefore is irrational and lacks any legal or reasonable basis.

On the other hand the learned District Judge who accepts the fact that deed No. 159 was duly executed by the plaintiff-respondent before the same attesting Notary has failed to consider the fact that the plaintiff-respondent has in his evidence categorically stated that he has never met this notary nor did he know him. Their execution according to the attestation of deed No. 159 has taken place barely three months prior to the impugned deed being executed on 12.08.1999 and that denial of any knowledge on the part of the plaintiff-respondent seriously affected his credibility is not considered at all by the trial Judge.

Due execution of the deed No. 167(P7) is testified to by both the attesting notary who unambiguously stated that he knew the plaintiff-respondent and one attesting witness Don Jayasena without any contradiction and no allegation whatsoever of bias was made against any of them. The trial judge has treated that they are not independent witnesses as they have been employed or engaged by the 2nd defendant-appellant. The learned trial Judge has failed to consider the practice that the matter of preparation of the deed and securing due execution of a deed is a matter for the beneficiary of the deed and his procuring witnesses and enlisting the services of a notary of his choice is the done thing. Uncontradictory evidence of the notary and the attesting witnesses against whom there is not at least an allegation of bias, along with the fact of plaintiff-respondent not disputing the signature on page 3 of the deed No. 167 as his, have by accepted norms and standards of proof, amounted to the proof of due execution. The learned trial Judge without any rational basis and on ill consideration of attendant circumstances has concluded that due execution is not proved.

In this regard the learned Trial Judge has seriously misdirected himself on elementary matters of evidence. The notary has unequivocally stated that he knew the plaintiff-respondent as a pensioner over a period of one year; but the learned trial Judge has gone on the basis that the notary did not know the plaintiff-respondent and the witness as having said that the notary visited the 2nd defendants house very often. In fact what the witness has stated is that the lawyer notary often visited the office of the architect behind the house of the 2nd defendant-appellant. The learned Trial Judge has thus seriously misdirected himself on basic facts testified by the witnesses. His findings and conclusions therefore are untenable in law.

With regard to corroboration of the evidence of the plaintiff-respondent the learned trial judge has failed to appreciate that any of his complaints to police prior to action being filed did not make any mention of the episode he described in the witness box. However the learned trial judge has considered the evidence of his daughter, who stated what was told to her by the plaintiff-respondent as corroboration. He has not appreciated the rule that what a witness who is told something by the principal witness afterwards, states, is no corroboration. Vide the decision of *Dona Carlina vs. Jayakody*[4].

However, the learned trial Judge looking for corroboration in the testimony of plaintiff-daughter failed to consider that the incident of threat and duress said to have been brought upon the plaintiff-respondent is not told to his daughter and there is no corroboration on most material aspects of the fraud alleged.

On the matter of damages the learned trial judge who concluded that damages are not proved proceeded to award Rs. 3,000 a month without any evidence or basis of estimation. Therefore the same is not lawful.

Lastly the learned trial judge has commented on the failure of the 2nd defendant-appellant to give evidence. What the learned trial judge failed to consider is that the plaintiff-respondent has failed to make out a case of fraud as alleged, failed to establish the cause of action pleaded in his plaint and therefore there is no legal obligation on the part of the 2nd defendant or any other defendant-appellant to explain by adducing evidence, what is not established Vide. in the case of

Edrick de Silva vs. Chandradasa de Silva[5] at P 174 H.N.G. Fernando C.J. (with the other two Judges agreeing) observed that "..... Section 163 (of Civil Procedure Code) of course does not have the effect that the opposing party must actually lead evidence, and that Judgment against him will follow if he does not. For instance his counsel can in appropriate circumstances be content to submit that the facts proved by the plaintiff do not establish the pleaded cause of action or do not entitle the plaintiff to the remedy he seeks, or that the plaintiff must fail on some ground of law."

For the foregoing reasons I hold that the findings of the learned trial judge are not supported by evidence, nor are they rational or lawful. In the result the Judgment dated 29.09.2003 is set aside and vacated and the plaintiff-respondent's action is dismissed with costs. The appeal is allowed with costs.

Appeal allowed.