HEMATHILAKE
v
ALLINA AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A NO. 81/89 (F)
D.C. NEGOMBO 3410/L
FEBRUARY 12 AND
MARCH 5, 2002

Deed of sale allegedly not duly executed – Validity – Prevention of Frauds Ordinance, section 2 – Notaries Ordinance, sections 31(16) and 33 – Party not giving evidence – Inference – Evidence Ordinance, section 114.

The plaintiff-appellant instituted action seeking a declaration that a particular deed is null and void. It was alleged that the deed was not a deed executed in conformity with the provisions of the Notaries Ordinance and the Prevention of Frauds Ordinance. It was also contended that the trial court did not consider the importance of section 114 of the Evidence Ordinance.

The plaintiff-appellant gave evidence; none of the defendants-respondents gave evidence but called the notary and attesting witness, an attorney-at-law.

The trial court dismissed the plaintiff's action.

On appeal –

Held:

(i) By calling the notary and the attesting witness the defendants-respondents have led the best possible evidence, and that too coming from independent witnesses and in the circumstances there was no necessity to call the 2nd defendant-respondent.

Per Somawansa, J.

> "What section 144 of the Evidence Ordinance provides for is the common sense advice that court may from a proved fact infer another fact which it thinks is likely to be true regard being had to human conduct and common course of natural events."

(ii) The defendants-respondents' position that the deeds were signed by the parties in the presence of the notary and witness is more probable.

(iii) Even if in fact the notary has failed to comply with any provision in section 31 of the Notaries Ordinance, it is well settled law that the validity of the deed is not thereby affected (section 33).

APPEAL from the judgment of the District Court of Negombo

Cases referred to:

1. *Weeraratne* v *Ran Menike* - 21 NLR 286 at 287
2. D.C. Kandy 1986 - Austin's Reports 113

K.S.Tillakaratna for plaintiff-appellant

S.F.A. Cooray with *C. Wijesooriya* for defendants-respondents.

Cur.adv.vult.

July 19, 2002

SOMAWANSA, J.

The plaintiff-appellant instituted action No. 3410/L in the District Court of Negombo seeking for a declaration that deed No. 983 dated 07.06.1982 marked P1 is null and void for one or more reasons stated in paragraph 9 of the plaint and for cancellation of the said deed. It is common ground that the plaintiff-appellant and the defendants-respondents agreed to exchange some of their properties by executing two deeds. The plaintiff-appellant's position was that for this purpose he, the two defendants-respondents and one Kumarathilaka went and met P.P.S. Fernando, attorney-at-law who took out 6 blank deed forms and got the plaintiff-appellant to sign 3 and the two defendants-respondents to sign 3 others and the said Kumarathilaka who had accompanied them to sign all 6 forms as a witness.

When the plaintiff-appellant went to collect the deeds from P.P.S. Fernando, attorney-at-law he was asked to collect them from one Anula Indrasiri, a Notary. When the deeds were collected the plaintiff-appellant found that the two deeds had been attested not by P.P.S. Fernando but by the said Anula Indrasiri and he also found that in deed No. 983 marked P1 by which plaintiff-appellant's rights were to be conveyed to the defendants-respondents also purported to convey in addition to what he agreed to convey, all the

rights the plaintiff-appellant would become entitled to by the final decree in two partition actions. It was his contention that at no time did he agree to part with rights he would become entitled to in the said partition actions. He also averred that in any event deed marked P1 was not a deed executed in conformity with the provisions of the Notaries Ordinance and also was contrary to provisions of section 2 of the Prevention of Frauds Ordinance in that it was not duly attested.

The defendants-respondents, position was that deed marked P1 was a valid document executed by plaintiff-appellant and attested by Anula Indrasiri, Notary Public in accordance with the instructions given by the plaintiff-appellant. In the circumstances they prayed for a declaration that the two deeds executed by the plaintiff-appellant and the defendants-respondents' marked P1 and P2 are valid documents and for the dismissal of the action.

At the trial two issues were raised on behalf of the plaintiff-appellant while two issues were raised on behalf of the defendants-respondents and at the conclusion of the trial the learned District Judge by his judgment dated 29.03.1989 held with the defendants-respondents and dismissed the action of the plaintiff-appellant. It is from the said judgment that the plaintiff-appellant has lodged this appeal.

At the hearing of this appeal, it was contended by the counsel for the plaintiff-appellant that the learned District Judge erred when he failed to act under section 114 of the Evidence Ordinance and draw an adverse inference from the fact that the 2nd defendant-respondent refrained from giving evidence at the trial. It is conceded that though the plaintiff-appellant himself gave evidence in support of his averments none of the defendants-respondents gave evidence; instead they have called the Notary who attested the deed marked P1 and an attesting witness who is an attorney-at-law.

The plaintiff-appellant's allegation is that deed marked P1 does not contain correctly the exchange of lands agreed upon between the plaintiff-appellant and the defendants-respondents. In proof of this allegation the plaintiff-appellant did not produce any documentary evidence and even the oral evidence is confined to

his own evidence. As against this evidence the Notary Public who attested both deeds marked P1 and P2 has given evidence that deeds were prepared according to the instructions given to her by the plaintiff-appellant as well as the defendants-respondents and that she prepared them in her own handwriting in the presence of all the parties while they waited for about two hours or so in her office room at her residence and that the two deeds were read over to the parties including the plaintiff-appellant and without any objections both plaintiff-appellant and the two defendants-respondents signed the deeds. This evidence is entirely corroborated by the evidence of one of the two attesting witnesses P.P.S. Fernando, attorney-at-law. In fact it appears that the 1st defendant had died before the trial started and in any event even though the 2nd defendant-respondent did not give evidence, by calling the Notary and the attesting witness the defendants-respondents have led the best possible evidence and that too coming from independent witnesses have been placed before court by the defendants-respondents. In the circumstances there was no necessity to call the 2nd defendant-respondent to give evidence. What section 114 of the Evidence Ordinance provides for is the common sense advice that court may from a proved fact infer another fact which it thinks is likely to be true regard being had to human conduct and the common course of natural events. The particular facts of each case must be carefully considered before any inference is drawn under section 114 of the Evidence Ordinance. I am inclined to think that much better evidence than the 2nd defendant-respondent himself could have given has been led on behalf of the defendants-respondents. Therefore the plaintiff-appellant's argument that court must act under section 114 of the said Ordinance and draw an adverse inference from the fact that the 2nd defendant-respondent did not give evidence is misconceived and without substance on the facts of this case.

It is also contended by the counsel for the plaintiff-appellant that although the plaintiff-appellant has proved his case on a balance of probability the learned District Judge has held against him by taking into consideration extraneous matters. It was the allegation of the plaintiff-appellant that the deed marked P1 was not prepared in accordance with the instructions given by him. However even the plaintiff-appellant in his evidence has not clearly disclosed

to court what instructions he gave. The plaintiff-appellant alone gave evidence and did not call any other witness. If as he says that the instructions given were not properly embodied in the deed he should have called Kumarathilaka who signed as an attesting witness. In the alternative he could have called the chief priest who it transpired in the plaintiff-appellant's evidence to be equally knowledgeable about the transaction. On the other hand, the Notary who wrote and attested the deeds and one of the attesting witnesses to the deeds were called by the defendants-respondents and their evidence shows that the instructions of the plaintiff-appellant were correctly embodied in the deed marked P1. It appears these two witnesses called by the defendants-respondents had no interest whatsoever to favour one side at the expense of the other or to give false evidence. They were independent witnesses on whose evidence much reliance should be placed. It is conceded that the learned District Judge in his judgment has touched upon certain extraneous matters. However on an examination of the evidence led by both parties he has on a balance of probability come to a correct finding that the plaintiff-appellant has failed to prove his case.

Another matter raised by the counsel for the plaintiff-appellant is that the said two deeds are not in conformity with the mandatory provisions of the Notaries Ordinance as well as section 2 of the Prevention of Frauds Ordinance and accordingly the said deeds should have been set aside by the learned District Judge.

Section 2 of the Prevention of Frauds Ordinance provides that -

> "No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, and no notice, given under the provisions of the *Thesawalamai* Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common

ownership, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses."

To examine whether the two deeds have been executed in conformity with the provisions of section 2 of the Prevention of Frauds Ordinance, we are once again called upon to examine the evidence led in this case by both parties, the evidence of the plaintiff-appellant and the notary and one of the attesting witnesses called by the defendants-respondents.

It is common ground that the plaintiff-appellant and the defendants-respondents along with Kumarathilaka went to meet P.P.S. Fernando, attorney-at-law. According to the plaintiff-appellant the said P.P.S. Fernando took out 6 blank deed forms and got the plaintiff-appellant to sign 3 of them and the defendants-respondents to sign the other 3. Kumarathilaka was made to sign all 6 deed forms. Subsequently the plaintiff-appellant was asked to collect the deed in suit from one Anula Indrasiri, Notary who had attested the said deeds.

If the evidence of the plaintiff-appellant were to be believed then certainly there is no compliance with section 2 of the Prevention of Frauds Ordinance. However according to the defendants-respondents when they went to meet P.P.S. Fernando he informed them that he has no notarial licence and on the following day he directed them to the said Notary Anula Indrasiri at whose residence the deeds were prepared by her in her own handwriting and signed by the parties in the presence of the said Notary and witnesses. The Notary and one of the attesting witnesses spoke to these facts. The learned District Judge having analysed the evidence of the plaintiff-appellant, the Notary and the witness has on a balance of probability correctly preferred to accept the evidence of the Notary and the attesting witness to that of the plaintiff-appellant.

It is also contended by the counsel for the plaintiff-appellant that the Notary has failed to comply with the mandatory provisions of the Notaries Ordinance. Though what the mandatory provisions are not elaborated in the written submissions tendered on behalf of the plaintiff-respondent it appears that the reference would be to provisions contained in section 31(16) of the Notaries Ordinance. Section 31 (16) of the said Ordinance provides that –

> "(a) He shall not authenticate or attest any deed or instrument other than a will or codicil affecting land or other immovable property, unless the deed or instrument embodies therein or in a schedule annexed thereto a description of the said land or other property showing its boundaries (which shall include whenever practicable the names of the lands adjoining it and of their owners), its probable extent and situation (with respect to the town or village, pattu, korale, administrative district, and province), and its name, assessment number, if any:
>
> (b) if such property consists of a share of a land or other property, the deed shall state whether it is a divided or undivided share, and the fractional part which it is of the whole. If it be a divided share, such share shall be clearly and accurately defined by its particular boundaries and extent; if it be an undivided share, the boundaries and extent shall be stated of the land of which it is a share:"

Contention of the counsel for the plaintiff-appellant appears to be that the Notary has failed to comply with the provisions contained in section 31(16) of the Notaries Ordinance in that the Notary has violated the rule that the Notary shall not attest a deed affecting land unless the deed 'embodies therein or in a schedule annexed thereto a description of the said land showing its boundaries, probable extent, situation and its name.'

On an examination of the deed No. 983 marked P1, it is apparent that it does embody a schedule containing a sufficient description of the three lands dealt with by the deed. But there is no reference in the body of the deed to the schedule to the deed.

However one could presume that the lands dealt with by the said deed are none other than the lands described in the schedule thereto. In any event if in fact the Notary has failed to comply with any provisions in section 31 of the Notaries Ordinance, it is well settled law that the validity of the deed is not thereby affected in view of section 33 of the Notaries Ordinance. Section 33 of the Notaries Ordinance provides that –

> "No instrument shall be deemed to be invalid by reason only of the failure of any Notary to observe any provision of any rule set out in section 31 in respect of any matter of form:
>
> Provided that nothing hereinbefore contained shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions of any other written law."

In *Weeraratne* v *Ranmenika*[1] De Sampayo, J observed.:

> "It is well settled that a Notary's failure to observe his duties with regard to formalities which are not essential to due execution, so far as the parties are concerned, does not vitiate a deed. For instance, the absence of the attestation clause does not render a deed invalid. D.C. Kandy, 19,866; D.C. Negombo 575. Similarly, I think the failure on the part of the Notary to have a deed executed in duplicate does not affect its operation as a deed. The case D.C. Kandy 22,401 is an authority on this point. I therefore think that the decision of the Commissioner in this case is erroneous."

In D.C. Kandy 19,886 reported in Austin's Reports 113 –

> "This was an action brought in 1846 upon a deed dated 1938, which deed did not contain the *signature* of the grantor but merely his *mark*, and was attested by a Notary of the District of Four Korales whereas the land mentioned in the deed was situated in the District of Matella, and ought therefore to have been attested (according to the Ordinance, No. 7 of 1834) by a Notary of the District wherein the land was situated.

The court below non-suited the plaintiff, but in appeal *reversed* and case remanded to proceed in due course. It appears from the deed that it is signed by the grantor by a mark, and the mere fact of a deed not being attested &c., by a Notary of the District does not invalidate the deed by the Ordinance, No. 7 of 1840, sec. 14". *Per Stark, December 7, 1848.*". 250

For the above reasons, I see no reason to disturb the judgment of the learned District Judge. Accordingly I dismiss the appeal with costs.

DISSANAYAKE, J. - I agree.

Appeal dismissed.