

Hemapala v. Abeyratne

COURT OF APPEAL,
ABDUL CADER, J. AND VICTOR PERERA, J.
C.A. (S.C.) 239/72 (F)—D.C KALUTARA 1472/L.
JANUARY 25, 1979.

Evidence Ordinance, section 68—Proof of execution of deed—Issue not raised at trial—Can such matter be raised in appeal.

Held

Where a defendant had put the plaintiff to proof of a deed (P1) in the answer but no issue was framed 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 along with other documents, it is too late to raise the plea in appeal that no evidence has been called to prove due execution of the deed in terms of section 68 of Evidence Ordinance.

APPEAL from the District Court, Kalutara.

C. Ranganathan, Q.C., with Ajit Tillekewardene, for the defendant-appellant.

H. W. Jayewardene, Q.C., with Miss P. Seneviratne, for the plaintiff-respondent.

January 25, 1979.

ABDUL CADER, J.

Mr. Ranganathan concedes that prior registration will not avail in this case. He also agrees that prescription does not arise in this case. The next matter in issue would be whether the land conveyed to plaintiff by P1 has been identified to be the land in dispute. On this matter, there was ample evidence on which the District Judge has held that it has been properly identified to be the land conveyed by P1. The name of the land within these four boundaries is in dispute, but it would not be material so long as the land has been properly identified as the land in dispute. In respect of one boundary of this land, there is some doubt because the deed P1 gives the northern boundary as rubber land whereas the plan shows that there is a road to the north. But, in the plan it is described as a new road, and to the north of it is said to be "Formerly rubber land now paddy". Since three boundaries tally and the fourth boundary appears to be correct, we are satisfied that the judgment of the learned District Judge is correct so far as the identity of the land is concerned.

Mr. Ranganathan drew our attention to paragraph 2 of the plaint where P1 is pleaded, and paragraph 2 of the answer which has put the plaintiff to the proof of P1. He states that since no witness has been called to prove due execution in terms of section 68 of the Evidence Ordinance, this Court should hold that P1 has not been proved, and, therefore, the entire case of the plaintiff fails. Though we find that the proof of P1 has been put in issue in the answer, at the trial no issue was framed as regards due execution of P1. In fact, the counsel who appeared for the plaintiff had expressly stated that the plaintiffs do not admit the due execution of deed D8. Even at that stage, the defendant's counsel could have stated that equally the defendant did not admit the due execution of the plaintiff's deed P1. That was not done. When the case was closed for the plaintiff, the plaintiff's counsel read in evidence P1 along with other documents. Even at that stage, this deed was not challenged.

Counsel's written submissions are in the record. There is nothing to indicate in those written submissions that the execution of P1 was challenged. The petition of appeal has been filed without any reference to due execution of P1. In fact, it states that P1 was not challenged. It is too late to raise this issue in this Court, and we do not agree with Mr. Ranganathan that we can go into the question of execution of this deed in appeal.

Mr. Ranganathan now draws our attention to the fact that the decree has been entered following the schedule to the plaint though the Judge has expressly answered issue 6 as follows:—

Lots 2 to 6 comprise the land claimed by the plaintiff and shown as Lot A in Plan 1519.

Therefore we amend the Schedule to read as follows :

All that land called and known as Kirigalmulla situated at Egaloya in Gangaboda Pattu of Pasdun Korale East in the District of Kalutara, Western Province, bounded on the north by new road, east by road to Botale and Ingiriya, south by rubber land belonging to Mr. Ranasinghe, and west by road and Lot B depicted as Lots 2 to 6 in Plan 777 made by M. Setunga which is identical with Lot A in Plan 1519 dated 21.6.69 made by H. Wijesurendra, Licensed Surveyor, in extent 1 Acre 1 Rood 21 Perches together with the buildings including the boutique building standing thereon and the plantations and everything else standing thereon inclusive of the paddy field lying within the said boundaries.

The appeal is dismissed with costs.

VICTOR PERERA, J.—I agree.

Appeal dismissed.

W. D. D. Weerasinghe,
Attorney-at-Law.