

PIYARATNE
v.
CECILYANA DE SILVA AND ANOTHER

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
CA NO. 687/93 (F)
DC MT. LAVINIA NO. 1527/P
NOVEMBER 27, 2000,
FEBRUARY 27 AND
MARCH 29, 2001

Partition action – Mental capacity of donor – Evidence Ordinance, sections 101 and 102 – Is medical evidence necessary? – English Law – Voidable contract.

It was contended that the mother of the 2nd defendant-appellant did not have the mental capacity to grant a gift of the corpus.

Held:

- (1) In the absence of medical evidence, a person who exhibits aberrant and abnormal behaviour cannot be called a deranged or insane person. A person who may be subjected to such irrational behaviour may still be capable of understanding the nature and effect of his act.
- (2) Under the English Law a contract is voidable if one contracting party is to the knowledge of the other, incapable by reason of unsoundness of mind of understanding the nature and quality of his act. The burden of establishing unsoundness of mind of this character is imposed upon the party alleging its existence.
- (3) The mere presence of delusions even if they are not altogether unconnected with the subject-matter does not *ipso jure* destroy contractual capacity, unless the delusions constitute the real motif of the transaction.

APPEAL from the judgment of the District Court of Mt. Lavinia.

Case referred to :

1. *Soysa v. Soysa* – 19 NLR 314.

P. A. D. Samarasekera, PC with *Champaka Laduwahetty* for substituted 2nd defendant-appellant.

Nihal Jayamanne, PC with *Noorani Amerasinghe* for plaintiff-respondent.

Cur. adv. vult.

July 12, 2002

DISSANAYAKE, J.

The plaintiff-respondent filed this action to partition the land called ⁰¹ "divided one-third share marked lot D of Gorakagahawatte" and morefully described in the schedule to the plaint and depicted in the preliminary plan No. 221 dated 10. 09. 1987 of Commissioner, Victor Chandradasa.

The 1st defendant-respondent and the deceased 2nd defendant by their separate statements of claim filed whilst denying the averments contained in the plaint prayed for dismissal of the plaintiff-appellant's action.

The case proceeded to trial on ten points of contest and at its ¹⁰ conclusion the learned District Judge entered judgment ordering interlocutory decree to be entered, allocating undivided 1/2 share each to the plaintiff-appellant and the 1st defendant-respondent, the entirety of house No. 88 to the 1st defendant-respondent, an undivided 9/10th share of house No. 90 to the plaintiff-respondent and undivided 1/10th share to the 1st defendant-respondent.

It is from the aforesaid judgment that this appeal is preferred.

Learned President's Counsel appearing for the substituted 2nd defendant-appellant contended that the learned District Judge misdirected himself in holding that house No. 90 devolved on the plaintiff-respondent and 1st defendant-respondent. 20

The above argument of the learned President's Counsel for the substituted 2nd defendant-appellant was based on the contention that the learned District Judge had failed to consider the evidence led by the deceased 2nd defendant to show that Alice de Silva did not have a sound mental capacity to execute deed No. 1671 of 01. 04. 1976 (P1).

There was no dispute in regard to the corpus which is in extent 19.08 Perches, on which houses bearing assessment Nos. 88 and 90 are situated. 30

The only dispute in this case is whether Alice de Silva, the mother of the 2nd defendant-appellant had the mental capacity to grant gift of the corpus by deed of gift No. 1671 of 01. 04. 1976 (P1). This is crystalised in the point of contest No. 5.

The plaintiff-respondent by calling Mohamed Ismail Hamdol one of the attesting witnesses to Deed of Gift bearing No. 1671 (P1) has established that Alice de Silva placed her signature on deed No. 1671 (P1) before Azad Raheem, Attorney-at-Law and Notary Public.

Witness Mohamed Ismail Hamdol was emphatic in his testimony that Alice de Silva has come to the office of attorney-at-law and Notary Azad Raheem for other work and he further stated that in the course of the conversation he had with Alice de Silva he came to know her well. The above evidence of witness Hamdol establishes the fact that 40

Alice de Silva was quite normal during and at the time of execution of deed No. 1671 (P1).

In view of this evidence it was absolutely essential for the deceased 2nd defendant's counsel to have cross-examined witness Ahamed Ismail Hamdol on the mental condition of Alice de Silva at the time of execution of deed of Gift No. 1671 (P1).

Since the mental health of Alice de Silva was in issue there was a duty cast on the deceased 2nd defendant to establish that Alice de Silva was not of sound mind at the time she executed deed No. 1671 (P1). 50

However, the counsel for the deceased 2nd defendant failed to cross-examine witness Hamdol on this basis.

Since it was the position of the deceased 2nd defendant that Alice de Silva was not of sound mental health at the time she signed deed of gift (P1), under section 101 of the Evidence Ordinance the burden of proving the existence of that fact was on the deceased 2nd defendant. 60

Under section 102 of the Evidence Ordinance, the burden of proof lies on that person who would fail if no evidence at all were given on either side. Illustration (b) of section 102 of Evidence Ordinance sets out as follows :

- (b) A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denied. If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved. Therefore, the burden of proof is on B.

The deceased 2nd defendant gave evidence to the effect that his mother Alice de Silva was not of sound mind since 1973. He came to that conclusion based on his observations of her. In his evidence the deceased 2nd defendant stated that on occasions whilst being seated in the verandah he observed her talking to an imaginary person whom she stated was her late husband. He also stated that she used to bring dirt, pieces of tin and stones into the house having put them inside her blouse. He also stated that at times she refused to have meals stating that it contained excreta.

He only relied on the evidence of one other witness. Attorney-at-Law Donald Ranasinghe who claimed to be a friend of the deceased 2nd defendant's late father. It was the testimony of this witness that after the years 1972 and 1973 Alice de Silva's behaviour had changed. He found her picking up pebbles on the road and stated further that she failed to recognize him when spoken to. ⁸⁰

The date on which deed No. 1671 (P1) was signed was the 1st of April, 1976. Therefore, it is incumbent on the deceased 2nd defendant who sought to set aside deed (P1) on the ground that Alice de Silva the donor, was not of sound mental condition, to lead evidence with regard to her mental condition on or about the 1st of April, 1976.

Donald Ranasinghe and the deceased 2nd defendant in their respective evidence referred to the delusions Alice de Silva is supposed to have had generally from about 1972 and 1973. ⁹⁰

In the absence of medical evidence a person who exhibits such aberrant and abnormal behaviour cannot be called deranged or insane. A person who may be subjected to such irrational behaviour may still be capable of understanding the nature and effect of his act.

In the case of *Soysa v. Soysa*⁽¹⁾ the head note reads as follows

"Under the Roman-Dutch Law.....

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Under the English Law a contract is voidable if one contracting party is, to the knowledge of the other incapable, by reason of unsoundness of mind, of understanding the nature and quality of his act; the burden of establishing unsoundness of mind of this character is imposed upon the party alleging its existence. The mere presence of delusions, even if they are not altogether unconnected with the subject-matter, does not, *ipso jure*, destroy contractual capacity, unless the delusions constitute the real motif of the transaction. Where a donee either stands in one of the certain recognised relationships towards the donor such as parent and child or solicitor and client, or is shown by the evidence to have been in a position of active confidence towards him the burden of proving that the gift was a voluntary act of latter will rest upon him, and the donation cannot be maintained unless it appears that the donor had independent advice. There may be mental conditions which fall short of insanity, but which may be productive of a facility of disposition over which undue influence might very readily be exercised with effect.

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Shaw, J. "In order to create a position of active confidence, it is not necessary for one of the usual relationships of solicitor and client, guardian and ward, parent and child, & c., should exist, and there is no reason why one brother should not stand to another in such a position. Every case must depend upon its particular facts."

Therefore, it is relevant to observe that the deceased 2nd defendant had failed to discharge his burden that Alice de Silva's mental condition was not sound when she executed deed No. 1671 (P1) on 01. 04. 1976. 130

The learned District Judge has considered the above material and had rightly come to the finding that the execution of deed No. 1671 (P1) was the act and deed of Alice de Silva who was possessed of a sound mental capacity at the time deed No. 1671 (P1) was executed.

Therefore, there is no basis for this court to interfere with the judgment and interlocutory decree entered.

I dismiss the substituted 2nd defendant-appellant's appeal with costs. 140

SOMAWANSA, J. – I agree.

Appeal dismissed.