PINGAMAGE
VS
PINGAMAGE AND OTHERS

COURT OF APPEAL
SOMAWANSA, J.
CA 372/96(F)
DC KURUNEGALA 3005/L
JUNE 11, 2004

Rei Vindicatio Action - Validity of Deed ? - Due execution - Evidence Ordinance, sections 68, 101 and 114-Attesting witness children of executant - Notaries Ordinance 1 of 1907, sections 31(9), 33 - Lack of consideration - Burden of Proof ? - Is it a ground to set aside a Deed ? - Justus causa - Roman Dutch Law.

The plaintiff respondent instituted action seeking a declaration of title and ejectment of the defendant appellant. The position of the defendant appellant was that the deed relied upon by the plaintiff respondent is a fraudulent/void deed and based their title on prescription. The trial court held with the plaintiff respondent.

HELD

(i) The plaintiff respondents in complying with section 68 Evidence Ordinance have called no one but both attesting witnesses.

(ii) Their evidence was not challenged under cross examination. No suggestion was put to them that they did not attest the deed.

(iii) There was no legal duty cast on the plaintiff respondent to have called the mother executant as a witness to prove that she placed here thumb impression on the deed as this fact was established by the testimony of the two attesting witnesses

(iv) Failure of consideration does not give rise to a claim for cancellation of the deed but only to claim for unpaid consideration.

(v) In Sri Lanka consideration is only necessary for those contracts which are governed by the Roman Dutch Law. Those contracts require only 'causa' to support them. Therefore in contracts governed by Roman Dutch Law proof of the want or failure of consideration

will not enable a party to set it aside so long as there is one just a causa to support it

(vi) Evidence reveals that the impugned deed has been duly attested or executed.

An **APPEAL** from the judgment of the District Court of Kurunegala.

Cases referred to :

1. *Velupillai vs. Sivakanipullai - 1A. C. R. 180.*
2. *Solicitor General vs. Ava Umma 71 NLR 512*
3. *Asliya Umma vs. Thingal Mohamed 1999 2 sri LR 152*
4. *Meyor vs. Rudolph's Executors SALR 1918 AD 70*
5. *Jayawardane vs. Amerasekera 15 NLR 280*
6. *Mohamadu vs. Hussain 16 NLR 368*
7. *Nona Kumara vs. Abdul Cader 47 NLR 457*

Lakshman Perera for the Defendant appellant
P.P. Gunasena for the Plaintiff respondent

cur. adv. vult.

SOMAWANSA, J.

The plaintiffs-respondents instituted the instant action in the District Court of Kurunegala seeking a declaration of title to the land described in the schedule to the plaint, ejectment of the defendant-appellant and those holding under him therefrom, damages in a sum Rs. 2,000 and as from the date of the plaint continuing damages at the rate of Rs. 1,000 per annum till the plaintiffs respondents are restored to possession thereof.

The position taken by the plaintiffs-respondents was that by virtue of deed No. 465 dated 18.08.1986, they became the owners of the land in suit and that on about 10.09.1986 the defendant-appellant without any manner of title or interest forcibly and unlawfully entered the land and is in occupation of the house standing thereon. They also set up a claim on prescriptive possession.

The position taken by the defendant-appellant was that about 26 years ago the properties of the family were divided amicably among its members

and in consequence the defendant-appellant was given the property in suit that he developed the property considerably and constructed a house thereon, that the aforesaid deed on which the plaintiffs - respondents have based their title is a fraudulent and a void deed and claimed title to the land in suit on the basis of prescriptive possession. He also set up a claim in reconvention for the improvements effected by him to the property in suit in a sum Rs. 300,000 and also the right to retain the property until the aforesaid sum is paid in full. In the premis he prayed for a dismissal of the plaintiffs-respondents action and a declaration that he has acquired title to the property on the basis of prescriptive possession. In the alternative, compensation in a sum of Rs. 300,000 for the improvements effected and the right to *jus retentionis* until payment in full.

The plaintiffs - respondents in their replication denied any liability in respect of the defendant-appellant's claim in reconvention.

At the trial parties admitted that one Ukkumenika was the original owner of the land in suit and that the said land is described in the schedule to the plaint.Parties raised 15 issues between them and at the conclusion of the trial the learned District Judge by his judgment dated 01.04.1996 held with the plaitiffs respondents. However he allowed the claim in reconvention of the defendant appellant and awarded a sum of Rs. 150,000 in respect of the house constructed by him on the land in suit and also the right to retain the same until the aforesaid sum is paid in full. It is from the said judgment that the defendant-appellant has preferred this appeal.

At the hearing of this appeal, the main argument revolved around deed No. 465 dated 18.08.1986 marked P2 as to whether it was a valid deed or not. Counsel for the defendant-appellant contended that though the learned District Judge has held that the said deed is valid he does not give any reasons or explanation as to why he arrived at such a conclusion. That the learned District Judge has failed to consider the evidence led in relation to the question whether the said deed marked P2 is the act and deed of the plaintiff-respondent's mother and whether there was in fact a contract between the parties at the time the said deed was executed for which no reasons have been given in the judgment.

The relevant issue settled on this point of contest is issue No. 12 which reads as follows :

(12) පැමිණිල්ලේ 4 වැනි ඡේදයේ සඳහන් 465 සහ 1986.08.18 වැනි දිනැති ඔප්පුව උත්තර පත්‍රයේ 8 වැනි ඡේදයේ සඳහන් ප්‍රකාර හේතු එකකට හෝ සමහරක් ක්‍රියා බල ශූන්‍ය ලේඛනයන්ද ?

Paragraph 8 of the answer referred to in the said issue reads as follows:

(8) "පැමිණිල්ලේ 4 වැනි ඡේදයට උත්තර සපයමින් විත්තිකරු මෙසේ කියා සිටී. 1986ක් වූ අගෝස්තු මස 18 වැනි දින වී. ඇම්. උක්කු මැණිකා විසින් පැමිණිලිකරුවන්ට මීලයට විකුණන ලදැයි කියන අංක 465 දරන ඔප්පුව පහත සඳහන් හේතු නිසා වංචාසහගතව සහ බලශූන්‍ය ලේඛනයක් බව කියා සිටියි :

(අ) එම ලේඛනයේ එකී වී. ඇම්. උක්කුමැණිකේ ක්‍රියාවක් බැව් ඔප්පු නොවන බවත් හෝ,

(ආ) එකී උක්කුමැණිකා රවටා හෝ අයුතු බලපෑම් යොදවා ලබාගත් ලේඛනයක් හෝ,

(ඇ) ප්‍රතිශ්‍යාවක් නොමැතිව ලබාගත් ලේඛනයක් බවත් "

The learned District Judge in answering the issues raised has answered the said issue in the negative and the reasons given in his judgment for answering the aforesaid issue in the negative are as follows :

" පැ2 ලේඛනයේ තිබූ අංක 465 ඔප්පුවට සාක්ෂි ලෙස අත්සන් තැබූ ගුණරත්න පිංගමගේ නමැති අයත්, පී. පොඩි මැණිකේ ගුණසේකර නමැති අයත් පැමිණිල්ල විසින් සාක්ෂියට කැඳවා ඇත. දීමතාකාරිය වූ පැමිණිලිකරුවන්ගේත් විත්තිකරු ගේත් මව වූ උක්කුමැණිකා මියගොස් බව සාක්ෂිවලින් හෙළිදරව් වී ඇත. මෙම "පැ2" ලේඛනය වංචනික ලේඛනයක් බව විත්තියෙන් දී ඇති උත්තරයේ සහ විත්තිකරුගේ සාක්ෂි වලින් කියා ඇතත්, "පැ2" ලේඛනය එවැනි වංචනික ඔප්පුවක් නොවන බවට පැමිණිල්ල මැනවින් ඔප්පු කර ඇති බව නිගමනය කරමි. "

On an examination of this paragraph wherein the validity of deed marked P2 is considered one has to concede that the learned District Judge has failed to analyse the evidence led on this point in detail. However, he refers to the all important two attesting witnesses who were called by the plaintiffs respondents to establish the due execution of the said deed. At this point,

it would be pertinent to refer to Section 68 of the Evidence Ordinance which 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 the instant action the plaintiffs-respondents in complying with the provisions in Section 68 of the Evidence Ordinance have called not one but both attesting witnesses to the deed marked P2 to testify to the due execution of the said deed. As to N.H. Gunaratne, Notary Public who attested the deed it tranpired in evidence that his whereabouts were not known and was not listed as a witeness. As to the evidence of these two witnesses in signing the deed as attesting witnesses was never challenged by the defendant-appellant and under cross examination no suggestion put to them that they did not attest the deed marked P2. It is also to be noted that these two attesting witnesses were not the recipients of any benefit in terms of the said deed.

It is contended by the counsel for the defendant-appellant that since the two attesting witnesses are the children of the executant and also since they are the ones who found the Notary and as the Notary did not know the executant there was a legal duty cast on the plaintiffs-respondents to have called the mother as a witness to prove the fact that she placed the thumb impression on the said deed marked P2. It is to be seen that in P2 Notray's attestation clearly says that the Notary does not know the transferor. He specifically has stated that he knows the two attesting witnesses who in turn were the children of the executant. At this point it would be pertinent to refer to Section 31(9) of the Notaries Ordinance No. 01 of 1907 which reads as follows :

> 31(9) " 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 witness 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, occuption, and residence."

Evidence reveal that these provisions contained in the aforesaid Section of the Notaries Ordinance has been complied with. Middleton, J in **Valupillai** vs. **Sivakampillai** [1] stated that :

> "To attest" means to bear witness to a fact. An attesting witness is a witness who has seen the deed executed and who signs it as a witness. Where the instrument is required by law to be attested, the meaning is that the witness shall be present at its execution and shall testify that it has been executed by the proper person. Middleton, J.was of the opinion that " to attest" does not necessarily mean that the witness is to write down anything in the document to the effect that he subscribes as a witness, and that if it is shown that **in fact he did sign** and did witness the signarture which he is attesting, that would be sufficient for attestation."

And as for the object of calling a witness in **Solicitor-General *vs.* Ava Umma**[2]at 515:

> Per T.S. Fernando, J.
>
> " The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in section 2 of No. 7 of 1940 (prevention of Frauds Ordinance (cap.84) means proof of the identity of the person who signed as maker and proof that the document was signed in the presece of a notary and two or more witnesses present at the same time who attested the execution."

Evidence of the two attesting witnesses also reveal that the deed marked P2 has been duly attested or executed. In any event, Section 33 of the Notaries Ordinance provide 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 **Asliya Umma *vs.* Thingal Mohamed**[3] the Supreme Court held :

> " The failure of the Notary to observe the provisions of section 31 of the Notaries Ordinance in executing the deed of revocation did not make it invalid; for in terms of section 33 of the Ordinance, the deed shall not be deemed to be invalid by reason of such failure."

In the circumstances, I am unable to agree with the counsel for the defendant- appellant that there was a legal duty cast on the plaintiffs - respondents to have called the mother as a witness to prove the fact that she placed the thumb impression on the deed marked P2 for this fact has been established by the testimony of the two attesting witnesses. The fact that the two witnesses were children of the executant does not make them disqualified to sign as attesting witnesses or make their testimony unworthy of credit. Therefore it appears that deed P2 stands proved as having been duly executed. In the circumstances provision of section 114 illlustration "F" of the Evidence Ordinance will have no application to the facts of this case. I might also say that though evidence revealed that when evidence on behalf of the plaintiffs-respondents were led the executant of the deed marked P2 was alive, evidence also revealed that she was 82 years of age and was a sick person and according to the evidence of the defendant-appellant she was not only physically ill, but also a mental patient for a number of years before she died. Defendant-appellant in his evidence at page 285 of the brief says as follows :

"ප්‍ර. මෙම නඩුව විභාගයට ගන්නා විට මව ජීවතුන් අතර සිටියාද ?

උ සිහි විකලින් සිටියා.

තමාගේ පියා බීමත්ව සහ සුදුවට ගිය බව කීවා. මව සිහි විකලින් සිටි බව කීවා නීතිඥ මහත්වරුන්ට කුට උපක්‍රම කල බව කීවා. තමාගේ මවට සිහිය විකල වූයේ කවදාද ?

උ. 1982 දී සිහිය විකල් වී වගේ හිටියා. 1984 වන විට හොඳටම සිහි වි කල්ව සිටියා."

Again at pages 287, 288 and 289:

"ප්‍ර. මව සිහි විකලින් එය ලිවුව බවද කියන්නේ ?

උ. ඔව්.

ප්‍ර. එම ඔප්පුව ලියා තිබෙන්නේ 1986 අවුරුද්දේ ද ?

උ. 1986.08.18 වෙනි දිනට එය ලියා තිබෙන්නේ.

ප්‍ර. 1983 අවුරුද්දේ අවසාන වශයෙන් තමන්ට කතා කරන විට මව සිහි විකලින් සිටි බව දැනගෙන සිටියා නම් පැමිණිල්ල ඉදිරිපත් කරන විට මෙවැනි ඔප්පුවක් ලියා තිබෙනවා කියා දැනගෙන සිටියා නම් තමන්ගේ සහෝදරියන් වංචනික ඔප්පුවක් ලියා තිබෙන බවට පොලීසියට පැමිණිලි කලා ද?

උ. පැමිණිලි කලේ නැත.

ප්‍ර. මෙම නඩුවට මව සාක්ෂි සඳහා කැඳවීමට උත්සාහ කළාද ? ඉඩම් හුවමාරුවක් වූ බව පෙන්වීමට අවුරුදු 30කට පෙර ?

උ. මවට සාක්ෂි දෙන්නට බැහැ පිස්සියක් නිසා."

when the defendant-appellant himself in his evidence says that the executant was a mental patient who was not in a position to give evidence, I am unable to comprehend as to how the counsel for the defendant-appellant could argue that the plaintiffs-respondents should have called the executant to prove the fact that she placed her thumb impression on the said deed marked P2 or if she was unable to come to Court to give evidence, the plaintiffs-respondents should have moved for affidavit evidence to be recorded on commission or *de benne esse* evidence before the trial.

Counsel for the defendent-appellant also contended that the learned District Judge had erred in coming to the conclusion that the plaintiffs-respondent's mother was dead at the time of trial, when in fact according to the evidence of the 1st plaintiff-respondent she was very much alive. However I do not think that the learned District Judge can be faulted for his conclusion for the defendent - appellant himself in his evidence admit that his mother is no longer living. At page 282 of the brief he says :

"ප්‍ර. මව මිය ගියේ කොහේ දි ද ?

උ. කෑගල්ලේ දි "

Also at page 286 of the brief :

"ප්‍ර. මවගේ මරණයට තමන් ගියා ද ?
උ. මව මිය ගිය බව දැන්වූ විට මම ගියා."

Again at page 320 of the brief :

ප්‍ර. ඇය මියගියේ මොන අසනීපයෙන් ද?

උ. පිස්සුවෙන් ඉඳල නැති වුනේ. පිස්සුවෙන් අවුරුදු ගණනක් සිටියා.

ප්‍ර. තමන් මවගේ මරණයට ගියා ද ?

උ. මම සහ බිරිඳත් ළමයිනුත් ගියා. මව පිස්සුවෙන් මැරෙන්නට ඇති."

Another matter raised by the counsel for the defendant-appellant is the lack of consideration. It is to be seen that the deed marked P2 in its attestation states that consideration was not paid in the presence of the Notary who attested the said deed. The 1st plaintiff -respondent who is one of the purported purchasers on the said deed marked P2 in his evidence admitted that no consideration passed or was paid. Evidence of Gunarathna Pingamage also reveal that consideration did not pass and the sum of R. 7,500/- was mentioned in the deed on the instructions given by the Notary.

The question arises as to whether the deed of conveyance becomes invalid if the consideration is not paid fully. According to Voet 19.1.21 non payment of purchase price is not a ground for cancellation of a conveyance. It was held in *Meyer vs. Rudolhp's Executors* [4] that the failure of consideration does not give rise to a claim for cancellation of the deed but only to claim for unpaid consideration. This question was considered in *Jayawardena vs. Amerasekera* [5] and the Court held as follows.

"On the execution of a notarial conveyance the sale is complete, and the mere fact that the whole of the consideration has not been paid cannot, in the absence of fraud or misrepresentation, afford ground for the rescission of the sale and the cancellation of the conveyance."

Where a person obtains a conveyance of property without fraud, but afterwards fraudulently refuses to pay the consideration stipulated for, the

grantor is not entitled to claim a cancellation of the conveyance, but his remedy is an action for the recovery of the consideration. This principle was adopted in *Mohamadu Vs. Hussian.*[6]

In *Nona Kumara vs. Abdul Cader*[7] the plaintiff, when she was a minor, transferred certain lands to the first defendant by a deed which, on the face of it, was a transfer for consideration. She sought to have the deed declared null and void on the ground that her signature was obtained to it by undue influence, intimidation and threats. The District Judge held against the plaintiff on the questions of undue influence, intimidation and threats. He held, however, although no specific issue was raised, that the deed was a donation, and therefore null and void, merely because the transferor did not receive the consideration mentioned in the deed. Jayetileke, J held " that the deed which on the face of it, was a transfer for consideration could not be held to be a donation merely because the transfer did not receive the consideration. The plaintiff's remedy was an action to recover the consideration and not to claim a cancellation of the conveyance."

I might also refer to the Law of Evidence E.R.S.R. Coomaraswamy vol. II Book 01 at page 203 wherein he considers 'Want or failure of consideration' and says :

" It can always be shown that a contract was entered into without consideration, or the consideration, if any, has failed. This applies even where the instrument contains an averment that the deed was for consideration."

" In Sri Lanka, consideration is only necessary for those contracts which are governed by the Roman-Dutch Law. Those contracts which are governed by the Roman-Dutch Law require only *causa* to support them. Therefore, in contracts governed by Roman-Dutch Law, proof of the want or failure of consideration will not enable a party to set it aside, so long as there is some *justa causa* to support it. But if there is and averment in a contract governed by the Roman-Dutch Law, such as a contract for the sale of land, that a certain consideration had been paid, then it is open to party, alleged to have received the consideration, to show that in fact no consideration had been paid.

Certain Indian cases took the view that the want or failure of consideration sought to be proved under the proviso must be such as invalidates an instrument. That is, total want or failure of consideration. But this view appears to be too narrow. The words "such as" in the proviso show that the words "wants or failure of consideration" need not be construed in this limited way. Our courts have held that it is open to a defendent to prove that the consideration was in fact different from the consideration stated in deed. Certain Indian cases take the same view."

Counsel for the defendant-appellant also contended that at the time of execution of the deed marked P2 none of the recipients who derived title by the said deed were present and the fact that no consideration passed between parties to the said deed goes to show that there being no nexus between the parties, no evidence of intention to transfer the property in suit and hence the validity of the deed is questionable. Here again, I am unable to agree with the counsel for the reason that due execution of the said deed has been established.

On the other hand, it is for the defendant-appellant to prove the objections taken by him to the said deed in paragraph 08 of the answer. It appears that except for lack of consideration the other matters pleaded therein have not been proved by the defendant-appellant. As the plaintiffs-appellants have proved due execution of the deed marked P2 the burden of proving that said deed marked P2 is not the act and deed of the executant Ukkumenika and that it was obtained by deceit and undue influence is on the defendant-appellant. Only evidence placed before the learned District Judge was the *ipse dixit* of the defendant-appellant that the executant was a mental patient.

Section 101 of the Evidence Ordinance reads as follows :

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.'

Illustrations

(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true.

A must prove the existence of those facts."

I would say the learned District Judge has correctly answered issue 12 raised by the defendant-appellant in the negative, though he has failed to give reasons for coming to that conclusion. Likewise once the paper title was established by the plaintiff-respondent it was for the defendant-appellant to establish his prescriptive right. However no submissions have been made by the counsel for the defendant- appellant on his claim based on prescription. Likewise no submissions have been made as to inadequacy of compensation awarded to the defendant-appellant. Hence I do not propose to go into these matters.

In the circumstances it is to be seen that even though the learned District Judge has failed to examine and analyse in detail the evidence placed before him and give reasons for his findings, on an examination of the evidence placed before the trial Judge he has it appears come to a correct finding and answered issue no. 12 in the negative and also held with the plaintiffs-respondents. In the circumstances I see no basis to interfere with the judgment of the learned District Judge. Accordingly the appeal will stand dismissed with costs fixed at Rs. 5,000/-

Appeal dismissed.