

For the aforesaid reasons, I am of the opinion that substantive questions 3 and 4 should be answered in favour of the Appellants. Accordingly, I answer question 3 in the negative and question 4 in the affirmative, and hold that substantive questions 1(a) and (b) have to be addressed in determining this appeal.

Proof of the Power of Attorney

Substantive question 1(a) on which special leave has been granted by this Court, is whether the Power of Attorney marked P7 has been duly proved. As already noted, this question is of extreme importance for establishing the chain of title of the Respondents, as it is by virtue of the power vested in him by the said power of attorney that the Attorney named therein, Noor Lebbai, purported to execute the Deed marked P1, by which the Respondents claimed to have derived their title to the land described in the schedule to the petition. In this connection, it is relevant to note that when the said Power of Attorney was first mentioned in the course of his testimony on 12th August 1991 by the 1st Petitioner-Respondent-Respondent, Abdul Majeed Mohamed Mansoor, the tender in evidence of a photocopy of the said power of attorney was objected to by learned Counsel for the Appellants, and the said photocopy was marked subject to proof.

When a document is marked subject to proof, it is essential for the said document to be proved through witness testimony. The procedure for tendering a document in evidence in the course of witness testimony is dealt with in Section 154 of the Civil Procedure Code, and what is most relevant to this case is the first sentence of Section 154(1), which provides that-

Every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness.

The explanation to this section is very useful in understanding this provision, and in particular understanding how a document marked subject to proof is to be proved. The said explanation is reproduced below, in full:-

If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it. *If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the court:-*

Firstly, whether the document is *authentic* – in other words, is what the party tendering it represents it to be; and

Secondly, whether, supposing it to be authentic, it constitutes legally *admissible* evidence as against the party who is sought to be affected by it.

The latter question in general is matter of argument only, but *the first must be supported by such testimony as the party can adduce*. If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a *prima facie case of authenticity* and is further of opinion that the authentic *document is evidence admissible against the opposing party*, then it should admit the document as before. (*emphasis added*).