IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under Article 128 of the Constitution read with Section 5(C) of the High Court of the Provinces (Special Provisions)(as amended) Act No. 54 of 2006.

SC Appeal No: 248/2017

SC/HCCA/LA No: 156/2016

WP/HCCA/GAM/Appeal No:279/2009 (F)

D.C. Gampaha Case No: 28041/P

Sirimanna Arachchi Appuhamilage Asilin nona alias Asilin Sirimanna of Marapola, Veyangoda.(Deceased)

Plaintiff

Subasinghe Dissanayaka Appuhamilage Piyaseeli of Marapola, Veyangoda.

Substituted Plaintiff

Vs.

01.Senanayaka Amarasinghe Mohotti Appuhamilage Sumanawathi

02.Subasinghe Dissanayaka Appuhamilage Maduraprema Harischandra Dissanayaka

03.Subasinghe Dissanayaka Appuhamilage Latha Iranganie Dissanayaka

04.Subasinghe Dissanayaka
Appuhamilage Anura Deshapriya
Dissanayaka.

05.Subasinghe Dissanayaka
Appuhamilage Virani Shyamali
Dissanayaka.

06.Subasinghe Dissanayaka
Appuhamilage Dissna
Shriyanjani Dissanayaka.

07.Subasinghe Dissanayaka
Appuhamilage Kapila
Dharmapriya Dissanayaka.

08. Subasinghe Dissanayaka
Appuhamilage Priyantha
Dissanayaka.

09.Subasinghe Dissanayaka
Appuhamilage Nishantha
Dissanayaka.

10.Subasinghe Dissanayaka
Appuhamilage Chullasena
Subasinghe
All of Marapola, Veyangoda.

11.Subasinghe Dissanayaka
Appuhamilage Syneris
Appuhamy of Malgomuwa,
Giriulla
(Deceased)

11.(a).S.D.A.S.Wijesena
Malgomuwa,
Giriulla

Defendants
AND

Senanayaka Amarasinghe
Mohotti Appuhamilage
Sumanawathi
Marapola, Veyangoda

1st Defendant Appellant

Vs.

Subasinghe Dissanayaka
Appuhamilage Piyaseeli of
Marapola, Veyangoda

Substituted Plaintiff
Respondent

02.Subasinghe Dissanayaka
Appuhamilage Madurapremа
Harischandra Dissanayaka

03.Subasinghe Dissanayaka
Appuhamilage Latha Iranganie
Dissanayaka

04.Subasinghe Dissanayaka
Appuhamilage Anura Deshapriya
Dissanayaka.

05.Subasinghe Dissanayaka
Appuhamilage Virani Shyamali
Dissanayaka.

06.Subasinghe Dissanayaka
Appuhamilage Dissna
Shriyanjani Dissanayaka.

07.Subasinghe Dissanayaka
Appuhamilage Kapila
Dharmapriya Dissanayaka.

08. Subasinghe Dissanayaka Appuhamilage Priyantha Dissanayaka.

09.Subasinghe Dissanayaka Appuhamilage Nishantha Dissanayaka.

10.Subasinghe Dissanayaka Appuhamilage Chullasena Subasinghe
All of Marapola, Veyangoda.

11.Subasinghe Dissanayaka Appuhamilage Syneris Appuhamy of Malgomuwa, Giriulla
(Deceased)

11.(a).S.D.A.S.Wijesena Malgomuwa,
Giriulla

Defendant Respondents
AND NOW BETWEEN

01.Senanayaka Amarasinghe Mohotti Appuhamilage Sumanawathi
Marapola, Veyangoda

1st Defendant Appellant
Appellant

02.Subasinghe Dissanayaka Appuhamilage Maduraprema Harischandra Dissanayaka

03.Subasinghe Dissanayaka Appuhamilage Latha Iranganie Dissanayaka

04.Subasinghe Dissanayaka Appuhamilage Anura Deshapriya Dissanayaka.

05.Subasinghe Dissanayaka Appuhamilage Virani Shyamali Dissanayaka.

06.Subasinghe Dissanayaka Appuhamilage Dissna Shriyanjani Dissanayaka.

07.Subasinghe Dissanayaka Appuhamilage Kapila Dharmapriya Dissanayaka.

08. Subasinghe Dissanayaka Appuhamilage Priyantha Dissanayaka.

09.Subasinghe Dissanayaka Appuhamilage Nishantha Dissanayaka.
All of Marapola, Veyangoda.

2nd to 9th Defendant Respondent Appellants

Vs

Subasinghe Dissanayaka Appuhamilage Piyaseeli of Marapola, Veyangoda

Substituted Plaintiff Respondent Respondent

10.Subasinghe Dissanayaka Appuhamilage Chullasena Subasinghe (Deceased)
All of Marapola, Veyangoda.

10th Defendant Respondent Respondent
10.(a). Padmaseeli Wickramaarachchi
10.(b)S.P.A Ananda Subasinghe
10.(c)S.P.A Gamini Subasinghe

All of Marapola, Veyangoda.

Substituted 10th Defendant Respondent Respondent

11.Subasinghe Dissanayaka Appuhamilage Syneris Appuhamy of Malgomuwa, Giriulla
(Deceased)

11.(a).S.D.A.S.Wijesena
Malgomuwa,
Giriulla

Defendant Respondent Respondent

BEFORE: **HON P. PADMAN SURASENA, CJ.**
HON K. KUMUDINI WICKREMASINGHE, J.
HON JANAK DE SILVA, J.

COUNSEL: S.N. Vijithsinghe for the 1st Defendant-AppellantAppellant

Dr. Sunil Cooray for the Substituted Plaintiff-Respondent-Respondent.

WRITTEN SUBMISSIONS: By the 1st Defendant-Appellant-Appellant on 04.10.2022 and 06.04.2023.

By the Plaintiff-Respondent-Respondent on 09.07.2018.

ARGUED ON: 01.03.2023

DECIDED ON: **26.09.2025**

K. KUMUDINI WICKREMASINGHE, J.

This is an appeal from a judgment of the Provincial High Court of the Western Province (Civil Appeals) holden at Gampaha dated 09.03.2016 which affirmed the judgment of the District Court of Gampaha, case bearing No: 28041/P, dated 04.12.2009.

The Original Plaintiff of this action instituted a partition action in the District Court of Gampaha against the Defendants seeking to partition the land called and referred to as "Kongahalanda" containing an extent of about 2A- 0R-31.5P and the said land was described in the schedules of the Plaint. The Original Plaintiff averred in her plaint in the District Court that the original owner of the land in suit was one Piyasinghe Dissanayake who was the husband of the present 1st Defendant-Appellant-Appellant (Hereinafter referred to as the "Appellant") and the father of the 2nd to 9th Defendants to this action and also the 10th and 11th Defendants who derived title to the same by virtue of the final decree entered in the District Court of Gampaha.

The Original Plaintiff (hereinafter referred to as Plaintiff) further averred that the Appellant had transferred an undivided ½ acre to the Plaintiff out her ½ share which she had derived as matrimonial inheritance by virtue of Deed 1530 dated 04.01.1982 attested by H.L. Wickremathileke Notary Public.

The Appellant filed her statement of claim denying all and singular the several averments contained in the plaint of the Plaintiff and specifically averred that deed on which the Plaintiff claimed a ½ acre was a forgery and prayed for a dismissal of the Plaintiff's action with costs.

The Appellant averred that the Plaintiff had preferred a claim to the land in suit even in action bearing No.20388/P which claim had been rejected by

Court and hence pleaded that the Plaintiff is not eligible to have and maintain the instant action. The Plaintiff died during the pendency of the action and the Substituted Plaintiff-Respondent-Respondent (hereinafter referred to as the Respondent) was substituted in the place of the deceased Plaintiff.

A commission was issued and the commission was returned together with the Preliminary plan together with the corresponding report. Thereafter. when the matter proceeded to trial, the Respondent sought to mark document P4, the Appellants raised an objection in relation to the admissibility of the said document, the Learned Trial Judge by her order dated 02.07.1998 upheld the objections raised by the Appellants and did not allow the marking of document P4. Being aggrieved with the order of the Learned Trial Judge, the Respondent appealed to the Court of Appeal. Their Lordships of the Court of Appeal by order dated 26.05.1999 allowed the appeal of the Respondent to produce the document P4 and set aside the order of the Learned Trial Judge and made an order for trial de novo.

The case commenced thereafter, and the Learned Trial Judge by his judgment dated 04.12.2009 answered the points of contest No 1 to 6 in favour of the Respondent and entered judgment in favour of the Respondent, allocating the residual rights to the 1st Appellant after deducting half an acre from the share which she had inherited as matrimonial inheritance from her husband.

Aggrieved by the judgment, the Appellants preferred an appeal to the High Court of Civil Appeal of the Western Province holden in Gampaha. The Learned High Court Judges dismissed the appeal of the Appellants and affirmed the judgment of the Learned Trial Judge.

The Appellant is before this Court challenging the judgment of the High Court of Civil Appeals holden in Gampaha. This Court by Order date 07.12.2017 granted Leave to Appeal on the questions of law, namely ***"Whether the Deed***

marked P2 has been established in terms of Section 68 of the Partition Law read along with Section 68 of the Evidence Ordinance?"

My analysis hereafter will be confined to examining the aforesaid question of law based on which leave was granted. The matter for consideration by this court is whether the Deed marked P2 has been established in terms of Section 68 of the Partition Law read along with Section 68 of the Evidence Ordinance.

The Plaintiff gave evidence and thereafter commenced her evidence anew. The Respondents contended that the Plaintiff has given clear evidence in respect of the preliminary plan and report and she also gave evidence of the pedigree and the fact that ½ an acre was purchased by her from the Appellant on Deed 1530 when the Appellant had offered to sell the land. Since the notary to deed 1530 had died the Respondent placed the death certificate of the notary before court to show that she cannot call him as a witness. This document was admitted without further objection at the closing of the case of the Appellants. The Respondents submitted that hence the court is bound to accept such documents as evidence and as documents which have been proved.

The Plaintiff contended that, initially she had only given a part payment of the consideration due on Deed 1530 marked P2 and the later the balance sum of money was paid by her to the Appellant marked as P3.

The Respondents contended that they had led cogent and credible evidence to establish the validity of Deed No. 1530 and the payment of consideration thereunder. The Plaintiff, in her testimony, affirmed that the land was offered to her at a time when she too was in need of land, and that she made an initial part payment to the Appellant, with the balance being paid subsequently. A receipt for the final payment was marked as "P3" and was admitted without objection, thereby affirming the payment. The Plaintiff also explained that the Appellant urgently required money to fund the legal defence of her paramour in a criminal matter.

On behalf of the Appellant, it was submitted that under Section 68 of the Partition Law, formal proof of execution of documents is generally not required unless the deed is specifically impeached. While in ordinary civil proceedings the necessity of formal proof arises upon objection at the time of production, in partition actions such requirement is only triggered upon a clear act of impeachment, which entails contesting the deed by raising an issue or making a specific averment in the statement of claim. The Appellant submits that the impeachment of Deed No. 1530, executed on 04.01.1982, was duly raised through issues Nos. 5 and 11(a) and in the statement of claim, thereby necessitating formal proof of due execution.

The Appellant's denial of execution is found in her evidence from pages 289 to 331 of the appeal brief, where she categorically denied signing the deed, denied knowledge of English (relevant as the signature was in English), and further stated that the signature appearing on the deed was not hers. In view of this direct challenge, it is incumbent upon the Respondent to have proved the due execution of the deed, in accordance with Section 68 of the Evidence Ordinance read with Section 68 of the Partition Law, particularly as interpreted by His Lordship the Chief Justice Jayantha Jayasuriya (as he was then) in the case of ***Lulwala Hewayalage Tilanganee v Kirigalbadage Gamini Chandrasena*** **SC APPEAL 154/2016 decided on 17.06.2021.** The above case is distinguishable from the present matter. In that case, there was a complete absence of evidence with regard to the due execution of the impugned deed. In contrast, in the instant case, the Respondents have, in fact, adduced positive and cogent evidence in proof of the execution of the Deed marked P2.

The Appellant also refutes the Respondent's position that non-objection at the time of marking the document constituted a waiver. The authorities make clear, including ***Fernando v. Ramanathan*** **[1930] 16 NLR 337**, that once an issue is framed, it cannot be waived or struck off at the instance of a party, and the Court is bound to adjudicate upon it. Furthermore, the submission that the impeachment was not valid merely because no objection was taken

at the time of production is flawed, as once the deed is specifically contested, the requirement of formal proof is engaged regardless of earlier procedural conduct.

The Appellant challenges the credibility of the Respondent's position regarding the attesting witness A.A. Gunasena. The claim that Gunasena was the paramour of the Appellant was unfounded and unsupported by credible evidence. The Appellant, at page 317, denied any knowledge of Gunasena, and noted that by the time of her husband's death, her children were already grown (vide page 323), undermining the Respondent's narrative. Furthermore, Gunasena's name was not included in the witness list filed by the Plaintiff, although he was a surviving attesting witness within the jurisdiction of court, and no plausible justification was offered for his absence.

As to the Notary's clerk who gave evidence on execution, it is submitted that the trial judge erred in placing reliance upon this testimony. The alleged threats made against this witness were not supported by a police complaint or any credible evidence. As noted in the order dated 09.09.2003 (page 224), the application for a civil warrant was refused, and no appeal was taken from this order. The failure to corroborate the allegation of intimidation diminishes the credibility of the Respondent's claim regarding the inability to secure this witness's further attendance.

The Appellant further contests the admissibility and evidentiary value of the receipt marked "P3", which purportedly acknowledges the payment of the balance consideration. It is the Appellants position that the evidence at page 212 indicates that the receipt was not executed by the Appellant herself, but by the Plaintiff or her agent, and hence lacks probative value. As "P2", the deed in question, has not been duly proved according to law, the validity of "P3" is necessarily undermined, as it is merely ancillary to the primary transaction.

Accordingly, it is submitted by the Appellant that the Respondent failed to discharge the burden of proving due execution of Deed No. 1530, particularly in light of the specific and sustained impeachment raised by the Appellant.

Now I look at the accepted legal position in this regard.

Section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840, as amended

"No sale, purchase, transfer, assignment, or mortgage of land or other immovable property…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".

Justice Mahinda Samayawardhena in ***Weerappuli Gamage Gamini Ranaweera v Matharage Dharmasiri and Others*** **SC APPEAL 56/2020 decided on 20.05.2022** held that *"To prove due execution of a deed, this section requires proof of four matters:*
(a) the deed was signed by the executant

(b) it was signed in the presence of a licensed notary public and two or more witnesses

(c) the notary public and the witnesses were present at the same time

(d) the execution of the deed was duly attested by the notary and the witnesses

It may be relevant to note that under section 2 of the Prevention of Frauds Ordinance, the document shall be signed by the executant in the presence of the notary and the two witnesses present at the same time. However, the section does not expressly state that the document shall also be signed by the two witnesses and the notary in the presence of the executant at the same time."

The principle enunciated by Samarakoon, C.J., in ***Sri Lanka Ports Authority and another v. Jugolinija – Boal east*** **[1981] 1 Sri L.R 18**, at page 24,

> *"If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law.".*

The above decision was followed by the Supreme Court in the case of ***Balapitiya Gunananda Thero Vs. Thalalle Methananda Thero*** **[1997] 2 Sri L.R 101** which stated at page 101 that,

> *"Where a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case. This is the cursus curiae."*

I must highlight that a new amendment has been introduced to section 154 of the Civil Procedure Code by the **Civil Procedure Code (Amendment) Act, No.17 of 2022 on 23rd June 2022** and the position of the aforementioned case has now been overtaken by this new amendment.

Transitional Provision in Section 3 of the said amendment states as follows,

Notwithstanding anything contained in section 2 of this Act, and the provisions of the Evidence Ordinance, in any case or appeal pending on the date of coming into operation of this Act –

(a)(i) if the opposing party does not object or has not objected to it being received as evidence on the deed or document being tendered in evidence; or

(ii) if the opposing party has objected to it being received as evidence on the deed or document being tendered in evidence but not objected at the close of a case when such document is read in evidence, the court shall admit such deed or document as evidence without requiring further proof;

(b) if the opposing party objects or has objected to it being received as evidence, the court may decide whether it is necessary or it was necessary as the case may be, to adduce formal proof of the execution or genuineness of any such deed or document considering the merits of the objections taken with regard to the execution or genuineness of such deed or document.

The standard of proof of due execution of a deed is on a balance of probabilities.

Section 68 of the Partition Law No 21 of 1977 reads as follows:

"It shall not be necessary in any proceedings under this Law to adduce formal proof of the execution of any deed which, on the face of it, purports to have been duly executed, unless the genuineness of that deed is impeached by a party claiming adversely to the party producing that deed, or unless the court requires such proof."

Section 25(2) of the Partition Law No21 of 1977 is as follows:

"If a defendant shall fail to file a statement of claim on the due date the trial may proceed ex parte as against such party in default, who shall not be entitled, without the leave of court, to raise any contest or dispute the claim of any other party to the action at the trial."

Now it is the contention of the Appellant that by raising issues 5 and 11 at the trial the deed No 1530 has been impeached as per section 68 of the Partition Act as such the execution of the deed must be proved.

Issue 5 is set out as follows:

"(5) පැමිනිල්ලේ සඳහන් අංක.1530 දරණ ඔප්පුව 1 වෙනි විත්තිකාරිය විසින් අත්සන් කරන ලද ඔප්පුවක් නොවන්නේ ද?"

Issue 11 is set out as follows:

"11 (අ) පැ.2 වශයෙන් සකස් කරන ලද ඔප්පුව නීතියට අනුව සකස් කරන ලද ඔප්පුවක් නොවන්නේ ද?

11 (ආ) නොඑසේ නම්, මෙම නඩුව පැමිනිලිකාරියට තවදුරටත් පවත්වාගෙන යා හැකිද?"

Section 68 of the Evidence Ordinance Nos,14 of 1895 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."

Section 69 of the Evidence Ordinance Nos,14 of 1895 sets out:
"If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."
The learned trial judge has answered issue 5 to be a document signed by the Defendant.

In the course of the trial, the Deed 1530 which is the pivotal document was marked as P2 subject to proof by the Respondent. A document marked P3 was marked by the Respondent which was said to be the receipt signed by the Appellant on receipt of the balance consideration of the deed marked P2. which was not objected at all by the Counsel of the Appellant.

In the instant case, since the attesting witnesses to Deed No.1530 were unavailable, one, Sirisoma, being deceased and the other, A.A. Gunasena, being the alleged paramour of the Appellant, the Respondent, in order to establish the due execution of the said Deed, called as a witness the office clerk of the Notary Public, one Amunugoda Hewage Chandrakumara Gamini Wickremathilake. His evidence, commencing at page 206 of the appeal brief, is of vital importance.

In his examination-in-chief, this witness gave a clear and consistent account of the circumstances under which the 1st Defendant, accompanied by the attesting witnesses, came to the residence of the Notary Public, Mr. Lanny Wickramathilake, and executed Deed No.1530. He testified that he himself had typed the Deed and witnessed the 1st Defendant signing as "S. Senanayake." Thereafter, in his presence, the two attesting witnesses, namely

Gunasena and Sirisoma, placed their signatures, followed by the signature of the Notary Public. Thus, the essential requirements under section 69 of the Evidence Ordinance were satisfied.

The witness further stated that on 11.01.1982, upon the instructions of the Notary Public, he personally wrote the receipt marked P3, which the Appellant signed in English as "S. Senanayake" on two stamps affixed thereto, acknowledging the receipt of the balance sum of Rs. 2,000/-. This evidence corroborates the payment of consideration and the due completion of the transaction. Notably, the witness, being a relative of the Notary Public, had no personal interest in the subject matter and must therefore be regarded as impartial.

Although his cross-examination had commenced, the witness failed to attend court on the subsequent date, and counsel for the Respondent informed court that the said witness had been threatened by the 2nd Defendant. An application was accordingly made for the issue of a civil warrant, which however was refused on the ground of delay. Nevertheless, the Respondent's daughter, Kalyanawathi, testified as to the threats made to the witness and produced material to show that police complaints had been lodged. The learned District Judge, by his order dated 12.12.2003, correctly held that notwithstanding the fact that cross-examination was incomplete, the evidential value of the testimony already given would be considered at the conclusion of the trial.

It is also significant that the Appellant, while giving evidence, did not challenge certain material suggestions put to her. When it was suggested that she and the Respondent's daughter, Kalyanawathi, had schooled together, she remained silent, thereby admitting the fact. It was further suggested to her that she was capable of reading and writing her name in English. No challenge had been made to Kalyanawathi on this point when she was giving evidence. The Appellant eventually admitted this fact. However, during cross-examination she made the unsolicited assertion that she never signed

documents in English, a statement clearly inconsistent with her admitted ability to write her name in English, as well as with the evidence of the notary's clerk and the receipt P3 signed by her.

Most tellingly, when it was put to her in cross-examination that her denial of having sold the land was false, the Appellant chose to remain silent (see page 325 of the appeal brief). Such silence, when a direct suggestion of falsity was made, can reasonably be taken as an implied admission. Her contradictory stance and evasive responses further undermine her credibility.

In the totality of circumstances, the evidence of the notary's clerk stands as cogent and credible proof of the due execution of Deed No.1530, while the testimony and demeanour of the Appellant reveal several inconsistencies and an absence of candour.

The Appellant contends that relying on section 68 of the Partition Law that formal proof is not necessary but genuineness of the deed is impeached by a party adversely claiming to the party producing the deed. The Appellant is an adversely who is challenging said deed. Further, relying on section 25(2) of the partition law the Appellants contend that without filing a statement of claim a party shall not be entitled to contest or dispute thus impeaching a deed means challenging the said deed in the statement of claim and raising an issue challenging the deed.

In the circumstances, I am of the view that reliance on the provisions of the Partition Law alone cannot suffice to impeach a deed without proper procedural compliance. It is well-established that an objection to documentary evidence must be taken not only at the time of tender but also maintained until the close of the case; failure to do so renders such objection of little avail as set out by the provisions of the civil procedure code. The Appellants contended that by virtue of section 25(2) of the Partition Law, a party seeking to challenge the validity of a deed is required to do so expressly by way of a statement of claim and by raising an appropriate issue, for it is only then that the Court is properly seized of the dispute. I am of the view that

the section of the new amendment to the Civil Procedure code set out above that is applicable to the present case is Section 3 (a) (i) as the Appellant's counsel failed to reiterate his objections at the end of the Respondent's case.

In any event, in answering issue No. 5, the learned District Judge has rightly concluded that the signature appearing on the deed was that of the Appellant. I find no reason to depart from this finding, for on the available material, including the corroborative receipt and the absence of contrary evidence, the Respondent has discharged her burden of proving execution of the deed to the fullest extent possible in the circumstances fulfilling the requirements of section 68 and 69 of the Evidence Ordinance.

When considering all the above discussed circumstances, it is evident that the Learned High Court Judge of the High Court of Civil Appeals of the Western Province holden in Gampaha and the Learned District Court Judge of Gampaha have arrived at the correct conclusion and I see no need to interfere with their decision.

On this basis, I decide the question of law in the present case in the negative. I uphold the judgments of the High Court Province of Civil Appeals of the Western Province holden in Gampaha and the District Court of Gampaha.

In these circumstances and for the foregoing reasons, the appeal of the Appellant is hereby dismissed without costs.

JUDGE OF THE SUPREME COURT

P.PADMAN SURASENA J.

I agree.

CHIEF JUSTICE

JANAK DE SILVA J.

I agree.

JUDGE OF THE SUPREME COURT