PATABENDI

v.

EDIRISURIYA AND OTHERS

COURT OF APPEAL.
WIGNESWARAN, J.
TILAKAWARDENA, J.
CA 849/92 (F).
DC HAMBANTOTA 972/L.
06TH SEPTEMBER, 1999.

Conditional Transfer - Conditions deleted in duplicate only - Attestations of original and protocol silent regarding deletions - Fraudulent conversions - Notaries Ordinance Ss.3(2), 24, S.33 - Prevention of Frauds Ordinance Ss.2, 15, 16 - Due execution and attestation - Is the duplicate a draft?

Held :

(i) S.16 Prevention of Frauds Ordinance requires deeds to be attested in Duplicate. The corrections or deletions in the original and duplicate must be attested in both copies stating that such and such correction took place in the original and such correction in the Duplicate.

(ii) Each copy cannot carry only corrections and deletions on its individual body only, then the deed would not be attested in Duplicate.

(iii) Under S.31(24) of the Notaries Ordinance duplicate cannot be the draft.

APPEAL from the Judgment of the District Court of Hambantota.

C.J. Laduwahetty for Plaintiff Appellant.

W. Dayaratne for Defendant Respondent.

Cur. adv. vult.

September 6, 1999.
WIGNESWARAN, J.

This is an appeal against the judgment of the District Judge of Hambantota dated 09. 06. 1992 wherein the action of the Plaintiff was dismissed and the 3rd and 4th Defendant-Respondents were declared entitled to the premises in suit.

Mr. Ladduwahetty on behalf of the Plaintiff-Appellant points out that there has been irregularity with regard to the execution of Deed No. 593 dated 14. 07. 1983 which went beyond mere formal irregularity and amounted to a fatal irregularity. He points out that the correction made in the Duplicate to the said deed had not been referred to in the attestations to the Original and Protocol copies of the deed. He refers to the evidence and points out that according to the Plaintiff what was shown to him was a prepared draft document in which a condition as to the re-transfer of the property was inserted while the other documents remained blank printed documents. After signature the condition in the draft had been deleted and the blank documents filled in without the condition. He also referred to the fact that in V2, the statement made to the Police on 27. 10. 1985, the Plaintiff had claimed the property as belonging to him which had been given on a conditional transfer and for which amount received on the conditional transfer he had paid interest. Mr. Ladduwahetty says that this deed transaction was in fact a fraudulent transaction where a conditional transfer had been converted into a deed of transfer with the connivance of the Notary.

Mr. Dayaratne points out referring to section 33 of the Notaries Ordinance, 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. He therefore states that any defect in the execution of the deed would not make the deed an invalid document. He further points out that the evidence of the Plaintiff had only referred to a single copy of the document being in blank and that such evidence contradicts the actual position because the Original and Protocol both had no deletion referred to in the attestation to the Duplicate.

We have perused the evidence, the documents filed of record and also the judgment. Without doubt Document P3 refers to the deletion of the last two lines on page two of the

said deed in the attestation and in fact there was such a deletion of the last two lines. Curiously no such deletion had been made in the Original Copy nor in the Protocol copy. The words deleted in the Duplicate were never mentioned in these copies. The attestations in the Original and the Protocol fail to refer to any deletion in the Duplicate. In fact the Original does not refer to any deletion at all in the attestation clause. On the face of the documents it would therefore be seen, as mentioned in the plaint and in the Plaintiff's evidence, that the condition relating to a right of re-transfer had been inserted in one of the copies of the deed but signatures obtained in three copies of the deed where presumably one or two copies were blank. If as mentioned by the Notary all three copies had been prepared at the same time prior to signature and the parties signed all three copies at the same venue, the three copies would have carried the conditional clause in all of them. This conditional clause is not found in the Original nor the Protocol. Therefore we have to come to the conclusion that the Original and the Protocol copies were prepared subsequent to the Duplicate. If all three copies had been prepared prior to signature with the Duplicate having deletions and the Original and Protocol being prepared sans the deletions, then the attestations in all three copies should have referred to the deletion in the Duplicate. Why did the Notary have different attestation for each of the copies, contrary to legal requirements? Probably the Notary had got the Original and Protocol signed in blank and in order to avoid being exposed had thought it fit to insert only the deletion in the Duplicate copy because a certified copy would have been available to the Plaintiff-appellant only from the Duplicate. The failure to carry the corrections and deletion made in the Duplicate copy in the attestations to the three copies of the deed was fatal. On the face of it therefore this document lacks credibility. We have considered the evidence of the Plaintiff and also the statement made by the Plaintiff to the Police. They bring out the fact that the Plaintiff had continued to be in possession of the land in question even after the execution of the said deed. Possession would have been

sought by the 2nd Defendant Respondent if in fact the deed was an outright sale. Dispute seems to have arisen only 2 years after the execution of P3. P3 was executed in 1983. P4 being a transfer by the 2nd Defendant to the 3rd Defendant took place in 1984 and only in 1985 did the dispute arise. The fact that the 2nd Defendant transferred the property to the 3rd Defendant was unknown to the Plaintiff. Therefore, There is no doubt that the transaction that took place at the time of the execution of P3 had not been properly reflected in the documents signed. Section 2 of the Prevention of Frauds Ordinance refers to the due attestation of an instrument by a Notary. Proviso to Section 15 of the Prevention of Frauds Ordinance requires even deeds executed or acknowledged before Notaries practising in other jurisdictions to be duly attested. Section 16 requires deeds to be attested in Duplicate. Thus the corrections or deletions in the Original and Duplicate must be attested in both copies stating that such and such correction took place in the Original and such correction the Duplicate. Each copy cannot carry only corrections and deletions on its individual body only. Then the deed would not be attested in Duplicate. In this instance the Original does not carry the attestation relating to the deletion of an important condition in the body of the Duplicate though mentioned in the Duplicate. The attestation clauses are therefore completely different in the Original and the Duplicate. The deed was therefore not attested in Duplicate. The attestation did not conform to the provisions of Section 31(20) of the Notaries Ordinance.

Mr. Dayaratne stated that the Duplicate was only a draft. If that was so it could have been made as the Protocol copy. Section 31(24) of the Notaries Ordinance refers to "a draft of copy" as Protocol. The Duplicate cannot form the draft. The stamped Duplicate copy which was sent to the Land Registry was different in content to the Original copy registered at the Land Registry. Thus it appears that the Original and the Protocol copies were filled in after signatures were obtained on the Duplicate without any deletions and on the Original and Protocol in blank. On the face of the copies of the document it

appears that at the time the Duplicate copy was signed the other two copies had been blank. This was pointed out in evidence by the Plaintiff though he referred to one copy being in blank. Whether one or two , a copy being in blank when signature was obtained speaks not well of the Notary who attested the deed.

We are therefore of the opinion that the conclusion of the learned District Judge is not acceptable in the face of the documents produced. The short-comings on the deed go to the root of the transaction in that there appears have been no consensus ad idem between the parties to the transaction when executing the deed. We agree with Mr. Ladduwahetty that the short coming was not merely one of form, but one which went to the root of the transaction and therefore the validity of the deed has become questionable. Therefore, we are of the opinion that the said document must be set aside for want of due execution and attestation.

We set aside the judgment of the learned District Judge dated 09. 06. 1992 and enter judgment in favour of the Plaintiff according to paragraphs (ඌ), (ඌ෦), (ඌ෧), (ඌ෨) of the plaint. The 2nd Defendant or her assignee is entitled to the amount deposited in Court by the Plaintiff Appellant. The Plaintiff Appellant is entitled to the costs of this appeal.

SHIRANEE TILAKAWARDANA, J, - I agree.

Appeal allowed.