SESSION 2

Fraudulent Land Transactions

Lecture by President's Counsel Neville Abeyratne

- **What is fraud?**
- ***According to Black's Law Dictionary*** , Fraud is defined as, *"some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury"*
- ***According to Penal Code of Sri Lanka, (sec 22)***

  Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly"

- ***Some of the common mistakes / errors made by notaries.....***

1. Lack of proper identification of the parties involved. (Specially vendor or donor or witnesses)

a) Identification documents of parties not been mentioned in the deed.

Is there a legal requirement to do so? – the Notaries Ordinance is silent, but under the ***Financial Statue of the Western Province*** **it is <u>mandatory</u>**

2. Not paying attention to the Mental and physical state of the executant-***the executant should be of good health of body, of sound and disposing mind, memory and understanding and capable of doing any act that require thought, judgment or reflection ...***
3. Non execution of documents in the presence of the executant and the witnesses. (the witnesses shall sign the same in his presence and in the presence of one another, all being present at the same time)
4. Untrue/false particulars are mentioned in the pedigree

   Example - in the chain of title in the pedigree, forwarded to the local authorities deed of declaration has been mentioned as a deed of transfer.
5. *Insertion of wrong dates.*
6. *Obtaining signatures on blank sheets or pre- printed deeds*
7. *Not doing a proper search to identify the current owner before the execution.*
8. *Non insertion of correct prior registration.(folios not being properly connected)*
9. *Non reflection of the correct/genuine transaction between the parties to the legal document.*

   Example- mortgage or conditional transfer written as absolute transfer.
10. Passing of consideration and the manner in which it was passed, not being mentioned in the attestation.- *No acknowledgement from the purchaser of the receipt of the consideration.*
11. Non examination of power of attorneys in the correct manner as to whether there is authority to do the transaction.(No authority to Gift or Donate)

    a) Non verification of the principal of the power of attorney

    b) Transfer of consideration to the attorney's account not to the principal's account.

    c) Non verification of the power of attorney whether it is still in force- not getting an affidavit from the attorney

12. Execution of a deed by the Notary outside of his jurisdiction(District).
13. Execution of deeds in places other than notaries residence or office
14. Execution of agreement to sale of property on non-notarial documents and places his signature and seal only
15. Alteration /interpolation/erasures in the body of the deed not mentioned in the attestation.

- **Whether these acts are done ,**
  - i. Willfully with dishonest intention,
  - ii. Due to ignorance of the law and procedure,
  - iii. Due to Negligence/ Gross negligence

- **Prevention of Frauds Ordinance**

  Section 2

  No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, and no notice, given under the provisions of the Thesawalamai Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, 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 witness.

- **<u>ROHAN DE SOYZA v JINENDRADASA 2004 1 SLR 379</u>**

  In this matter it was held by the Court of appeal that :-

  i. The evidence shows that the impugned deed has been attested in violation of section 2 of the Prevention of Frauds Ordinance in that, it has been signed by a Notary who did not have a license to officiate as a Notary Public for the year 1985.

  ii. The evidence also reveals that the deed has not been signed by the executant, the attesting witness and the Notary all being present at the same time and place and therefore it has not been signed before one another.

  iii. Evidence of witness S with regard to the Notary's state of health, with regard to the fact that he was paralyzed and was unable to write from about 1984, and that the impugned deed did not bear his signature has not been challenged; it has not even been suggested that he was an untruthful witness.

  "The *maxim falsus in uno, falsus in omnibus* is not an absolute rule which has to be applied in every case where a witness is shown to have given false evidence on a material point.

- **Provisions in Penal Code regarding Fraudulent Acts (Chapter 18)**

Sec 452

Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to the Government, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed, commits forgery

Sec 453.

A person is said to make a false document—

Firstly—Who dishonestly or fraudulently makes, signs, seals, or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed, or executed, by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed ; or

Secondly—Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration ; or

Thirdly—Who dishonestly or fraudulently causes any person to sign, seal, execute, or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him he does not, know the contents of the document or the nature of the alteration.

Sec 454. (punishment for forgery)

Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

- **DON PERCY NANAYAKKARA v. THE REPUBLIC OF SRI LANKA 1993 1 SLR 71**

Candidate Hewagama's result sheet at the April 1978 A.L examination indicated she had failed in Physics. On the re scrutiny despite an assurance by the accused-appellant the results sheet still showed a failure in Physics. The candidate's father took this matter up with the accused-appellant who took back the re scrutiny results schedule and handed over a fresh schedule showing a pass in Physics. As the candidate's employer wanted confirmation of the results, the accused-appellant issued a letter of confirmation under his hand confirming the pass in Physics. The original results sheet was also altered and the letter "F" (failure) which had earlier appeared on it was scored off and the letter "S' (pass) interpolated under the initial of the accused-appellant.....

Held,

- The alteration on the Physics results sheet of candidate Hewagama was clearly unauthorized.....
- The offence of forgery consists of the making of a false document as defined in section 453 of the Penal Code for any of the purposes stated in section 452. Section 453 defines a false document by setting out the particular process of making the document by which the document itself is rendered false

- **Aiding and Abetting (sec 100)**
- **A person abets the doing of a thing who-**

  Firstly—Instigates any person to do that thing; or

  Secondly—Engages in any conspiracy for the doing of that thing; or

  Thirdly—Intentionally aids, by any act or illegal omission,

- **Notaries Ordinance**

  Some of the most important sections of the Notaries Ordinance in relevance to execution of deeds...

  - Sec 31(2)-*Attestation of documents drawn by any other person.*
  - Sec 31(3)-*When may the signature of a party or witness to a deed be taken*
  - Sec 31 (8)-*Two witnesses essential for every deed.*
  - Sec 31(9)-*Party executing the deed should be known to notary or to two attesting witnesses*
  - Sec 31(11)-*When deed to be read over and explained*
  - Sec 31 (12)-*When may deed be attested*
  - Sec 31 (13)-*What deeds may not be attested by notary.*
  - Sec 31 (15)-*Duty of notary in regard to deed signed with a mark*
  - Sec 31 (18) -*Date of execution of deed to be inserted*
  - Sec 31 (19)-*Erasures, interpolations, &c, not to be made after execution of deed.*
  - Sec 31 (20)-*Attestation*
  - Sec 31 (21)-*Form of attestation*
  - Sec31 (22)-*Deed not to be attested outside notary's jurisdiction or in language other than that in which he is authorized to practice.*
  - Sec 31 (25)-*Deeds executed before more than one notary.*

- WIJEYARATNE AND ANOTHER v. SOMAWATHIE (2002) 1 SLR 93

Held :

(1) Proof of due execution would be on a balance of probability.

(2) Non-compliance of the Rules in section 31 of the Notaries Ordinance does not invalidate a deed. Section 33 protects a deed.

(3) The absence of a mark by the executant at most would be non-observance by the Notary of the Rules specified in section 31.

Per Udalagama, J.

"It is my view that the essential element of due execution is to comply with the provisions of section 2 of the Prevention of Frauds Ordinance."

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16th June 2009

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Mr. U.R. de Silva,
Secretary,
Bar Association of Sri Lanka.

My dear U.R

You would recall, at a Seminar organized by the Bar Association of Sri Lanka, members expressed concern regarding the arrest of Attorneys at law on charges of forgery or deeds. As it was stated that sometimes Attorney at law were produced before court on charges of forgery when the facts did not warrant an arrest. I have, through the Inspector General of Police, set out a circular to all police stations setting out instructions regarding the arrest of Attorneys at law in such instances. I set out below an extract of the said circular so that you could keep your members informed of it.

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"When an allegation is made against an Attorney at law regarding the forgery of a deed during the course of his/her professional duties, investigations should be promptly concluded and the notes of investigation should be submitted to the Attorney General for advice before arresting and producing the suspect in court."

Sincerely yours,

PALITHA FERNANDO
Additional Solicitor General

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ආණ්ඩුවේ රස පරීක්ෂක දෙපාර්තමේන්තුව
அரசாங்க இரசாயனப் பகுப்பாய்வாளர் திணைக்களம்
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Your No.
Date 2009.06.04

ඉහත සඳහන් අදාළව 2009.03.18 දිනැති ලිපිය මඟින් සොළමන් ප්‍රනාන්ත මහේස්ත්‍රාත් අධිකරණයේ මහේස්ත්‍රාත් විසින් කොළඹ 23655 දරන මහඩියරුන්ස් අත පිටපත් කළ සටහන මගින් එවන ලද (කියා ඉහත සඳහන්) ඊ 1 සිට ඊ 40 තෙක් සහ එස් 01 සිට එස් 114 දක්වා අංකය දරන සාක්ෂිකරුවන් සහ සාවද්‍ය අල්ලස් පිළිබඳ ආඥාපනවල විධිවිධාන යටතේ පරීක්ෂණ සඳහා ඉහත සඳහන් සාක්ෂිකරුවන් විසින් භාරදෙනු ලබන ලද සාක්ෂි වස්තු පරීක්ෂා කිරීමෙන් අනතුරුව එහි ඇතුළත් කරුණු පිළිබඳ අදහස්වලට පැමිණිය හැකි බවට මෙයින් දන්වා සිටිමි.

02. එවැනි ඉහත සඳහන් පොදුවූ ඔබගේ ලිපියේ එස් 1 සිට එස් 53 සහ එස් 55 සිට එස් 111 දක්වා සොදු සටහන් කළ ලද ආදර්ශ අත්සන් X දරන ඔවුන්ගේ අංකයෙහි සටහන් ලදී.

03. ඉහත සඳහන් පරීක්ෂණ සඳ මෙහා 2009.03.18 දිනැති ලිපියෙන් ඉල්ලා ඇති පරිදි වාර්තා සටහන් මෙහි මහේස්ත්‍රාත් ඉල්ලා සිටි.

04. ඊ 1 සිට ඊ 40 තෙක් දක්වා අත්සන් , අත්තෙරුවන් සහ ඉලක්කම් අත්සන්කරු සහ වෙනත් ප්‍රධාන ප්‍රධානයන් ඔබේ පරීක්ෂා සඳ මෙහා ඉදිරිපත් කර ඇති අනුරාධ ආදර්ශ සමඟ ඉල්ලා ඇති පරිදි සසඳාලමින්, ඔබ ගේ වෙන් කිරීමේ සම්මන්ත්‍රණ , ඇඟවූ අභ්‍යාසයෙන් , පරීක්ෂණයෙන් , පරාජයෙන් , සාක්ෂිත්ව ප්‍රතිඵලයෙන් , නිගමනයෙන් සහ ප්‍රත්‍යක්ෂීන ආදර විදිහේ

4.1 ඊ 1 සිට ඊ 40 තෙක් ඊ 1.1 සිට ඊ 40.1 දක්වා අංකය ප්‍රධානත අත්සන් එස් 01 සිට එස් 53 තෙක් X දරන අංකය ආදර්ශ අත්සන් සහ එස් 54 (අංකය 5) තෙක් ආදර්ශ අත්සන් සමඟ සැසඳෙන්නේ යන්න සඳහා

4.2 ඊ 1 සිට ඊ 40 තෙක් ඊ 1.2 සිට ඊ 40.2 දක්වා අංකය ප්‍රධානත අත්සන් එස් 55 සිට එස් 111 තෙක් X දරන අංකය ආදර්ශ අත්සන් සහ එස් 112 (අංකය 5) තෙක් ආදර්ශ අත්සන් සමඟ සැසඳෙන්නේ යන්න සඳහා

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4.3 ඊ 01 සිට ඊ 40 තෙක් ඉල්ලීසා වූ ප්‍රත්‍යක්ෂ අත්තෙරුවන් සහ ඉලක්කම් ද , ඒවාට සොදු සාවද්‍ය වෙනස් සටහන අංක අල්ලස්කරු සහ ඉලක්කම් ද , එස් 113 (අංකය 4) සහ එස් 114 (අංකය 4) තෙක් ආදර්ශ අත්සන්කරු සහ ඉලක්කම් සමඟ සසඳාගෙන් ප්‍රධාන වෙනස්.

05. එස් 113 (අංකය 4) සහ 114 (අංකය 4) තෙක් ආදර්ශ අත්සන්කරු සහ ඉලක්කම් ලියූ ප්‍රධානයා ඊ 01 සිට ඊ 03 , ඊ 06 , ඊ 08 , ඊ 11 , ඊ 13 , ඊ 16 , සහ ඊ 32 ඊ ඒවාට අදාළ සටහන් සහිත ලද ඉලක්කම් ලියවිල්ල සැසඳ සටහන සහ සරිය මහතෙන් පැහැදිය යොමුවෙන.

06. ඔහුගේ නිගමනය වනුයේ

6.1 එස් 01 සිට එස් 53 තෙක් X දරන අංකය ආදර්ශ අත්සන්කරු , එස් 54 (අංකය 5) තෙක් ආදර්ශ අත්සන්කරු සඳහා ප්‍රධානයා ඊ 1 සිට ඊ 40 තෙක් ඊ 1.1 සිට ඊ 40.1 දක්වා අංකය අත්සන් සමඟ සැසඳී වේවැ.

6.2 එස් 55 සිට එස් 111 තෙක් X දරන අංකය ආදර්ශ අත්සන්කරු , එස් 112 (අංකය 5) තෙක් ආදර්ශ අත්සන්කරු ලඟ ප්‍රධානයා ඊ 1 සිට ඊ 40 තෙක් ඊ 1.2 සිට ඊ 40.2 දක්වා අංකය අත්සන් සමඟ සැසඳී වේවැ.

6.3 එස් 113 (අංකය 4) සහ එස් 114 (අංකය 4) තෙක් ආදර්ශ අත්සන්කරු සහ ඉලක්කම් ලියූ ප්‍රධානයා ඊ 1 සිට ඊ 40 තෙක් ඉදිරිපත් වූ අත්සන්කරු සහ ඉලක්කම් ද ඊ 1 සිට ඊ 40 තෙක් සොදු සාවද්‍ය වෙනස් සහ අත්සන්කරු සහ ඉලක්කම් ද ලියා ඇති බවත්ය

06. අවසාන වශ වෙමි.

(ඒ.ඩී.සෝමතිලක)
සහ පරීක්ෂණ අධිකාරී
රසායනාගාර.

(ආර්.සේනාධීරතා)
සහ පරීක්ෂණ අධිකාරී
රසායනාගාර.

මහේස්ත්‍රාත්
මහේස්ත්‍රාත් අධිකරණය
කොළඹ 12.

නිවැරදි
අධිකාරී
අපරාධ පරීක්ෂණ දෙපාර්තමේන්තුව .
කොළඹ 01.

ඒ. විජේවික්‍රම මයා
ජ්‍යෙෂ්ඨ. පොලිස් අපරාධ විමර්ශන නිලධාරී
අපරාධ පරීක්ෂණ දෙපාර්තමේන්තුව
කොළඹ 01

- ***Some important Judgements.....***

Thangarasa vs Arunodayam 1987 2 SLR 184

Date of attestation of a notary if false does not invalidate a deed .

A deed of transfer is not invalid merely because the requirements of notaries ordinance were not complied with by the notary who attested the deed

Weeraratne vs Ranmanika 21 NLR 286, 288

Arliya Umma Vs Thingal Mohommad (1999) 2 SLR 152, 157

People's Bank vs Hewawasam (2000) 2 SLR 29

Pingamage vs Pingamage and Others (2005) 2SLR 370,376

PACKIYANATHAN vs SINGARAJAH (1991) 2 SLR 205

It is necessary to make a distinction between mistake or inadvertence of an attorney-at-law or party and negligence. A mere mistake can generally be excused; but not negligence, especially continuing negligence. The decision will depend on the facts and circumstances of each case. The Court will in granting relief ensure that it's order will not condone or in any manner encourage the neglect of professional duties expected of Attorneys-at-Law.