

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

S.C Appeal 125/2011

SC/HCCA/LA No. 300/2010

In the matter of an application for Leave to Appeal under Section 5(C) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006

Benthota Arachchige Kanthi Pushpa Ranjini
"Karunawasa",
Kiralawelkatuwa,
Embilipiriya.

PLAINTIFF

Vs.

Handagalage Dhammika Wajirapriya
Sarathchandra Textiles
Pallegama
Embilipitiya.

DEFENDANT

AND BETWEEN

Handagalage Dhammika Wajirapriya
Sarathchandra Textiles
Pallegama
Embilipitiya.

DEFENDANT-PETITIONER

Vs.

Benthota Arachchige Kanthi Pushpa Ranjini
“Karunawasa”,
Kiralawelkatuwa,
Embilipiriya.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Handagalage Dhammika Wajirapriya
Sarathchandra Textiles
Pallegama
Embilipitiya.

DEFENDANT-PETITIONER-APPELLANT

Vs

Benthota Arachchige Kanthi Pushpa Ranjini
“Karunawasa”,
Kiralawelkatuwa,
Embilipiriya.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE:

S.E. Wanasundara P.C., J.
B. P. Aluwihare P.C., J. &
Anil Gooneratne J.

COUNSEL: Manohara de Silva P.C. with Avindra Wijesurendra
For the Defendant-Petitioner-Appellant

Harsha Soza P.C., with Upendra Walgampaya
for the Plaintiff-Respondent-Respondent

WRITTEN SUBMISSIONS TENDERED ON:

28.10.2011 (by the Appellant)
11.11.2011 (by the Respondent)

ARGUED ON: 14.09.2015

DECIDED ON: 02.12.2015

GOONERATNE J.

This was an action filed in the District Court of Embilipitiya for a declaration of title and eviction/damages against Defendant-Petitioner-Appellant from the land described in the schedule to the plaint. Defendant-Petitioner-Appellant by his answer has made a claim in reconvention. It is pleaded inter alia in the answer that a cause of action has accrued to the Defendant to claim for a declaration of title to the same land in question. In paragraph 12 of the answer it is

pleaded that the sums of money referred to therein are also claimed by the Defendant for improvements, and as such would be entitled to retain the land in question until satisfaction of the said sum.

The land in question is in extent of about 30 perches as described in the schedule to the plaint. In the plaint (paragraph 4) it is pleaded that Plaintiff-Respondent-Respondent obtained a loan from the Defendant-Petitioner-Appellant keeping as security the land described above on a promissory deed bearing No. 1122 of 11.12.1990 marked as 'X', which deed is annexed to the plaint. The deed 'X', indicates that having kept the land in question as security the Plaintiff-Respondent-Respondent obtained a loan of Rs. 150,000/- from the Defendant-Petitioner-Appellant. It is apparent that Clause 3 of 'X' refer to the position that if the amount stated in deed 'X' is not paid in the manner described in the said deed, the land described above, possession, ownership and all rights would pass to the Defendant-Petitioner-Appellant. The relevant clause and condition in deed 'X' had not been fulfilled by the Plaintiff.

In this appeal learned President's Counsel on either side raised an interesting point of law. i.e despite non-fulfillment of the said conditions by the plaintiff, does legal title to the property in dispute vest in the Defendant-Petitioner-Appellant? It is the position of the Plaintiff-Respondent-Respondent that the

Defendant-Petitioner-Appellant would be entitled only for possession of the property as per deed 'X' and that legal title does not vest in the Appellant. The facts presented to this court would reveal that the money due to the Defendant-Petitioner-Appellant had not been paid by the Plaintiff within the prescribed period.

Three preliminary issues were raised before the Learned District Judge, which had been tried by the District Judge based only on written submissions of parties. Learned District Judge by his order of 03.02.2010 held with the Plaintiff-Respondent-Respondent, and answered the said issues against the Defendant-Petitioner-Appellant. Being aggrieved by the above order, Defendant-Petitioner-Appellant, filed a Leave to Appeal application in the High Court, but leave was refused by the High Court, and the High Court affirmed the order of the learned District Judge on 31.08.2010. This court on 16.09.2011 granted Leave to Appeal on questions of law set out in paragraph 20 of the petition dated 13.09.2010. The said questions are as follows:

- (a) The said order is contrary to law and against the weight of evidence.
- (b) The High Court erred by holding that title of the subject matter of this action cannot be conveyed in terms of the terms and conditions of Promissory Deed No. 1122 to the Defendant-Petitioner-Petitioner as the Plaintiff-Respondent-Respondent "has not

executed a Deed of Transfer in terms of Section 02 of the Prevention of Frauds Ordinance”,

- (c) The High Court erred by failing to properly consider the application of Section 115 of the Evidence Ordinance,
- (d) The High Court erred by holding that the Plaintiff-Respondent-Respondent was not estopped from maintaining this action as pleaded by the Defendant-Petitioner-Petitioner,
- (e) The High Court erred by holding that if issue Nos. 11, 12 and 13 are answered in favour of the Defendant-Petitioner-Petitioner, his claim in reconvention would remain unadjudicated, whereas issue No. 13 states “if the issues 11 and 12 above are answered as “yes” is the defendant entitled to obtain any of one of the reliefs prayed for in paragraphs (a), (b), (d) and (f) in the prayer to the answer?
- (f) The High Court erred by holding that it is unable to come to a decision on the admissions alone without hearing evidence led with regard to the terms and conditions of the Promissory Deed.
- (g) The High Court and the District Court erred in failing to answer issue No. 11 in favour of the Defendant-Petitioner-Petitioner notwithstanding the fact that the Plaintiff had admitted the terms and conditions of the Promissory Deed ‘X’, including Clause 04 and 06 of the deed wherein it is stated that upon non-payment of the sums set out therein, the right, title and interest of the land would vest in the Defendant, and also by the admission No. 5 by which it was admitted by the parties that the monies has under the promissory deed has not been paid by the Plaintiff to the Defendant,

- (h) The High Court erred by holding that the action of the Plaintiff-Respondent-Respondent was a rei vindicatio action and therefore the period of prescription has not lapsed. However in terms of the admissions recorded at the trial (vide paragraph 11 above), the cause of action, if at all, accrued on the Plaintiff-Respondent-Respondent on 27.11.2000 and an action to set aside a notarially executed document must be filed within 3 years from the date the cause of action arose.
- (i) The High Court erred in not identifying the difference between prescription of the land and prescription of the action,
- (j) The High Court erred by not applying Section 10 of the Prescription Ordinance,
- (k) The High Court erred in holding that the Plaintiff's action was not prescribed within 03 years (from the date of the Deed or within 03 years from 27.11.2000) in terms of Section 10 of the Prescription Ordinance,
- (l) The High Court erred by holding that the Defendant-Petitioner-Petitioner has failed to prove that the action of the Plaintiff is prescribed.

In the District Court parties recorded 5 admissions and raised about 21 issues, and issue Nos. 11, 12 & 13 were raised as preliminary issues, as being issues of law. It is important even for this court to consider the initial steps that took place in the original court. In a gist the corpus, Promissory Deed 'X' and its conditions are admitted. Further paras 7 & 8 of the plaint were also admitted. The said paragraphs refer to the fact that possession was handed over to the Defendant-Petitioner-Appellant from the date of executing deed 'X' i.e 11.12.1999. It is averred in

paragraph 8 of the plaint that the Plaintiff-Respondent-Respondent failed to repay the principal sum of Rs. 150,000/- due to the Defendant and the interests due on same within 12 months as from 11.12.1999.

The issues that were tried in the original court are as follows:

- (a) Based on the admissions recorded, can the Plaintiff have and maintain this action?
- (b) Is the action of the Plaintiff prima facie prescribed?
- (c) If (a) & (b) above are answered in the affirmative is the Defendant entitled to obtain the relief prayed for in sub paragraphs (a), (b), (d) & (f) of the prayer to the answer. ((a) is for dismissal, (b) declaration of title in favour of Defendant (d) retention of land and buildings (improvements) till amounts reflected in prayer (d) is paid. (f) such other and further relief as deemed by court)

The learned District Judge held in favour of the Plaintiff-Respondent-Respondent. Having tried the preliminary issues as issues of law, the learned District Judge also observed that although parties have admitted the several conditions in deed 'X', parties were at variance as to what is really meant by those conditions or its meaning “අර්ථය කුමක්ද”? (folio 78 & pg. 57). At folio 79 and pg. 8 of the learned District Judge’s judgment I find in its first paragraph that the trial Judge having on his own posed several questions connecting deed 'X', observes

that court cannot arrive at a conclusion based solely on question of law, and state it is improper to do so without a full trial of the case.

The trial Judge further elaborate on this point as follows:

එහෙයින්, පුර්ණ නඩු විභාගයකදී සාක්ෂි මෙහෙයවමකින් පසු හා එම සාක්ෂි, අදාල විය හැකි නීතිමය කරුණු සමග විශ්ලේෂණය කර සලකා බැලීමකින් තොරව, හුදෙක්ම මෙම නඩුවේ සටහන් කර ඇති පිලිගැනීමේ මත පමණක් පදනම්ම පැමණිලිකාරියට මෙම නඩුව පවරා පවත්වාගෙන යා හැක්කේ ද යන්නට හෙවත් II වන නීතිමය විසඳිය යුතු ප්‍රශ්නයට විත්තියේ වාසියට පිළිතුරු සැපයීමට නොහැකි බවට තීරණය කරමි.

The learned High Court Judge in its judgment has held that issues No. 11, 12 & 13 would not dispose of the entire case before the District Court, but affirm the order of the learned District Judge. Both the Original Court and the Civil Appellate Court expressed the view that the case ought to proceed to trial. As observed above the learned District Judge seems to have realized the importance of hearing evidence, which decision he could have taken at the very outset. However we in the Apex Court cannot fault either court, on certain matters, as an open judicial mind need to be maintained at any stage of the case in the best interest of justice. Trial of issues of law to be tried initially is embodied in Section 147 of the Civil Procedure Code. It reads thus:

When issues both of law and of fact arise in the same action, and the court is of opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issue of law have been determined.

I would prefer to consider some case law on the point although our courts have pronounced several judgments under Section 147 of the Code.

Courts have power to dismiss an action on an issue of law without recording any evidence. 15 NLR 389; to dispose of a case on a preliminary issue, it should be a pure question of law. As far as practical Judges of the original court should go through the entire trial and answer all issues 1994(3) SLR 11; in what manner the issues are to be tried is best left to the Original Court, and Appellate Courts ought to be slow to interfere 1997(3) SLR 202. Per Hector Yapa J. in Mohinudeen Vs. Lanka Bankuwa 2001(1) SLR 290. "Section 147 of the Code gives a wide discretion to the trial Judge, so that even if he has decided earlier to try an issue as a preliminary issue of law, it is open to him to decide such an issue later, if he is of the view that it cannot be decided without taking evidence".

In a case where questions of law are intricately tied up with questions of fact the trial court need to, as far as possible, go through the entire trial and answer all issues. A question of prescription could involve factual matters. As observed by the learned District Judge, even though the parties accept and agree

to the condition in 'X', trial Judge states that parties are at variance as to what those conditions really mean. My attention has been drawn to condition No. 7 of 'X'. It states in the event of a breach of condition in deed 'X' parties could have recourse to a legal remedy, or enforceable through legal action.

Having perused both judgments of the District Court and the High Court, I would take the view that as stated by the learned District Judge this case ought to proceed to trial, but from the beginning. I do not think that based on admissions alone, issue Nos. 11, 12 & 13 could be tried as preliminary issues. An important issue based on prescription cannot be tried or should not be tried in the absence of ascertaining all the factual positions, in a case of this nature. It is so because deed 'X' though described as a promissory deed, it is in fact a conditional transfer. I would fortify my views based on the following principle of law gathered from case law.

It must be borne in mind that both parties to the suit, had willingly entered into deed marked 'X', and its terms and conditions must be strictly followed and applied.

Conditional Transfers-Promissory Deed-Agreement to re-convey

If a deed absolute on the face of it contains an agreement to re-convey, conditions therein have to be complied with on time and time is of the essence of the contract.

So said Gratiaen J. in *Thambipillai v. Muthukumaraswamy* 58 NLR 387

“Time is of the essence of the contract in contracts of this nature”

Terms of the contract were unambiguous. P3 operated as an absolute transfer. But there were conditions such as repayment.

At pg. 388

In due course, the plaintiff instituted this action claiming a conveyance of the land from the appellants on payment of the purchase price which was not however deposited in Court and is apparently not yet forthcoming. Time is of the essence of the contract in a *pactum de retrovendendo*, and the plaintiff's failure to tender the stipulated consideration within time is therefore fatal to his claim. The learned Judge took the view, however, that the transaction was in reality a mortgage and not a sale. I would reject this conclusion for the same reasons as those recorded in the recent judgments of my brother Sansoni and myself in *Setuwa v. Ukku*. Accordingly, there is no room for the application of the principle “once a mortgage, always a mortgage”.

It is unnecessary to consider whether in any event the plaintiff could alone have exercised the option of repurchase. His claim fails *in limine*. owing to his omission to make a valid tender within the time fixed in P2. I would therefore set aside the judgment, under appeal and dismiss the plaintiff's action with costs (in favour of the appellants) in both Courts.

So the unambiguous terms of the deed indicate that it is a sale subject to an agreement to re-convey.

The transferee must observe the conditions within the time stipulated.

The tender of the price within the time agreed upon constitutes a condition precedent to obtaining a re-conveyance.

One cannot claim a retransfer if he has not complied with the condition. Supposing he has failed to tender the money on time.

Conditional sale having the effect of passing title on the fulfilment of the conditions is well known to Roman Dutch Law 16 NLR at 147.

Velupillai Sanmugam and others v. Kathiravelu Thambaiya, B.L.R. (1990) Vol.111 Part 1 p. 27 (SC).

Notice compelled in Section 93 of the Trust Ordinance-Conditional transfer – Trust.

Held that Dismissing the Appeal and affirming the judgment of the District Judge (per Bandaranayake J. with H.A.G. de Silva, J and Kulatunga, J agreeing):

1. The conclusion of the District Judge that the promissory note was invalid and hence insufficient to discharge liability on the conditional transfer was unimpeachable on the evidence;
2. The Court of Appeal was mistaken in coming to the view that the 'notice' contemplated in Section 3 of the Trusts Ordinance meant only notice of matters appearing on the face of the Registers and that knowledge gathered from other sources was irrelevant. Such a view is too restrictive and not a proper view of the Law.
3. Where the condition underlying the conditional transfer is not fulfilled the transferee becomes absolute owner in terms of the agreement of parties free from any obligation to re-transfer. No question of a trust arises in such a context as there was no existing contract.

Gnanasambandam v. Bin Adaham and Another, (1998) 2 SLR L.R. 305 (CA).

Conditional transfer – Deed not signed by vendee – Rights to obtain retransfer.

Held that

A deed of transfer of a land embodying a condition to retransfer on payment of the purchase price plus interest within five years binds the vendee to retransfer the land on being paid the purchase price and interest within the stipulated time although the vendee had not signed the deed.

The property was transferred with a condition attached to it. The condition cannot be disengaged from the property. The failure of the defendant-appellant to sign the deed does not entitle him to wriggle out of his obligation to retransfer. The obligation was intrinsic in the transfer itself.

If oral evidence is led there could be more clarity to the conditions contained in deed 'X'. Subject to the views expressed above it would be in the best interest of both parties to commence the trial from the beginning. In these circumstances I would set aside both judgments of the District Court and the High Court as per sub paragraphs (c) & (d) of the prayer to the petition of the Defendant-Petitioner-Petitioner, dated 13.09.2010, with a direction to commence trial de nova.

I would answer the questions of law (a) to (L) as follows:

- (a) No oral evidence led. Does not arise
- (b) Yes, but all necessary evidence need to be led.
- (c) Yes, to arrive at a final decision, but oral evidence should be led.
- (d) Yes, based on the limited material, but all necessary evidence need to be led.
- (e) Yes from the limited evidence, but all necessary evidence need to be led.
- (f) No
- (g) Yes, but merits of the case should be considered after leading all available evidence.
- (h) Nature of the case is such that all available material should be placed before court to consider the question of prescription.
- (i) Same as (h) above
- (j) Same as (h) above.
- (k) Same as (h) above
- (l) Same as (h) above

Appeal allowed as above, subject to the directions given by this court.

JUDGE OF THE SUPREME COURT

S. E. Wanasundera P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

B. P. Aluwihare P.C., J

I agree.

JUDGE OF THE SUPREME COURT