

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

S.C . Application No. 48/2012

Samarakoon Mudiyanseelage Jayathilake of
Palle Baddewela, Makehelwala

DEFENDANT-APPELLANT-PETITIONER

Vs.

Balahinna Arachchige Sarath Abeyweera of
No. 110, Aththalapitya, Hingula.

PLAINTIFF-DEFENDANT-RESPONDENT

BEFORE: Priyasath Dep P.C., J.,
Upaly Abeyrathne J. &
Anil Goonerathne J.

COUNSEL: Sunil Abeyratne with Uditha Collure for the
Defendant-Appellant-Petitioner

D.M.G. Dissanayake for Plaintiff-Respondent-Respondent

ARGUED ON: 23.03.2015

DECIDED ON: 19.06.2015

GOONERATNE J.

This is an appeal from a judgment of the Civil Appellate High Court of Kegalle Province dated 18.10.2011 dismissing an appeal from the judgment of the District Court of Mawanella. The action out of which it arises was brought by the Plaintiff-Respondent-Respondent in the District Court for a declaration of title to a land described as 'Paranawatte' more fully described in the schedule to the plaint, and to eject the Appellant from the said land, with a claim for damages. As the appeal to this court involves questions of facts and law it is necessary to examine the evidence in some detail, keeping in mind the main argument of the Appellant advanced on behalf of the Appellant that the transactions explained in the plaint are not absolute outright transfers based on deeds, but relates only to loan transactions.

Parties proceeded to trial on 3 admissions and one of which was the admission of the corpus, and on 13 issues. However in the trial court itself issue No. 12 had been rejected by the learned District Judge by his order of 19.11.2007. Issue No. 12 refer to prescriptive rights of Defendant. Issue No. 11 is whether Plaintiff identified the land? As such issue No. 13 became issue No. 12. It is evident from the record that order of 19.11.2007 was not canvassed. However on 14.02.2008 parties at the trial agreed to acceptance of the issue on prescription. Plaintiff in his evidence produced deeds marked P1 to p4. By P1 the Defendant transferred the land described in the schedule of the amended plaint to E.W.M. Asoka Chaminda Boyagoda, on 11.05.2001 and the said Boyagoda transferred the land in question to E.M. Asoka Dissanayake by transfer deed P2 of 01.02.2002. The above E.M. Asoka Dissanayake by deed P3 of 12.8.2003 transferred to Somalatha. Both the District Court and the Civil Appellate High Court accept that land described in the schedule to the deeds P1 to P3, are identical.

It is also in evidence of the Plaintiff that the land described above in deed P3 had been surveyed and divided into two lots by plan 426 of 12.12.2003 by Licenced Surveyor Weerasinghe marked P5. Lot 2 of plan P5 was transferred by Somalatha to Plaintiff-Respondent by deed 1614 of 04.01.20204, marked P4 for a

consideration of One Hundred Thousand rupees. It was Plaintiff's evidence that the Defendant and his son signed as witness to deed P4, and with the purchase of the land in question Plaintiff went into possession (folio 66) but after some time possession had been disturbed by removal of poles fixed to the ground. However Plaintiff testified that prior to the transfer of the land the above Somalatha was in possession who had leased (P6) the land to the Defendant. However later, prior to purchase of the land, lease had been cancelled.

In the evidence of the Plaintiff-Respondent he very clearly identified the corpus by referring to the metes and bounds thereof with a comparison of the Survey plan, more particularly to lot 2 of plan No. 426 (P5) as stated above. Plaintiff has also marked and produced as P6 the lease of land to Defendant by Somalatha. Plaintiff in his evidence has stated that in view of the lease he cannot purchase the land and as such Somalatha by P7 cancelled the lease.

I have also examined the Plaintiff's version in cross-examination which is important to this case, and the following points to be noted.

1. It is the Defendant who initiated the preparation of plan P5 and even showed the boundaries to the Surveyor.
2. Survey done as it was necessary to separate the lot which was to be purchased by Plaintiff.

3. Defendant was residing in the house but unaware as to the period he was in possession.
4. Defendant was not residing in the portion separated for the plaintiff (lot 2). Defendant's portion shown as lot (1) .
5. Possession of Plaintiff disturbed. As from the date of purchase Plaintiff went into the land in spite of being obstructed.
6. Plaintiff requested Somalatha to cancel lease P6.
7. Money transaction between Defendant and Somalatha, and not Plaintiff. Plaintiff denies that deed P4 was executed based on money transaction. Plaintiff unaware of transaction between Somalatha and defendant.
8. Land purchased for Rs. 100,000/- from Somalatha. Somalatha told Plaintiff to give the money to Defendant. The Defendant signed the deed as a witness. Somalatha got title to the land from Defendant's wife. Plaintiff however denies any transaction with money and loan based on deed P4. Plaintiff also state he is unaware of any money dealings referring to the other deeds.
9. Plaintiff specifically denies that deed P4 refer to any money or loan transaction.
10. By deed P4, Plaintiff purchased the land in question from Somalatha.

Defendant in his evidence states he had no land transaction with the Plaintiff. He executed deed P1 in favour of 'Boyagoda' and maintains that it is a money transaction and deed P1, was kept as security. He obtained a sum of Rs. 50,000. When the Defendant was questioned as to why he executed a transfer deed, it was his answer that, if not he cannot obtain money at interest. Defendant also testified about deed P2 in favour of his wife, and again states it is a loan transaction. Defendant admits he signed as a witness to deed P4. He rejects plan P5 and lease P6, and cancellation of lease P7. However in cross-examination Defendant admits that the deed P1 contains no conditions, (even as regards the other deeds P2 – P4) as a loan transaction. Defendant states he did not issue any other letter referring to a condition as a loan transaction. Defendant admits his signature in deed P4.

On a perusal of the two judgments i.e District Court and the Civil Appellate High Court I find that both courts have analysed the factual position with clarity. I would advert to the above position with reference to vital points accepted and dealt by both courts above mentioned. All 4 deeds (P1 – P4) are no doubt transfer deeds. These deeds contains no specific condition to at least give or hint at a clue that the transactions were in fact loan transaction, or that deeds in question are conditional deeds. The most relevant deed being deed marked P4

is an outright transfer from Somalatha to Plaintiff-Respondent, for valuable consideration. Further the Defendant-Appellant was a witness to such deed and signed same. It is evident that the attestation clause refer to the consideration being furnished and paid in the presence of the Notary. In fact all other transfer deeds produced by the Plaintiff is to that effect. Further even in deed marked P3 the Defendant-Appellant was a witness. If the transaction in question and more particularly deed P4 differs in its nature the best evidence that could have been placed would have been of that of 'Somalatha' the vendor. The Appellant had not been able to lead any such evidence and both courts specifically refer to same.

I also note that the learned District Judge had the great advantage of seeing the witnesses in the witness box. Learned District Judge did not err on the question of burden of proof and decided the case correctly on a balance of probability. This court also need not disturb findings of primary facts considered by the learned District Judge 1993(1) SLR 119. On question of fact Appellate Court will not overrule decisions of the lower court, unless it is a perverse order. 20 NLR 332; 1955 1 All England Reports 326; 20 NLR 282.

I would also wish to discuss the provisions contained in Section 68 of the Evidence Ordinance since an argument was advanced that the deeds in

question are not proved. In any event according to the facts relevant to the case in hand, it is apparent that on both deeds marked P1 and P4, the Defendant-Appellant had signed the deeds and admitted this fact in his evidence before the District Court. Further the transferor of P1 was by the Defendant-Appellant. In the context of the case there is due compliance with Section 68 of the Evidence Ordinance. To attest means to bear witness to a fact. An attesting witness is one who has seen the document executed and who sign it as witness. (Velupillai V. Sivakampillai 1907(1) A.C.R 180 at 181; Marian Vs. Jesuthasan 59 NLR 348 at 349. In this context it is also important to bear in mind Section 70. Admissions of execution by party to attested document. No doubt there must be a specific admission for this purpose. Fernando Vs. Ceylon Tea Co. Ltd. (1894) 3 SCR 35. The evidence transpired in the District Court by the Defendant-Appellant itself as an attesting witness and transferor is ample testimony in this regard, as an admission and due compliance with Section 68 of the Evidence Ordinance.

Deed marked P2 was proved by calling the attesting witness. Sumanadasa. I also note that the learned High Court judge has correctly observed that the Defendant in filing the amended answer did not plead that the deeds in question were fraudulently executed nor was such execution of deeds challenged.

However it is subject to rules relating to amendment of pleading changing the nature and character of the case presented by a party.

Learned District Judge has arrived at a conclusion that deeds P1 to P4 are duly executed. Somalatha was at a certain point of time owner of the land and executed lease P6. As observed by the Civil Appellate High Court Defendant-Appellant cannot deny title of Somalatha as she derived title from the deed executed by the Defendant who had title to the land in dispute at a certain point of time and if permitted to accept Defendant's contention, in a way such contention would offend Section 116 of the Evidence Ordinance. (a tenant or person claiming through such tenant cannot deny that the landlord had title to the immovable property. The same estoppel applies to licencees of immovable property. 55 NLR 116; 70 NLR 313 at 317. However it will not apply in the case of fraud De Silva Vs. Isan Appu 31 NLR 225. A lessee would also be in the same position, as a licencee.

I also had the advantage of reading the decided case namely Piyadasa Vs. Binduva Alias Gunasekera a Judgment of the Court of Appeal 1992 (1) SLR 108 at 109, on execution of deed. This judgment has incorporated a

Judgment of the Supreme Court, viz W. Branchy Appu V. J. Poidohamy (1902) 2 Br. Rep 221, 222 where the former Supreme Court (Lawrie A.C. J with Moncreiff J. agreeing) held “The execution of a document impeached as having obtain by fraud need not be proved.

“But when it is alleged that a person signed a blank sheet of paper, which was subsequently filled up in the form of a deed and impeached as fraudulent by such person, the execution of such document ought to be proved, not by calling the notary who attested it, but by calling at least one of the witnesses thereto”.

The important question as to whether the transaction was a loan transaction need to be inferred from the attendant circumstances. The evidence led in the case and more particularly the case of the Defendant-appellant does not indicate that the transaction was a pure and simple loan transaction. The Appellant had not been able to place the best available evidence before the trial court. i.e evidence of Somalatha the last vendor to the property in dispute. There is always available to a party to a suit to lead parole evidence to establish the true nature of the transaction as a exception to the rules contained in Section 92/93 of the Evidence Ordinance, if land is transferred as security for a loan or the transfer

in fact creates a trust as per Section 83 of the Trust Ordinance such an exception would be instances permitted by law to lead parole evidence to establish the true nature of the transaction. I am in agreement with the views expressed by the learned High court Judge on this point, and there is no acceptable basis as contended by the Appellant to disturb such findings.

In the context of this case I would also wish to give my mind to whether, the Appellant never intend to transfer the beneficial interest. A proposition as the beneficial interest leads me to consider a situation where the transferor has entered into a notarial conveyance like the case in hand. If it is the position of the Appellant that this is a pure and simple loan transaction, courts tend to place a heavy burden on the transferor to prove facts to establish such a contention. The Appellant must prove he did not intend to part with the beneficial interest. In the case in hand the Appellant failed to place the best available evidence as observed above, or prove it was a constructive trust in terms of Section 83 of the Trust Ordinance.

Section 83 of the Trust Ordinance encluse:

“where the owner of property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or

legatee must hold such property for the benefit of the owner or his legal representative.”

“Attendant circumstances” in section 83 have been described as those “which precede or follow the transfer.... But are not too far removed in point of time to be regarded as attendant....”

“Whether a circumstance is attendant or not would depend on the facts of each case (1960) 62 NLR 559, 546. Whether it be a trust or loan transaction, each case need to be decided on the facts of each such case. But cases where there was held to be no trust, either the transferor remain in possession. Perera Vs. Fernando 17 NLR 486 or stated facts provide no indication as to who was in possession. Adaicappa Chetty Vs. Caruppen Chetty (1921) 22 NLR 417. On a balance of probability it is the burden of the Appellant. He need also to prove that he remains in possession and the consideration he received was adequate. A mere assertion of a loan transaction or that Respondent never had possession would not suffice. In the instant case both courts i.e the District court and the Civil Appellate High Court preferred to accept the version of the Respondent. As such I see no reason to interfere with that position.

The Appellant should have established that the transaction between Somalatha and vendee Plaintiff-Respondent, was a fictitious transaction or a sham. In this regard I have considered the decided case of Penderlan Vs. Pendarlan 50 NLR 513 where the transaction was never intended to be acted upon. The facts relevant to the case in hand does not take the Appellant's case anywhere near to the case of Penderlan Vs. Pendarlan.

In the above circumstances I am not inclined to disturb both the judgments of the learned District Judge and the High Court Judge. There is no merit in this appeal. As such this appeal is dismissed without costs. The judgment of the High Court is affirmed.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT