

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

**SC. Appeal No. 93A/2011**

SC.(Spl) LA. No. SC(HC)CA.LA. 271/10  
CA. Appeal No. 805/99(F)  
D.C. Panadura No.695/L

Kapila Warnasooriya  
No. 285/2, Idama,  
Moratuwa.

(Acting through Attorney holder  
Patabendi Mahakariyakarawanage Rahal  
Warnasooriya of the same address)

**Plaintiff**

**Vs.**

Dayawathi Sellahewa  
No. 13/2, Mendis Lane,  
Idama, Moratuwa.

**Defendant**

**And**

Dayawathi Sellahewa  
No. 13/2, Mendis Lane,  
Idama, Moratuwa.

**Defendant-Appellant**

**Vs.**

Kapila Warnasooriya  
No. 285/2, Idama,  
Moratuwa.

(Acting through Attorney holder  
Patabendi Mahakariyakarawanage Rahal  
Warnasooriya of the same address)

**Plaintiff-Respondent**

**And**

**SC. Appeal 93A/2011**

Dayawathi Sellahewa  
No. 13/2, Mendis Lane,  
Idama, Moratuwa.

**Defendant-Appellant-Appellant**

**Vs.**

Kapila Warnasooriya  
No. 285/2, Idama,  
Moratuwa.

(Acting through Attorney holder  
Patabendi Mahakariyakarawanage Rahal  
Warnasooriya of the same address)

**Plaintiff-Respondent-Respondent**

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**Before** : **Saleem Marsoof PC.J.**  
**Sathya Hettige PC. J. &**  
**Eva Wanasundera, PC,J.**

**Counsel** : Mahinda Ralapanawa with Nisansala Fernando and Lalani  
Hettiarachchi for the Defendant-Appellant-Appellant.  
  
Dr. Sunil F.A. Coorey with Sudarshani Coorey for the  
Plaintiff-Respondent-Respondent.

**Argued On** : **05.02.2014**

**Further Written**  
**Submissions filed** : By the Appellant on : 18.02.2014  
By the Respondent on: 18.02.2014

**Decided On** : **25.03.2014**

\* \* \* \* \*

**Eva Wanasundera, PC.J.**

This Court granted Special Leave to Appeal with regard to this appeal on three questions of law on 29.6.2011. The said three questions of law are as follows:-

1. Did the Court of Appeal err when it failed to take note that Deed No. 6517(P5) (V4) was a conditional transfer as more than 50% of the transfer price had not been settled as at the date of execution of the said Deed No. 6517 (P5) (V4)?
2. In any event, could the Plaintiff-Respondent-Respondent have succeeded in an action for declaration of title, in the absence of proper conveyance of title?
3. Did the Court of Appeal err when it concluded that it does not intend to make an order with regard to payment of balance purchase price as issue No. 8 had been answered in favour of the Defendant-Appellant and failed to appreciate that it is not possible to obtain any payment from the Bank?

A further question of law was raised by this Court on 05.02.2014 at the hearing of this appeal on 05.02.2014, as follows:-

4. In all the circumstances of this case, did the mere execution of P5 (Deed 6517) and delivery of that deed to the Respondent suffice to pass dominium over the property to the Respondent?

The facts are pertinent to understand the decision and as such I lay down bare facts at the beginning itself. The Defendant –Appellant-Appellant (hereinafter referred to as the ‘Defendant-Appellant’) Dayawathie Sellahewa agreed to sell her house and land at No. 13/2, Mendis Lane, Idama, Moratuwa to the Plaintiff-Respondent-Respondent (hereinafter referred to as the ‘Plaintiff-Respondent’), Kapila Warnakulasooriya of No. 285/2, Galle Road, Idama, Moratuwa on 27.11.1990 for a price of Rs.4,45,000/-.

The Plaintiff-Respondent paid Rs.100,000/- on 27.11.1990 to the Defendant-Appellant when she signed the document, “agreement to sell”. The Plaintiff-Respondent agreed to pay the balance money within 6 months i.e. on or before 27.05.1991. He applied for a loan from the State Mortgage & Investment Bank (hereinafter referred to as ‘SMB Bank’) to pay the balance to the Defendant-Appellant. On 23.04.1991, the Plaintiff-Respondent paid another Rs.105000/-to the Defendant-Appellant as part of the balance

money to be paid for the purchase of the property. Therefore the balance money due to be paid to the Appellant by the Plaintiff-Respondent to complete the purchase price as agreed was only Rs.240000/-. Before the SMI Bank granted the loan to the Plaintiff-Respondent, he went abroad but he gave the Power of Attorney to Rahal Warnasooriya. The Appellant wanted to buy a house at No. 552, Mihindu Mawatha, Malabe to live in, when she sells the house in Moratuwa. Incidentally, she paid Rs.7500/- to Mr. S.P. Perera the owner of that house and entered into another agreement to buy that house for Rs. 300.000/-.

The SMI Bank wanted the transfer deed signed by the Appellant transferring the property to the Respondent and the mortgage deed signed by the Respondent mortgaging the same to the SMI Bank and agreeing the loan to be paid within 5 years. On 23.04.1991 the Appellant signed the deed of transfer P5 (deed 6517). The Appellant trusted that the balance money of Rs.240000/- would be paid to her on or before 27.05.1991 as agreed by the Respondent. But the Respondent had failed to submit the registered deeds and extracts to the Bank as duly undertaken to be done on time and as such the SMI Bank did not release the money to the appellant on or before 27.05.1991, the date agreed for balance money to be paid by the Respondent to the Appellant. Then the Defendant-Appellant informed the SMI Bank that she is unable to hand over vacant possession of the property as the balance purchase price was not paid to her on time and as a result she lost the chance of buying the house at Malabe.

The Plaintiff- Respondent filed action in the District Court praying that the Defendant-Appellant be ejected from the premises, that a declaration be granted to the effect that the Plaintiff-Respondent is the owner of the property and that the Defendant-Appellant be ordered to pay damages at the rate of Rs.5000/- per month. The Defendant-Appellant filed answer praying for the dismissal of the plaint, for a declaration that the Plaintiff-Respondent is holding the property on trust and for damages in a sum of Rs.240,000/- with interest and for a transfer of the land back to the Defendant-Appellant on payment of Rs.195000/- according to the terms of the sale agreement. At the end of the trial, judgment was given in favour of the Plaintiff-Respondent. The Defendant-Appellant appealed from that judgment to the Court of Appeal and the Court

of Appeal varied the judgment of the District Judge only to the extent of leaving out the damages to be paid by the Defendant-Appellant to the Plaintiff-Respondent. So, the record remains that the Plaintiff-Respondent is entitled to be the owner and eject the Defendant-Appellant from the premises.

I observe that Deed 6517 (P5) was signed by the Defendant-Appellant without getting the balance Rs.240,000/- into the hand for completion of the sale. She did so because the SMI Bank would not give a loan without mortgaging the land belonging to the borrower. The borrower was the prospective buyer, the Plaintiff-Respondent. The moment the deed 6517 (P5) was signed by the seller, the Defendant-Appellant, that act of signing facilitates the SMI Bank's procedure to write a mortgage binding the buyer to the Bank to repay, with the property taken as security. As of today in 2014 the procedure in all the banks granting loans happens to be different. At the time the deed of transfer is signed by the seller to the buyer, the Bank gets the buyer to sign the mortgage. The task of getting the sale deed and the mortgage deed both registered at the Land Registry rests in the hands of the Bank. Then and there the Bank releases the cheque for the balance money due to the seller. In the year 1990, it seems that the buyer had to get the deeds registered and bring the extracts to prove that they were registered, back to the Bank, for the Bank to release the cheque in favour of the seller. I feel that the delay on the part of the Plaintiff-Respondent, who was physically abroad and who had burdened the power of Attorney holder to do the needful on his behalf, has triggered this problem in our hands now, altogether.

I am of the view that the Defendant-Appellant wholeheartedly trusted that the SMIB would give the money soon, hardly knowing that a delay would be caused by inaction on the part of the Plaintiff-Respondent. It is in evidence that the Defendant-Appellant visited the Power of Attorney holder of the Plaintiff-Respondent and the Bank many times; wrote letters to the Plaintiff-Respondent abroad personally with regard to the problem and finally wrote to the Bank that she will not be able to hand over possession as the money was not paid to her within the time frame granted according to the "agreement of sale". As it is, the balance Rs.240,000/- was not paid to the seller by the SMI Bank but the Bank has a mortgage of the property from the buyer. The SMI Bank did not give any money to the buyer or the seller. So the loan asked for was never in

fact given but there is a mortgage in favour of the Bank registered at the Land Registry. In the same way there is a deed of transfer registered at the Land Registry in favour of the buyer who has not paid the balance due on the purchase price to the seller. The SMI Bank is not going to file action or cannot in fact file action against the borrower who is the Plaintiff-Respondent because he in fact did not borrow any money. No consideration passed for that mortgage. Then that transaction is null and void. The registered 'mortgage bond' is a nullity.

In the same way, the transfer deed 6517(P5) does not hold water as the full consideration has not passed. The consideration was partly paid but not fully paid. The seller was made to believe that she will be paid by the SMI Bank on behalf of the buyer on time. The time agreed between the parties to conclude the transaction lapsed. The balance money was never paid. I am of the opinion that the mere signing of the deed of transfer does not convey the title to the buyer without having the full consideration passed to the seller.

If I may draw an example; 'A' agrees to sell the property to 'B'. 'B' pays two instalments as part of the selling price to 'A'. 'A' is made to believe that after signing the deed of transfer he will be paid the balance. 'A' signs the transfer deed. But the balance was not paid. Then is the deed of transfer valid? Answer would be 'No'. The mere fact that the Defendant-Appellant signed the deed of transfer 6517(P5) does not by itself give the right title and interest in the property to the Plaintiff-Respondent for the reason that both in the mind of the Defendant-Appellant and in the mind of the Plaintiff-Respondent, the intention to convey or to receive the right title and interest in the property was absent, at the moment of signing. Both parties knew that the conveyance would take place when the balance money is given and possession is handed over. The stake in the hands of the Defendant-Appellant was the 'possession of the property' and the stake in the hands of the Plaintiff-Respondent was "the balance money Rs. 240,000/-". The signing was conditional on those two factors. Neither party bond fide believed that the conveyance was done and concluded. Either party trusted each other. Deed 6517(P5) was signed on 23.04.1991.

The conditions in the agreement to sell stated that payment of the balance money should be done on or before 27.05.1991. Even after the lapse of this date the Defendant-Appellant had written an air-mail to the Plaintiff-Respondent on 04.06.1991 explaining her predicament in not being able to buy a place in Malabe due to the fact that she did not receive the money due to be given to her by the SMI Bank on behalf of the Plaintiff-Respondent.

I am of the view that since the balance money was not in actual fact given to the Defendant-Appellant before 27.05.1991 the Defendant-Appellant was not bound in law to hand over possession of the house to the Plaintiff-Respondent. At no time was the Defendant-Appellant legally bound to hand over possession of the house and property before receiving the balance money. There was no agreement to do so in the signed 'agreement to sell' or any undertaking to leave the house given by her 'to leave before the payment is received'. The agreement to sell came to an end on 27.05.1991. As such the Defendant-Appellant informed, the same in writing to the SMI Bank on 10.06.1991, by 'V2' requesting the SMI Bank to cancel the deed of transfer and explaining in detail the reasons. The SMI Bank in turn wrote to the Plaintiff-Respondent on 20.06.1991 with a view to resolving the matter which the Plaintiff-Respondent failed to do. Instead he filed action in the District Court against the Defendant-Appellant to eject the Defendant-Appellant, taking advantage of the fact that the deed of transfer was signed and registered in his name as the owner, fully well knowing that he did not pay the balance money on time before 27.05.1991.

Since counsel for both parties, the Appellant as well as the Respondent have quoted the following three cases for consideration amongst many other cases they referred to in their written submissions. I am of the opinion that consideration of these three cases would suffice to deal with the problem in hand. They are, *Appuhamy Vs. Appuhamy* 1 880 3 SCC 61, *Gunatillake Vs. Fernando* 1919 21 NLR 257 & 1921- 22 NLR 385 and *Baiya Vs. Karunasekera* 1954 56 NLR 265.

All these cases are well analysed in a lecture delivered in 1969 by R.K.W. Goonesekere and reproduced as an article in the Journal of Ceylon Law published by the Incorporated Council of Legal Education Volume 1 No. 2 of December 1970 which was reproduced recently in the Bar Association Law Journal 2012 Vol. XIX at page 182. This article is titled “Transfer of Land –Some Controversial Questions” and the aforementioned three cases come under the sub title ‘Tradition in the Modern Law’.

In *Appuhamy Vs. Appuhamy* 1880 3 SCC 61, the question which was considered took this form, i.e. “was a transferee by notarial deed entitled to bring a *rei vindicatio* action although he never had possession”. Berwick J. laid down the Roman-Dutch Law applicable in Ceylon thus :- “Under our law, the affixing of the vendor’s signature to the conveyance does not automatically operate to pass title. Delivery of the deed is the ‘Minimum pre-requisite’ (as constituting constructive delivery of the land itself) to the creation of a title which is sufficient even to enable the purchaser to maintain an action to recover the property from a third person in possession, without or under a weak title”.

In *Gunatileke Vs. Fernando* 1919 21 NLR 257 & 1921- 22 NLR 385 confirmed the view in our law that “delivery of possession in the form of delivery of the deed is essential to transfer title”.

In *Baiya Vs. Karunasekera* 1954- 56 NLR 265 where facts were somewhat similar to the instant case, it was held that “a deed may be delivered on condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only”.

I am of the view that in the present case, that the deed having been signed on an implied and understood condition that it is not to be operative until the balance purchase price was paid by the SMI Bank to the seller (the Defendant-Appellant) the deed being signed and delivered was on escrow only. No dominium of the property passed by the mere execution of the transfer deed and delivery of the deed to the buyer.



I am of the view that in the circumstances of this case the mere execution of P5 (Deed 6517) and delivery of that deed to the Plaintiff-Respondent does not suffice to pass dominium of the property to the Respondent. Therefore, I answer the questions of law raised by this Court in favour of the Defendant-Appellant and state further that, as such, the Deed 6517(P5) should be cancelled and such cancellation be registered thus leaving the ownership to the Defendant-Appellant. The monies given as an advance, to the Defendant-Appellant i.e. Rs.205000/- should be returned to the Plaintiff-Respondent at the time of the cancellation of the said deed. I also answer the 1<sup>st</sup> and 3<sup>rd</sup> questions of law mentioned at the beginning of this judgment in the affirmative. As regards the 2<sup>nd</sup> question of law aforementioned, I state that, the Plaintiff-Respondent could not have succeeded in an action for declaration of title in the absence of proper conveyance of title, because it is admitted by both parties that only signing of deed 6517(P5) was done and possession did not pass as the full amount of consideration was not paid as agreed within the agreed time. By having signed the deed (P5), no title was properly conveyed.

Accordingly, I direct that a sum of Rupees Two Hundred and Five Thousand (Rs.205,000/-) be deposited in the District Court by the Defendant-Appellant in favour of the Plaintiff-Respondent within a period of six months from date hereof. No interest on the said sum of money is granted since the Defendant-Appellant has sustained a loss of Rs. 75,000/- at that time which was forfeited by the vendor for non-compliance of the conditions of the sale agreement by the Defendant-Appellant with regard to the land she was going to buy in Malabe. When the money is deposited, I direct the Registrar of the District Court of Panadura to execute a deed of cancellation, cancelling the deed of transfer at the instance of the Defendant-Appellant and the same be registered at the Land Registry. I hold further that the deed of mortgage executed by the State Mortgage and Investment Bank is null and void. Thus I allow the appeal of the Defendant-Appellant.

I make no order for costs.

**Judge of the Supreme Court**

**SC. Appeal No. 93A/2011**

**Saleem Marsoof, PC.J.**

I agree.

Judge of the Supreme Court

**Sathya Hettige, PC. J.**

I agree

Judge of the Supreme Court