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

SC Appeal 175/2018

SC/HCCA/LA Application No. 195/17

WP/HCCA/AVI-1220/11 (F)

D.C. Homagama Case No. 6045/SPL

Weerasekarage Vineetha Rodrigo,

No. 168/B,

Biyagama.

PLAINTIFF

-VS-

Sandya Kanthi Ranasinghe

Mangala Niwasa, Wedagama,

Pasyala.

DEFENDANT

AND BETWEEN

Sandya Kanthi Ranasinghe

Mangala Niwasa, Wedagama,

Pasyala.

Presently at-

No. 285/3, Sethsiri Place,

Sudarshana Mawatha,

Malabe.

DEFENDANT- APPELLANT

-VS-

Weerasekarage Vineetha Rodrigo,

No. 168/B,

Biyagama.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Sandya Kanthi Ranasinghe,

No. 285/3, Sethsiri Place,

Sudarshana Mawatha,

Malabe.

DEFENDANT- APPELLANT-

APPELLANT

-VS-

Weerasekarage Vineetha Rodrigo,

No. 168/B,

Biyagama.

PLAINTIFF-RESPONDENT-

RESPONDENT

Before: Hon. E.A.G.R. Amarasekara, J.,

Hon. K.K.Wickremasinghe, J.,

Hon. Janak De Silva, J.

Counsel: Sanjeewa Jayawardena, PC for the Defendant-Appellant-Appellant.

Dr. Sunil Cooray for the Plaintiff-Respondent.

Argued on: 25.10.2021

Decided on: 04.04.2025

E.A.G.R. Amarasekara, J.

This is an appeal by the Defendant- Appellant-Appellant (hereinafter sometimes referred to as the "Defendant") against the Judgment of the Civil Appellate High Court of the Western Province Holden in Avissawella dated 01.03.2017, where the learned High Court Judge dismissed the appeal of the Defendant and affirmed the Judgment of the District Court of Homagama dated 30.09.2010 that was originally decided dismissing the Plaintiff-Respondent-Respondent's action (hereinafter sometimes referred to as the "Plaintiff" or "Respondent") as well as the Defendant's claim in reconvention.

As per the Plaint filed on 28.11.2001 in the District Court of Homagama, the Plaintiff described the cause of action as follows:

- The Defendant became the owner of the land described in the 1st Schedule to the Plaint through Deed of Gift No. 1826 dated 31.03.1994 attested by P.B. Heenkenda, Notary Public.
- The Defendant agreed to sell the land described in the Second Schedule to the Plaint which is a divided portion of the land described in the 1st Schedule to the Plaint to the Plaintiff for Rs. 1,625,000/-, and thus entered into an Agreement to Sell dated 12.06.2000 before H.M.P B. Heenkenda, AAL and Notary Public. The Plaintiff, at the time of entering into the said agreement, made an advance payment of Rs. 500,000/- to the Defendant, and it was agreed that the remaining balance of Rs. 1,125,000/- was to be paid on or before 31.07.2000.
- However, a difference arose between the Plaintiff and Defendant as the land remained as an undivided portion which delayed the payment of the remaining balance.

- Subsequently, the Defendant prepared Survey Plan No. 1520 dated 24.08.2000, through L.K.C.N. Apasingha, the Licensed Surveyor, which delineated the disputed property as Lot No. A 1.
- Subsequently, the Plaintiff and Defendant entered into another Agreement to Sell dated 12.09.2000, before Mrs. Lakshmi Surige, AAL and Notary Public (hereinafter sometimes referred to as second or subsequent Agreement to Sell). In this subsequent Agreement to Sell, it was acknowledged that the Plaintiff had made several payments: Rs. 500,000/- on 12.06.2000; followed by Rs. 600,000/- on 05.09.2000; and further Rs. 90,000/- and Rs. 10,000/-; totaling up to Rs 1,200,000. The Plaintiff agreed to pay the remaining amount of Rs. 425,000/- on or before 05.11.2000, failing which, to pay an additional Rs. 500/- for each and every day of the delay.
- On or around 30.11.2000, the Plaintiff went to Mrs. Lakshmi Surige Notary Public's residence to settle the balance to the Defendant and execute the Deed of Transfer for the said land. However, although the Defendant indicated that she would be present, her failure to come prevented the Plaintiff from completing the payment.
- Later, on or around 31.01.2001, both parties went to Mrs. Lakshmi Surige, Notary Public's residence to pay the balance due and execute the Transfer Deed, the Defendant refused to accept the payment tendered by a cheque and demanded the payment in cash and declined to sign the Deed of Transfer.
- Realizing that the Defendant was violating the terms of their Agreement to Sell, the Plaintiff lodged a police complaint against the Defendant at Biyagama Police Station. Following this, on 25.06.2001, the Plaintiff sent a letter of demand through her lawyer to the Defendant requesting to accept the remaining payment of Rs. 425,000/- along with a penalty calculated at Rs. 500/- per day until 31.01.2001 and to transfer the property to the Plaintiff.
- On 16.07.2001, the Defendant responded to this letter of demand acknowledging receipt of Rs. 1,200,000/- from the Plaintiff and expressed her willingness to refund that amount instead of transferring ownership of the property to the Plaintiff. The Plaintiff contended that this constituted a breach of the terms in the Agreement to Sell by the Defendant, giving rise to a cause of action against the Defendant.

- The Plaintiff, among other things, had prayed from the Court to direct the specific performance of the second Agreement to Sell by directing to execute a Transfer Deed for the land described in the Second Schedule to the Plaint in favour of the Plaintiff after accepting the balance payment of Rs. 425, 000/- and Rs.43,000/-, which is the due amount for the delay of payment from 05.11.2000 till 31.01.2000. Alternatively, she had prayed for the return of money already paid along with 2.5 % interest from 31.01.2000 till the date of institution of the action and there after legal interest till the payment in full along with an order to occupy and enjoy the said property until the Defendant pays that amount in full.
- Additionally, the Plaintiff had prayed to permit her to deposit the balance amount to be paid to the Defendant with the Court and to file a *lis pendens* application in the land registry etc.

It is observed that the Plaintiff had annexed the said Agreements to Sell, Police Complaints and letter of demand and replies to the Plaint. It is also observed that in the aforesaid purported subsequent Agreement to Sell, though it was named as an Agreement to Sell at the beginning, there is no clause that stipulates to execute a deed of transfer after the payment of balance money but the Clause 3 of the said agreement stipulates to send the Transfer Deed already signed for the registration to the land registry after the said payment.

Subsequently, the Defendant filed the Answer dated 14.02.2003, while denying the cause of action and many of the averments stated in the Plaint, the Defendant admitted the averments contained in paragraphs 2,3,4 and 5 of the Plaint. The Defendant further pleaded as follows;

- The agreement which is expected to be enforced by the Plaint has not been made in compliance of the provisions of the Notaries Ordinance. Thus, no relief can be expected from that agreement.
- She received the letter of demand sent by the Plaintiff but denied the contents of the said letter of demand.
- By Lease Agreement bearing No. 2452, executed on 22.08.1998, the Plaintiff and the Defendant entered into a lease for the land described in the schedule to the Plaint for the period of two years starting from 01.09.1998 to 31.08.2000.
- Subsequently, the Plaintiff expressed her intention to purchase the land, to which the Defendant consented subject to the condition that the Plaintiff continued to pay a monthly rental of Rs. 2,500/- in accordance with condition No. 4 of the aforementioned Lease

Agreement until the sale was finalized. Consequently, both parties formalized an Agreement to Sell for the property before P.B. Heenkenda, Notary Public.

- The Plaintiff refused to complete the purchase on the agreed date and delayed the transaction by providing untrue and baseless justifications. In response, the Defendant indicated her willingness to refund the advance payment of Rs. 500,000/- if the Plaintiff did not proceed with the purchase by the specified deadline in the said Agreement to Sell but, conversely, the Plaintiff requested the Defendant to grant her further time to buy the land in dispute.
- Accordingly, the subsequent Agreement to Sell was entered between the Plaintiff and Defendant before Ms. Lakshmi Surige, AAL and Notary public.
- At the time the said subsequent Agreement to Sell was executed, the original lease term had expired and in terms of the said Agreement to Sell, subject to paying Rs.2,500/- as the lease rental, parties agreed to allow the Plaintiff to remain in the property limiting the Plaintiff's possession to the premises relevant to the action which is depicted as Lot A 1 (13 Perches) in Survey Plan No. 1520 dated 24.08. 2000, made by licensed surveyor A.K.C.N. Apasingha.
- Thereafter, the Plaintiff constructed unauthorized structure regarding which the Defendant informed the Biyagama Pradeshiya Sabha and the Defendant put up a parapet wall valued Rs. 70,000/- around the land which was in possession of the Plaintiff.
- As the Plaintiff did not show his readiness to purchase the land, the Defendant sent reminders but there was no response from the Plaintiff, who also failed to pay the outstanding balance on or before 05.11.2000 as agreed.
- However, instead of paying the balance and buying the land, the Plaintiff continued to construct unauthorized structures within the premises while occupying the land in breach of the agreement they entered into.
- On 31.01.2001, both the Plaintiff and Defendant visited Mrs. Lakshmi Surige, AAL, intending to conclude the transaction. However, when the Plaintiff attempted to pay the remaining balance with a cheque drawn against a third party's account, the Defendant refused to accept it due to the risk that may arise in encashing it. The Defendant insisted that the payment be made in cash for the Deed of Transfer to proceed. At this point, the Plaintiff and her associates insulted her and attempted to have a row on this regard.

- As the Plaintiff's malicious intention was to delay the payment rather than paying the balance and buying the land and to deceive and defraud the Defendant causing the breach of reliability, the Defendant was not bound to transfer the property as per the agreement. Thus, it is the Plaintiff who was in breach of the terms of the agreement.

As per the admissions made in the Answer, the Defendant admitted that she became the owner of the land in terms of the Deed of Gift No. 1826 attested by P.B. Heenkenda, Notary Public, that she entered into the 1st Agreement to Sell before said P.B. Heenkenda, Notary Public, and the payment of Rs.500,000/- as an advance in terms of that agreement. The Defendant has also admitted that the balance of Rs. 1,125,000/- was to be paid on 31.07.2000 as per the said agreement. As per the averments in the Answer she has further admitted that they entered into the 2nd Agreement to Sell before Lakshmi Surige, Notary Public but she challenges the enforceability of the 2nd Agreement to Sell only on the ground that it was not executed according to the provisions of the Notaries Ordinance. It is also noted that, even though the Defendant has pleaded that there was an agreement to pay Rs. 2500/- in terms of the Deed of Lease even after the expiry of the said lease agreement, no such term has been recorded in the said two Agreements to Sell.

The Defendant had prayed for the dismissal of the Plaintiff's action and as a claim in reconvention she had prayed as follows;

- For an order against the Plaintiff to pay Rs. 200,000/- as compensation for losses resulting from the breach of the Agreement to Sell as she lost Rs. 200,000/- from an advance payment she spent to buy another land from the money she anticipated from the Plaintiff.
- For an order against the Plaintiff to pay Rs. 32,500/- as lease rentals in arrears for the period from June 2000 to July 2001.
- For a declaration of title to the land in dispute and order to place her in possession.
- For an Order to Pay Rs. 500/- for each and every day from 07.07.2001 till the possession is given back to the Defendant.
- For an order to pay Rs. 70,000 for expenses incurred in constructing a parapet wall.
- For costs.

The Plaintiff filed her Replication challenging the claims made through the claim in reconvention.

Thereafter, on 10.06.2004, four admissions were recorded and issues bearing Nos. 1 to 6 were raised by the Plaintiff. In lieu of the issues No. 7 to 34 raised by the Defendant on that date, on 30.06.2005, with the permission of Court, fresh issues bearing Nos. 7 to 11(b) were raised on behalf of the Defendant. In these circumstances, further issues bearing Nos. 12 and 13 were raised on behalf of the Plaintiff. Thereafter, the case was taken up for trial on the said issues and admissions.

Subsequently, on 26.02.2009, whilst the trial was proceeding, further issues bearing Nos. 14,15, and 16 were framed by the Plaintiff and consequential issues bearing Nos. 17, 18 and 19 were raised by the Defendant.

On behalf of the Plaintiff, the Plaintiff herself, Lakshmi Surige, AAL and Notary Public, and H.M.P.B. Heenkenda, AAL and Notary Public were called to give evidence and documents P1 to P6 were marked in evidence. On behalf of the Defendant, the Defendant herself and D.M.S.B. Dissanayake, a technical officer of the Colombo Municipal Council gave evidence and documents marked V1 to V19 were marked in evidence.

By the Judgement dated 30.09.2010, the learned District Judge in the District Court of Homagama Case No.6054/SPL dismissed the stance of the Plaintiff as well as dismissed the claim in reconvention made by the Defendant, among other things, on the following reasons:

- The Document marked P2 which is the Agreement to Sell entered before Lakshmi Surige, AAL and Notary Public is a document executed in terms of Section 2 of the Prevention of Frauds Ordinance. As per the authorities cited in the judgment, merely because the attestation clause was not included by the Notary Public and/or the non-registration of the agreement do not make the agreement invalid and therefore the said document marked P2 is an enforceable document.
- Even though the Plaintiff had stated that he was ready to pay the total balance on 05.11.2000, the letter marked V2 written by the Plaintiff herself shows that she was ready with only Rs. 325,000/- by 06.11.2000.
- The Plaintiff has given false evidence stating that she was ready to pay the balance amount on 31.01.2001 by a cheque drawn against an account of her son where it was a cheque issued by a third party. Therefore, the refusal by the Defendant to accept that cheque was

reasonable. Thus, it is the Plaintiff who was in breach of the condition that Rs. 425,000/- was to be paid to the Defendant on or before 03.01.2001.

- As per the agreement marked P2, Parties have not intended to terminate the agreement merely on the nonpayment of Rs. 425,000/- on 05.11.2000 but had agreed to pay that amount along with Rs. 500/- for each and every day of delay even after that date. Further, it had been agreed by the parties to send the Deed of Transfer that had already been signed by the Defendant for registration once the payment is made according to the terms of the Agreement marked P2.
- Even though the agreement marked P2 had been executed naming it as an Agreement to Sell, as per the said agreement the property had been already transferred to the Plaintiff by the Defendant and the agreement had been prepared only to set the terms relating to the balance payment.
- The Defendant had falsely taken up a stance in her written submissions to the District Court that she had signed some blank deeds, but she had never suggested such fact to Lakshmi Surige, AAL and Notary Public before whom it was executed during her cross examination and further, she had suggested to the Plaintiff's witness, Lakshmi Surige, Notary Public during cross examination that such Deed of Transfer was executed. Going beyond that the Defendant herself, in her evidence, had admitted the execution of a transfer deed and had not stated in evidence that she signed a blank deed. The Defendant had further admitted during cross examination that through letter marked V8, she requested not to send the said Deed of Transfer for registration until the balance payment is made.
- Thus, on 12.09.2000, a duly executed Deed of Transfer had been executed in favour of the Plaintiff by the Defendant and nonregistration of that would not affect its validity. Since the Defendant had already transferred her rights as at the date of filing this action the Defendant is not entitled to a declaration of title to the land.
- Even though the Defendant is entitled to Rs. 425,000/ - and a surcharge of Rs. 500/- per day during the delay of payment, the Defendant had not prayed for that relief in her Answer.
- As a deed of transfer had been already executed in favour of the Plaintiff, the Court cannot grant relief prayed for in the Plaint and the Plaint has to be dismissed.

With regard to the Defendant's claim in reconvention, the learned District Judge had come to the following conclusions;

- First prayer in the Answer is to dismiss the Plaint and it is already granted as per the reasons given in the Judgment.
- As the Defendant has a right to claim a surcharge of Rs. 500/- for each and every day of delay in paying the balance amount, the Defendant has no right to claim any other relief. Therefore, claim of Rs. 200,000/- cannot be granted.
- As the title to the land had been transferred to the Plaintiff and she had become the owner, the Defendant cannot claim the Rs. 32,500/- as arrears of lease rentals. On the same ground, the Defendant cannot be granted the declaration of title to the land and an order to evict the Plaintiff and damages claimed till she is restored in possession.
- The Defendant had not placed any evidence to prove her claim of Rs. 70,000/- as the expenses incurred on putting up a parapet wall around the subject matter.

As per the reasons elaborated above, the learned District Judge dismissed the Plaintiff's Plaint and Defendant's claim in reconvention.

Being aggrieved by the above District Court Judgment, the Defendant as well as the Plaintiff appealed to the Civil Appellate High Court of Western Province Holden in Avissawella. The learned High Court Judge dismissed the said Petitions of Appeal by Judgment dated 01.03.2017 and, affirmed the District Court Judgment dated 30.09.2010. The learned High Court Judges' Judgment divulge the following reasons and conclusions;

- With regard to the Plaintiff's Appeal, the learned High Court Judges' view was that they should not interfere with the finding of the learned District Judge that the Defendant has a right to recover the balance money as the Plaintiff had not paid it on the due date.
- With regard to the Defendant's claims, the learned High Court Judges have confirmed the dismissal of the Plaint by the learned District Judge. With regard to the other monetary claims in reconvention, the learned High Court Judges have stated that the Defendant had not placed sufficient evidence to prove such claims. With regard to the declaration of title and ejectment of the Plaintiff, the learned High Court Judges have come to the conclusion that as title had been transferred to the Plaintiff and no evidence had been led to prove title, such relief cannot be granted in favour of the Defendant.

In fact, the learned District Judge's finding was that though the Defendant is entitled to the balance money, the Defendant had not prayed for it as a relief. On the other hand, there was no dispute that the Defendant became the owner owing to the Deed of Gift referred to above in this Judgment. However, her title became an issue when it was revealed in evidence when P2 was marked that a Deed of Transfer had been executed by the Defendant. Even the Defendant's own evidence as discussed in the learned District Judge's Judgment confirms the said transfer of title by the Defendant.

Being aggrieved by the above Civil Appellate High Court Judgment, the Defendant appealed to this Court. When the Leave to Appeal application was supported, this Court granted leave on 07.11.2018 on the questions of law set out in paragraph 19 (A), (B), (C) and (D) of the Petition dated 11.04.2017 which are quoted later in this Judgment.

One of the grounds stressed by the Defendant is that the document marked P2 at the trial, namely the subsequent Agreement to Sell entered before Lakshmi Surige, Notary Public, is not enforceable. The only reason to state that as revealed in the Plaint is that the said agreement had been executed contrary to the Provisions of the Notaries Ordinance. Issues No.7a and 7b had been raised by the Defendant in that regard. In the Replication filed by the Plaintiff it has been averred that the validity depends on the fact whether the Notary followed the provisions in Section 2 of the Prevention of Frauds Ordinance and not on the fact whether the Notary followed the provisions in the Notaries Ordinance in executing the deed. It is noted that the Defendant had not taken a stance in her Answer, issues or during cross examining the Plaintiff's witnesses that the said agreement was executed in contrary to the provisions in Section 2 of the Prevention of Frauds Ordinance. Thus, she has not taken such position in a way so that the Plaintiff could meet such position. Thus, any reference to non-compliance of Section 2 of the Prevention of Frauds Ordinance made during a later stage such as making submissions cannot be accepted.

It must be also noted that the agreement marked P2 was tendered in evidence without objections and at the close of the Plaintiff's case, no objection was reiterated in that regard. As per the decision in **Sri Lanka Ports Authority V Jugolinija - Bold East** (1981) 1 Sri L. R.18 it becomes evidence for all the purpose of the case. This position is further solidified by Section 3 of the Civil Procedure Amendment Act No.17 of 2022 which applies to pending appeals. Thus, there was no need of further proving P2 in terms of Section 68 of the Evidence Ordinance. However, the Notary who wrote it had given evidence. No question was put to her in cross examination to say that she did

not follow the provisions in section 2 of the Prevention of Frauds Ordinance. Thus, only objection to the enforceability of P2, the subsequent Agreement to Sell entered before Lakshmi Surige, Notary Public was raised on the basis that the Notary did not follow the provisions in the Notaries Ordinance. As per the stance of the Defendant it is so objected stating that the Notary Public has not included her attestation clause as to the due execution in terms of the Notaries Ordinance.

In this regard, it is observed that the learned trial Judge has correctly followed the decision of the Supreme Court in **Thiyagarasa vs. Arunodayam** (1987) 2 Sri LR 184 which also quoted the decision in **Kiribanda V Ukkuwa** (1892)1 S C R 216 and E R S R Coomaraswamy from **The Conveyancer and Property Lawyer Vol.1, part 1** and held that;

" I accordingly hold that once it is established that the requirements of section 2 of the Prevention of Frauds Ordinance relating to the execution of the deed have been complied with, the mere fact that the notary has inserted a false or wrong date of its execution does not render the deed void. The lapse on the part of the notary does not touch the validity of the deed but may render the notary liable to be prosecuted for contravention of the provisions of the Notaries Ordinance. This seems reasonable and just for the parties to the transaction have no control over the act of the notary who is a professional man. I am therefore of the opinion that P3 is valid and effective to transfer the legal title to the property and is not bad for want of due execution."

The portion quoted in the said judgment from **The Conveyancer and Property Lawyer** also read as follows "*The Notaries Ordinance requires the notary attesting a deed to append a formal attestation to the deed. The absence of this attestation clause will not invalidate the deed but will render the notary liable to a statutory penalty…… Only the formalities required by section 2 (of the Prevention of Frauds Ordinance) are absolutely essential. If these requirements are fulfilled the failure to observe the other requirements of the Ordinance or any other Ordinance, such as the Notaries Ordinance, will not invalidate the deed*."

De Sampayo J. in **Weeraratne vs. Ranmenike** (1919) 21 NLR 286. at p. 287-288 *stated that "It is well settled that a notary's failure to observe his duties with regard to formalities which are not essential to due execution, so far as the parties are concerned, does not vitiate a deed. For instance, the absence of the attestation clause does not render a deed invalid.".*

As there was no challenge to the agreement marked P2 on the basis that it was not executed in terms of the Section 2 of the Prevention of Frauds Ordinance and only challenge to its enforceability was based on the failure to append an attestation clause by the Notary in terms of the Notaries Ordinance, in view of the aforesaid authorities that express the settled law of this country, I hold that the learned District Judge was correct in holding that the P2, subsequent Agreement to Sell entered before Lakshmi Surige, Notary Public, is a valid agreement that can be enforced.

However, the learned District Judge dismissed the Plaint as explained above. Even though, as said before, the Plaintiff and Defendant both made an appeal to the High Court, the learned High Court Judges affirmed the District Court's decision to dismiss claims made by both parties. Though there are certain findings in the District Court Judgement affirmed by the High Court against the interests of the Plaintiff, the Plaintiff did not appeal to this Court perhaps due to the fact there is no enforceable decision against the Plaintiff as both Courts dismissed the claims of the Defendant. However, the Defendant as aforesaid has appealed to get the reliefs she had prayed for. Some of them are monetary claims based on the alleged fault of the Plaintiff in breaching the agreement they entered by not paying the balance amount on due date as agreed. While in one hand stating that the agreement entered by her and the Plaintiff before said Notary, Lakshmi Surige is not enforceable, on the other hand, she attempts to claim damages for alleged breach by the Plaintiff. She cannot be allowed to approbate and reprobate. One may argue this claim is based on the finding of the learned District Judge that it was the Plaintiff who was in breach of the agreement caused by not paying as agreed. As certain monetary damages are based on the alleged breach of payment on due date as agreed, it is incumbent on this Court to see whether the finding of the District Court which was affirmed by the learned High Court Judges, as to the fact that it was the Plaintiff who acted in breach of the agreement in P2 is correct.

P1 was the first Agreement to Sell entered between the parties before P.B. Heenkenda, Notary Public. As they entered into a new agreement on the same matter before Lakshmi Surige, Notary Public, there was a novation of obligations between the parties and, now parties cannot go back to the first agreement but are bound by the obligations created by the subsequent Agreement to Sell marked P2. As stated above it is a valid agreement. As per the agreement marked P2, parties had

not agreed as to the mode of payment of the balance amount. It does not stipulate that money should be paid by cash only. It has not excluded payment by a cheque.

The learned District Judge was correct in not believing the Plaintiff's position that she was ready with the money on 05.11.2000, since her own letter marked V2 dated 06.11.2000 indicates that she was ready with only Rs.325,000/- by the date of the letter. However, as per the terms agreed in P2, the agreement does not terminate on not paying the balance amount on the said agreed date which was 05.11.2000. The agreement provides that the balance money could be paid thereafter with a surcharge of Rs.500/- for each and every day of delay of payment. The Evidence show that parties agreed to conclude the transaction on 31.01 2001 by paying the balance payment with the said surcharge calculated as agreed in P2.

Evidence before the learned District Judge on behalf of the Plaintiff was that the Plaintiff came with the balance payment of consideration for the transfer, which was Rs. 425,000/-, in a cheque written to that amount and with cash for the amount due on delay- vide Plaintiff's evidence and Lakshmi Surige, Notary Public's evidence. The Defendant never suggested to the Plaintiff or her witness that cash for the delay was not brought on that date. The Defendant's position was the cheque brought on that date was a third-party cheque, and due to risks she perceived relating to such cheques, she refused to accept the cheque. The learned District Judge found the said refusal to accept the cheque as reasonable on the grounds mentioned below;

- Even though the Plaintiff had stated that it was a cheque issued against her son's account by her son, she could not recognize the signature on the cheque as her son's signature.
- Even though the Plaintiff had stated that she paid the advance Rs.500,000/- by way of a cheque, P.B. Heenkenda, Notary Public's evidence show that it was paid by cash.
- Even though, that a previous payment mentioned in the agreement marked P2 for Rs. 600,000/- was made through a cheque against an account in the Commercial Bank, the cheque brought on 31.01.2001 was a cheque (marked V4) issued on the People's Bank.
- Thus, Plaintiff was not truthful in saying that it was a cheque issued against the account of her son but it was a third-party cheque.

The learned District Judge failed to consider that the reference to Rs. 500,000/- paid by a cheque in Plaintiff's evidence may be a mistake as a payment of Rs. 600,000/- had been made previously by a cheque. I cannot understand how the District Judge came to the conclusion that Plaintiff was not truthful as to the issuer of cheque on the said facts that one cheque was a Commercial Bank cheque and the other was a People's Bank cheque. The previous cheque indicates that the Defendant accepted payment by cheques on previous occasion. As Plaintiff had stated that she did not have an account to issue cheque, the previous cheque also would have been a third-party cheque. Whether it was a cheque issued by her son or a different third party, the learned District Judge failed to consider that a cheque is a negotiable instrument drawn on a banker to pay on demand. The learned District Judge further failed to consider that it is presumed that holder of a cheque becomes the holder in due course and a cause of action could only be accrued to the Defendant against the Plaintiff only if the bank dishonours the cheque. Hence, I doubt the correctness of the finding that it was the Plaintiff who was in breach of the agreement. However, after the Judgment of the learned High Court Judges, the Plaintiff did not proceed to appeal against such finding to this Court as aforesaid. Even if it is considered as a correct finding only claim that the Defendant could make was to ask for the balance payment of Rs. 425,000/- along with the surcharge calculated in terms of the agreement marked P2. As learned District Judge correctly found there was no prayer claiming that amount in the Answer. It must be noted here that even if the Defendant is the one who breached the agreement by not accepting the balance payment made by a cheque, the Plaintiff's action had to be dismissed as it was filed on the wrong premise to get an order to execute a deed of transfer in relation to the property involved when the P2 agreement clearly indicate that the Deed of Transfer was executed along with the said agreement but it can be sent for registration only when the balance of payment is made. There was no term in P2 to execute a deed of transfer when the balance money is paid. Thus, the learned District Judge was correct in saying that even though P2 is named as an Agreement to Sell, it was merely an agreement as to the conditions relating the payment of balance money. The Plaintiff action was misconceived and filed on a wrong premise as said before.

The Defendant attempts to argue that the learned District Judge and the learned High Court Judges by confirming the District Court Judgment had converted the action filed for specific performance of executing a deed of transfer in terms of P2 into a declaration of title to the Plaintiff to the land in question and thus, granted a relief not prayed for in the Plaint. In this regard, it is brought to the

notice of Court that the Deed of Transfer referred to in the P2 agreement had not been marked in evidence. This argument is based on the fact that the learned District Judge had answered the issues No. 14 and 15 in the affirmative along with issue No. 16 in favour of the Plaintiff. The said issues raise the question whether a deed of transfer has been executed with regard to the land in dispute and if so, whether the Plaintiff becomes the owner of the property and as such whether the Defendant can claim a declaration of title to the property.

It must be noted these issues were not raised at the beginning of the trial but in consequence to the marking of P2 which refers to the execution of a Deed of Transfer in its Clause No.3 and even after the Defendant admitted that fact in evidence on 26.02.2009, that he wrote a letter to the relevant Notary Public regarding the said Deed of Transfer. The Defendant had not objected to the said issues but had only raised few consequential issues relating to the payment of balance of the consideration and the Plaintiff's right to pray for the execution of a Deed of Transfer. Once issues are framed the case which the court has to hear and determine becomes crystallized in the issues and the pleadings recede to the background- vide **Hanaffi V Nallamma** (1998) 1 Sri L R 73. Thus, one cannot blame for learned District for answering the said issues. On the other hand, those issues are framed to find answer to the certain factual situations revealed through evidence and one cannot say that it was to change the scope of the action as Plaintiff has not moved to change the reliefs it prayed for. It was still for an execution of a deed of transfer after accepting the balance payment. As said before, after they were allowed to be issues of the court without any objections and invited the learned District Judge to answer them, now at a later stage the Defendant cannot be allowed to say it amounts to change of stance when the answers are against her interests. Then she should have objected to at the first instance when they were framed. On the other hand, whether a transfer deed had already been executed was a necessary finding in interpreting the subsequent agreement named as Agreement to Sell, marked P2, as the Plaintiff was praying for the execution of a deed of transfer.

Now I would see whether said issues were answered correctly by the learned District Judge. As to whether there had been a deed of transfer executed in respect of the property in issue, it is clear that there had been a deed of transfer executed between parties as it is so stated in Clause 3 of P2, which was a document signed by both parties and which this court decided above as a valid agreement between the parties as found by the learned District Judge. Further by the document

marked V6, the Notary had agreed not to send them to registration and as per the letter marked V8, dated 06.11.2000, the Defendant had asked the Notary to return the said Deed of Transfer to her as P2 was terminated on 05.11.2000 on the ground that the agreement was not fulfilled, impliedly admitting that there is a deed of transfer executed in relation to the land in dispute. As said before, P2 did not terminate on 05.11.2000 as there was a clause which enable the Plaintiff to tender the balance of the consideration along with a surcharge of Rs. 500/- per each and every day of delay in paying the balance of consideration for the Deed of Transfer. Even though the Defendant took up the position that she signed blank documents before Lakshmi Surige, Notary Public in her written submissions to the District Court (vide paragraph 20 of the written submissions to the District Court), the Defendant never suggested that she signed blank documents before said Notary when the said Notary gave evidence. If she signed blank documents, it is difficult to comprehend how she named them as a printed deed of transfer in V8 and request not to send them for registration. If she signed blank documents, she should have naturally said about signing blank documents in V8. Aforesaid Notary Public, Lakshmi Surige while giving evidence had clearly said in evidence that to have more reliability (may be with regard to the transaction) she got the transfer deed executed on the same date. Whatever was her intention a transfer deed had been signed according to her evidence- vide page 227 of the brief. The Notary Public, Lakshmi Surige, had again clearly stated that a deed of transfer was executed but it was not sent for registration as the balance amount was not paid- vide page 237 of the brief. It is true that at one point the said Notary had expressed the view that sale was not done but the deed was signed and it was to be sent for registration only after the payment of Rs. 425,000/-. In this regard I prefer to quote the following authorities.

In **Jayawardene Amerasekera** 15 N L R 280 Lascelles C J held as follows:

"On *the execution of a notarial conveyance the sale is complete, and the mere fact that whole of the consideration has not been paid cannot, in the absence of fraud or misrepresentation, afford ground for the rescission of the sale and the cancellation of the conveyance."*

In **Mohamadu V Hussim** 16 N L R 368 Pereira J held as follows:

"Where a *person obtains a conveyance of property without fraud, but afterwards fraudulently refuses to pay the consideration stipulated for, the grantor is not entitled to claim a cancellation of the conveyance, but his remedy is an action for the recovery of the consideration*."

Above position was reiterated by this Court in the recent case of **Weerasinghe v. Heling** (2020) 3 Sri LR 136.

Mere suspicion that the cheque may not be honoured by the Bank would not established fraud. Thus, it is clear once the transfer deed is executed sale of the land takes place unless there is fraud or misrepresentation. Existence of fraud or misrepresentation was never suggested to the said Notary Public while she was under cross examination. P2 agreement itself shows that the idea was to execute the deed of transfer on the same date and to keep it without registration till the balance of consideration is paid. Thus, a transfer had taken place and the only remedy for the Defendant was to file an action for the balance of consideration if it was not paid. Furthermore, the Defendant herself had admitted in evidence that she signed a deed of transfer– vide page 267 of the brief. What is admitted need not be proved.

Hence on balance of probability, there was sufficient evidence for the learned District Judge to hold that a Deed of Transfer had been executed in relation to the land in dispute along with the agreement marked P2. As said before it was a necessary finding in interpreting P2. Thus, answering issue No. 14 framed before the District Court in the affirmative was correct. However, it is apparent that even though there was evidence to show that a deed of transfer was executed, there was no clear admission found through evidence as to the ownership of the land as the Defendant was claiming for a declaration of title.

The issue No. 15 framed before the learned District Judge was focused on a finding to the effect that if the issue No. 14 was answered in the affirmative whether the Plaintiff is the owner of the land in dispute. It is true that as per the evidence led, the Plaintiff appears to be the one who bought the land in dispute by the aforesaid Deed of Transfer referred to in the agreement marked P2. However, whether it is the Plaintiff who was the vendee in the said Deed of Transfer is part of the contents of the said deed, contents of a document have to be proved by leading primary evidence. No evidence was before the learned District Judge to say that, in that regard, secondary evidence could have been accepted in terms of Sections 65 and 66 of the Evidence Ordinance. Had it been produced in evidence, a party could have been able to challenge its due execution etc. Thus, in my view the learned District Judge should not have answered the issue No. 15 in the affirmative but should have answered as "not proved by producing primary evidence". It is important to note that even though the document marked P2 is named as an Agreement to Sell, the document itself

indicates that sale had already occurred. Perhaps, as consideration was not fully paid, in drafting the agreement, they would have named it as an Agreement to Sell. The above quoted case law and authorities indicate that the sale happens with the execution of the deed of transfer. It is also observed that at one place, even the Plaintiff had stated in evidence that the Defendant is the owner. This may be the understanding of the Defendant as the consideration was not fully paid, but if the evidence indicates that a deed of transfer had been executed, said answer cannot be taken as a fact indicating that the title is still with the Defendant.

Merely because the answer to the issue No.15 should be as aforesaid, the Defendant is not entitled to a declaration of title to the land, which entitlement was the matter in focus in issue No. 16 for the reasons discussed below.

As per Section 35 of the Civil Procedure Code, there is a positive bar to amalgamate other causes of action or claims without permission of the Court when one files an action for declaration of title. As per the prayer of the Defendant in his Answer, which contains a claim in reconvention, there are other claims amalgamated and it does not appear that the Defendant asked for permission for such amalgamation. Even if this Court disregards this due to the lack of any objection from the opposite party, still the Defendant cannot be given a declaration of title since:

a) there is documentary evidence in P2 to indicate that he transferred his rights on the same date the parties entered into P2- vide Clause 3 of P2,
b) the Notary had given evidence to the effect that she executed a deed of transfer to the land in dispute,
c) as said before, the Defendant herself has by his conduct and through letters and while giving evidence had admitted that she executed a transfer deed.

A court cannot turn a blind eye to such evidence, which shows that the property had been transferred by the Defendant by the time of filing the Plaint in this action, and grant a declaration of title to the Defendant merely because the Defendant owned the property in the past on a Deed of Gift marked V12. Granting such a relief to the Defendant would be against the Defendant's own admissions in oral evidence and in her own letters. If she wanted a declaration of title to the land, she should have produced evidence to show that the said deed of transfer, existence of which she admitted, is not valid in law and she is the title holder at the time of filing the action. The Defendant, in her written submissions, has stated that P2 was not tendered in evidence through

Lakshmi Surige, Notary Public. However, it cannot be expected to be tendered through the Plaintiff's witnesses as marking it was obnoxious to the stance taken by the Plaintiff that she has a right to get a deed of transfer executed. As it is the Defendant who prayed for a declaration of title, it is she who must prove title. Due to the availability of evidence to show that there is a deed of transfer executed by her, it is she who must prove that there is no such valid transfer for her to get a declaration of title in her favour.

It appears that the Defendant filing her Answer had attempted to rely on the clauses of the Lease Agreement that existed between them. It is clear that after the lease period parties willingly subject themselves to the P1 and P2 agreements (Agreements termed as Agreements to Sell) and thus, entered into a new relationship and new obligations. As said before none of these agreements contain a clause to say that the Plaintiff should pay the lease rental or an amount similar to that till the total consideration to buy the land is paid. Hence, these documents do not show that the parties intended to continue with the clauses in the Lease Agreement until the full consideration of the sale of land is paid. Instead, in the subsequent agreement marked P2, it is visible that the Plaintiff had paid a considerable amount of buying price and also parties agreed for a penalty for delay in payment of the balance of the consideration. It appears, as per P2, that parties also executed a transfer deed. Further, the Plaintiff explained in evidence that they remained in the property with consent of the Defendant indicating that new license to possess the land anticipating the payment of balance of the consideration for the sale of the land was created through such consent- vide pages 204, 208 of the brief. In that context, it cannot be presumed that the parties intended to continue with the terms of the Lease Agreement after they entered into P1 and P2 as they entered into new obligations without any reference to continuation of previous obligations.

In the above backdrop, now I would consider whether any of the relief prayed by the Defendant in her prayer could have been granted by the learned District Judge.

The learned District Judge had dismissed the Plaint. As said before, the Plaint had been filed on a wrong premise as such said dismissal should stand. Thus, the 1st relief prayed in the Answer had been granted even though it was seemingly given on different grounds.

The second relief prayed in the Answer is based on the alleged fact that the Defendant entered into an agreement with another person to buy a land but failed to buy it due to the failure of the Plaintiff to pay the balance as agreed, which caused a loss of Rs. 200,000/- to the Defendant. Other than

the mere oral statement of the Defendant in evidence, no such agreement had been produced in evidence. Thus, as learned High Court Judges observed there was no evidence to prove such loss. On the other hand, when the parties have agreed for a penalty to pay when a delay is caused, as correctly observed by the learned District Judge, a further amount cannot be granted other than that entitlement. Thus, the second relief prayed by the Defendant was correctly denied by the learned District Judge and High Court Judges.

Third relief prayed by the Defendant is the arrears of rental based on the Lease Agreement they had previously. As explained above, parties entered into new agreements creating new obligations between the parties and it also appears that until the full payment of the balance of the agreed consideration the Defendant consented the Plaintiff to remain in possession creating new license to possess anticipating the transfer of the property. Further, there was evidence to show that the Defendant even executed a deed of transfer. Since there is no sufficient evidence to the satisfaction of the Court to conclude that the parties agreed to pay the lease rental after the lease period ended until the Plaintiff buy the land, this third relief also had to be refused.

Why a declaration of title cannot be granted in favour of the Defendant has been explained above. Thus, the Defendant cannot be granted the 4th relief prayed for in the Answer for declaration of title and the related reliefs No. 5 and 6 for eviction of the Plaintiff and damages based on that also cannot be granted.

Relief No. 7 prayed in the Prayer to the Answer pray for Rs. 700,000/- spent for putting up a parapet wall around the land. No evidence had been led to establish this loss. On the other hand, if the Plaintiff put up unauthorized structures in the land in dispute, it should be a matter to be attended through the relevant authority, but no reason has been shown through evidence how such acts make it necessary to put up a parapet wall. This Court cannot see any rational relationship with the alleged delay in paying the balance of consideration and the necessity to put up a wall. Hence, the 7th relief also had to be refused.

Thus, even though this Court may differ in giving reasons on certain matters when compared with the reasons given by the learned District Judge, whose decision was confirmed by the learned High Court Judges, this Court does not see any error in refusing the reliefs claimed by the Defendant. In such a situation, this appeal has to be dismissed as the final conclusion of the Courts below to dismiss the Plaint and the Claim in reconvention of the Defendant is correct.

The questions of law allowed by this Court are as follows;

A. Did the High Court of Civil Appeals and the District Court fail to appreciate the precise nature of the cause of action, especially paragraphs 14,16 and 18 of the Plaint, read with prayers (a) and (b) thereof, which unequivocally and unambiguously demonstrate that the cause of action of the Respondent was to primarily obtain a judgment for specific performance of the Agreement to Sell, produced marked P2?

B. Did the High Court of Civil Appeals and the District Court fail to appreciate that in the prayer to the plaint, what the respondent sought was specific performance of the Agreement to Sell, produced marked P2 or in the alternative, for the petitioner to repay to the respondent, the part payments that had been already made by the respondent?

C. Did the High Court of Civil Appeals and the District Court fall into serious error by failing to appreciate that the prayer to the plaint, was clearly incompatible with any character of ownership of the corpus in suit?

D. Did the High Court of Civil Appeals and the District Court fall into serious error by holding that the transfer deed had already been executed in favour of the Respondent, when in fact, very simply, no such purported transfer deed was ever produced before Court or ever transpired at all?

As per the evidence led at the trial, it appears that the Plaintiff misconstrued P2, may be, either by being misled by the naming of the agreement or by thinking that a transfer of title is perfected only when the consideration is paid and not when the deed of transfer is executed. Thus, she filed an action for purported specific performance to execute a deed of transfer when there is no clause in P2 that provides to execute a deed of transfer once the balance of consideration is paid. It only provides to send the deed of transfer already executed for registration. What the Plaintiff could have prayed in terms of P2 was an order directing the Defendant to accept the balance payment or to deposit it in Courts in favour of the Defendant so that he could get the deed of transfer referred to in P2 registered. Instead, she prayed for an execution of a deed of transfer which is not contemplated in P2 as it has already been done. Thus, the Plaintiff's action should fail as it was filed on a wrong premise. In that backdrop, I do not think that the learned Judges of courts below failed to appreciate the precise nature of the prayers of the Plaint, but they appreciate the nature of the prayers to the Plaint, but found that those prayers cannot be based on P2 in accordance with

the agreed terms therein. Further, the statements regarding the ownership of the Plaintiff had been made not as a relief but as result of an answer to an issue which was framed without any objection. Thus, it was not a misunderstanding or failure to appreciate the nature of the prayer to the Plaint but rather a finding on facts in response to an issue framed. In fact, the Plaintiff's action has been dismissed without granting any relief by the Judges below. However, this Court has already made its observation that the learned District Judge should not have answered issue No.15 in the affirmative rather should have answered it as 'not proved' since the primary evidence was not produced. In that backdrop, this Court shall answer the above questions of law A, B and C in the Negative.

Question of law D mentioned above, also has to be answered in the negative as the fact of executing a deed of transfer had been established through documentary evidence (Clause 3 in P2), oral evidence of the Notary Public and Lakshmi Surige, and admissions made by the Defendant herself in her letters and while giving oral evidence. Document itself is needed only to prove the contents or terms of the document -vide Section 91 of the Evidence Ordinance.

Even though there are inaccurate statements or findings as discussed above in the District Court Judgment, the final conclusion to dismiss the Plaintiff's case as well as the Defendant's claim in reconvention is correct.

Hence, this appeal is dismissed. No Costs.

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Judge of the Supreme Court

Hon. K.K. Wickremasinghe, J.

I agree. ……………………………………

Judge of the Supreme Court

Hon. Janak De Silva, J.

I agree.

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Judge of the Supreme Court