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

In the matter of Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka from the Judgement of the Civil Appellate High Court of Kalutara in WP/HCCA/KAL/80/2003 [F] dated 12th of July, 2011.

SC Appeal No. 156/2012
SC/HCCA/LA Appl No. 320/2011
WP/HCCA/KAL/80/2003 [F]
D.C. Matugama Case No: 1978/L

Kodithuwakku Arachchilage Don Mithrasena
Temple Junction, Welipanna

Plaintiff

VS.

1. Withanage Don Ariyarathne
2. Opatha Kankanamge Don Neetha Ranjani
   Both of No. 05, Kannangara Mawatha, Matugama

Defendants

AND BETWEEN

Kodithuwakku Arachchilage Don Mithrasena
Temple Junction, Welipanna

Plaintiff – Appellant

VS.

1. Withanage Don Ariyarathne
2. Opatha Kankanamge Don Neetha Ranjani

Both of No. 05, Kannangara Mawatha, Matugama

1st and 2nd Defendants – Respondents

AND NOW BETWEEN

1. Withanage Don Ariyarathne (Deceased)

1A. Vithanage Don Charith Jithendra
1B. Vithanage Dona Nethmi
1C. Vithanage Dona Sanduni

All of No. 39/22A, Hospital Road, Waththawa, Matugama.

2. Opatha Kankanamge Don Neetha Ranjani (Deceased)

2A. Vithanage Don Charith Jithendra
2B. Vithanage Dona Nethmi
2C. Vithanage Dona Sanduni

All of No. 39/22A, Hospital Road, Waththawa, Matugama.

1A To 1C and 2A to 2C Substituted Defendants – Respondents - Appellants

VS.

Kodithuwakku Arachchilage Don Mithrasena (Deceased)
Temple Junction, Welipanna

Plaintiff – Appellant – Respondent

1A. Tharindu Madushan Kodithuwakku
1B. Kodithuwakku Arachchige Don Sajith Madhusanka
1C. Randika Madushashi Kodithuwakku

All of Temple Junction, Welipanna

1A to 1C Substituted Plaintiffs – Appellants – Respondents

Before : Priyantha Jayawardena PC, J
: Kumudini Wickremasinghe, J
: A. L. Shiran Gooneratne, J

Counsel : Upendra Walgampaya Wijeratne Hewage for the 1A-1C and 2A-2C Substituted Defendants – Respondents – Appellants.

: Navin Marapana, PC, with Uchitha Wickremasinghe for the Substituted Plaintiffs – Appellants – Respondents.

Argued on : 30th of October, 2023

Decided on : 29th of February, 2024

Priyantha Jayawardena PC, J

This is an Appeal to set aside the judgment of the Civil Appellate High Court of Western Province holden in Colombo (hereinafter referred to as the "High Court"), dated 12th July 2011 where it was held that the learned District Judge has erred in holding that the defendants–respondents–appellants (hereinafter referred to as the "appellants") were entitled to the land in suit.

The plaintiff–appellant–respondent (hereinafter referred to as the "respondent") instituted an action in the District Court of Matugama against the 1st defendant-respondent-appellant (hereinafter referred to as the "1st appellant") praying, *inter alia* for a declaration of title to the land

described in the first schedule to the Plaint, and he is the owner of the articles listed in the second schedule to the Plaint.

Further, the respondent prayed for the ejectment of the appellants from the said land and claimed a sum of Rs. 2,500/- per month from 1st of June, 1994 as damages until the respondent is placed in possession of the said land.

The respondent further averred that he became the owner of the said land and premises on the 15th of January, 1988 and placed the appellants in possession thereof as licensees on or about the 1st of June, 1988. Further, he permitted the appellants to use and enjoy the movables listed in the second schedule.

On the 18th of April, 1994 the respondent had sent a notice to the 1st appellant terminating the said license granted to him to occupy the said premises, and requested him to hand over possession of the land, premises and movables on or before the 31st of May, 1994. The 1st appellant, through his Attorney-at-Law had sent the letter dated 9th of May, refusing to vacate the premises and refused to accept the title of the respondent. Further, in the said letter, the 1st appellant had taken up the position that the said land and premises were purchased by the appellants in the name of the respondent as a trust.

Later, the 2nd defendant-respondent-appellant (hereinafter referred to as the "2nd appellant"), who is the wife of the 1st appellant, was added as a party to the District Court action as the 2nd defendant, consequent to an application made by her to court.

In their joint amended Answer dated 26th of August, 1997, the appellants took up the positions, *inter alia*, that the consideration on the said Deed No. 3749 was provided for by both the appellants as the respondent promised to transfer the said property to the appellants whenever they made a request for the transfer of the property.

Evidence led at the Trial

The vendor of the said deed, Yasawathie Perera, gave evidence at the trial on behalf of the respondent, and stated that with regard to the said sale of the property, she only dealt with the respondent and that the consideration of Rs. 125,000/- had been paid by the respondent to the

Notary. Later, the Notary handed over the said money to her. She further stated that the appellants were not known to her and that they never took part in the said transaction. Further, the broker who found the said property for the respondent gave evidence at the trial and stated that at the time the said deed was executed by the Notary, the appellants were not present.

The Grama Niladhari for the area in which the appellants resided, Don Lionel, and a clerk from the Divisional Secretariat gave evidence at the trial and stated that the appellants and their child were in receipt of food stamps under the Janasaviya Programme in 1989 and 1992. He further stated that only persons who were in receipt of an income less that Rs. 300/- per month were entitled to such food stamps. Further, the Grama Niladhari for the area in which the property in suit was situated, A. K. Piyadasa, gave evidence and stated that the 1st and 2nd appellants are given as occupants of the house in suit in the Village List and also that they came into occupation on the 31st of March, 1988. It was further stated that the name of the owner of the house is given as that of the respondent.

The respondent, in giving evidence stated that he knew the 1st appellant as he was supplying latex rubber to his rubber store. Further, the 1st appellant requested the said premises for a short period of time as he was asked to vacate the house that he was occupying by the landlord. He further stated that it was he who paid the full consideration for the house in suit and that it was bought by him for his own use. The respondent also stated that he made certain improvements to the house and denied the allegation that he held the property in trust for the respondents.

The 2nd appellant also gave evidence and stated that a few days after the said deed was written, she wanted the respondent to re-transfer the property in her name as she wanted the deed for the purpose of admitting her son to school. Moreover, she obtained the letter 'P12' from the respondent, where he admitted that the money for the purchase of the land was given by her, and that the respondent was holding the land in her favour. The respondent, however, stated that the letter, 'P12' was given to the 2nd appellant upon her request to facilitate the admission of her child to the school and thus, it was not an admission that the said money was paid by the 2nd appellant to purchase the property.

She further stated that she gave the money to the respondent on the 25th of December, 1987 prior to the execution of the deed as the respondent was the one who found the house. She further stated

that she got to know the respondent in 1987 and that she had an illicit affair with him from March, 1987.

The 2nd appellant went on to state that as at January 1988 she had Rs. 30,000/- to 40,000/- in her Savings book. Further, she stated that she sold her business to a cousin brother, Leslie, for Rs. 71,000/- to raise funds to purchase the house.

The 2nd appellant in her evidence stated that she visited the house/land and went to the Notaries office prior to the purchasing the house. In giving evidence at the trial, it was stated as follows,

"ප්‍ර: ඒක තමන්ලා බලන්න ගියාද?

උ: ඔව්.

ප්‍ර: බලන්න ගියේ කව්රු කව්රුද?

උ: මගේ මහත්තයාව සහ මාව පැමිණිලිකරුගේ කාර් එකෙන් එක්ක ගෙන ආවා..."

"පස්සේ ලියන්න කියා දවස් 2ක් එක්ක ගෙන ආවා . වාද්දුවේ නොතාරිස් මහත්තයෙක් ලඟට යන්න ඕ නෑ කිව්වා. අද බැහැ පස්සේ එමු කිව්වා. ඊට පස්සේ88.1.15 වෙනදින ඉඩම ලියා නිබුනා. සල්ලි මම දීලා නිබුනේ. අප බෙන්තර සිටි ගේ අයිතිකරුට කඩේ පවරුවා. අවුරුදු 2 කට ගේ අරගෙන නිබුනේ..."

"ප්‍ර: නොතාරිස් ගාස්තු දුන්නේ කව්ද?

උ: මම රුපියල්8000/- ක් දුන්නා

ප්‍ර: පැමිණිලිකරු එක්ක නමයි තමන්ලා මුදල් දුන්නේ?

උ: ඔව්. නමුත් දවස්2ක් විතර නොතාරිස් මහත්තයා ළඟ ට ගියාට ඔප්පු ලියන්න බැරි වුනා..."

Judgment of the District Court

Upon the conclusion of the trial, the learned District Judge of Matugama delivered Judgment dated 28th of March, 2003, answering all the issues in favour of the appellants and granted all the reliefs prayed for in the amended Answer. Further, it was held, *inter alia,* that the letter dated 15th of July,

1988 which is admittedly written by the respondent, contains an admission that the subject property had been purchased by the 2nd appellant in the name of the respondent. Further, it was held that the respondent had failed to prove his case on a balance of probabilities.

Judgment of the Civil Appellate High Court

Being aggrieved by the said Judgement of the District Court, the respondent appealed to the High Court of Civil Appeals of the Western Province holden in Kalutara. After hearing the submissions of the parties, the Civil Appellate High Court allowed the Appeal of the respondent and set aside the judgment of the District Court. In the said judgment, it was held that the District Court judgment was based on unfounded and uncorroborated evidence. Moreover, it was held that the appellants were not entitled to the subject property described in the first schedule to the Plaint.

Appeal to the Supreme Court

When the application was supported for granting of leave, this Court granted leave to appeal on the following question of law:

> *"Did the learned Civil Appellate High Court Judges err in holding that the Petitioner has failed to discharge the burden placed on him by law as regards prayer of adequate circumstances with respect to the alleged constructive trust?"*

Did the learned Civil Appellate High Court Judges err in holding that the Petitioner has failed to discharge the burden placed on him by law as regards prayer of adequate circumstances with respect to the illegal constructive trust?

The learned judges of the Civil Appellate High Court, *inter-alia,* stated in the said judgment;

> *"... The burden of proof shifted to the Defendant after the Plaintiff had proved by calling the Notary Public who had attested the said deed, that it*

was an outright transfer but not a constructive trust created by the Plaintiff for the 2nd Defendant…"

However as aforementioned, the said Notary, who was a vital witness to this case did not testify at the trial. Further, his evidence is vital as the parties are at variance with regard to the person who paid consideration to purchase the property.

Moreover, the learned judges of the Civil Appellate High Court held,

"… As is said earlier, nothing was proved by the Defendant that the said P1 was a forgery and not an act and deed of the said Ratnasekara…"

A careful consideration of the evidence reveals that a person named 'Ratnasekara' had not given evidence at the trial before the District Court.

The powers of the appellate courts in hearing civil appeals and the requirements of the judges are set out in section 774 of the Civil Procedure Code, which states as follows;

"(1) On the termination of the hearing of the appeal, the Court of Appeal shall either at once or on some future day, which shall either then be appointed for the purpose, or of which notice shall subsequently be given to the parties or their Counsel, pronounce judgment in open court; and if the bench hearing the appeal is composed of more than one Judge, each Judge may, if he desires it, pronounce a separate judgment.

(2) The judgment which shall be given or taken down in writing, shall be signed dated by the Judge or Judges, as the case may be, and shall state-

(a) the points for determination;
(b) the decision of the Judge or Judges thereon;
(c) the reasons which have led to the decision;
(d) the relief, if any, to which the appellant is entitled on the appeal in consequence of the decision."

However, as stated above, the reasons which led to the decision to set aside the judgment of the District Court are based on facts that were not transpired at the trial before the District Court.

Hence, the impugned judgment of the Civil Appellate High Court is contrary to section 774(2)(c) of the Civil Procedure Code as amended.

Further, an appellate court should not interfere with the findings of facts of a learned judge who has had the advantage of seeing the demeanour of witnesses at the trial. A similar view was expressed in the case of ***De Silva and others vs. Seneviratne and another*** **(1981) 2 SLR page 7**, where it was held;

> *"*
>
> *(1) Where an Appellate Court is invited to review the findings of a trial judge on questions of fact, the principles that should guide it are as follows:*
>
> *a. Where the findings on questions of fact are based upon the credibility of witnesses on the footing of a trial judge's perception of such evidence, then such findings are entitled to great weight and the utmost consideration and will be reversed only if it appears to the Appellate Court that the trial judge has failed to make full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced by the plainest considerations that it would be justified in doing so;*
>
> *b. That however where the findings of fact are based upon the trial judge's evaluation of facts, the Appellate Court is then in as good a position as the trial judge to evaluate such facts and no sanctity attaches to such findings of fact of a trial judge;*
>
> *c. Where it appears to an Appellate Court that on either of these grounds the findings of fact by a trial judge should be reversed then the Appellate Court "ought not to shrink from that task"*

In view of the aforementioned erroneous findings in the said judgment of the Civil Appellate High Court on vital facts, I answer the following question as follows;

"Did the learned Civil Appellate High Court Judges err in holding that the Petitioner has failed to discharge the burden placed on him by law as regards prayer of adequate circumstances with respect to the alleged constructive trust?"

Yes

In the circumstances, the judgment of the Civil Appellate High Court dated 12th July, 2011 is set aside. In view of the above, the other questions of law were not considered in this judgment. Hence, the instant appeal is sent back to the Civil Appellate High Court to re-hear the appeal on merits. At the rehearing, the parties are entitled to make fresh submission before the said court.

Accordingly, the appeal is allowed.
No costs.

Judge of the Supreme Court

Kumudini Wickremasinghe, J
I agree

Judge of the Supreme Court

A. L. Shiran Gooneratne, J
I agree

Judge of the Supreme Court