IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Hettiarachchige Don Nicholas
Heliyan
No.243. Wilpatha
Chilaw

Defendant-Appellant-Appellant

S.C.Appeal No.51/2015
S.C./HC/CA/LA/No.172/2014
NWP/HCCA/KUR/137/2009(F)
D.C.Chilaw Case No.540/L **Vs.**

Peththaperuma Arachchi Somawathie
"Siriniwasa", Addipala
Chilaw

Plaintiff-Respondent- Respondent

BEFORE : **B.P.ALUWIHARE PC J.**
K.T.CHITRASIRI J.
PRASANNA S JAYAWARDENA PC J.

COUNSEL : Amrit Rajapakse with Niranjan de Silva for the Defendant-Appellant-Appellant

Dr.Sunil Cooray with Sudarshani Cooray for the Plaintiff-Respondent-Respondent

ARGUED ON : **10.08.2016**

WRITTEN : 07.05.2015 by the Defendant-Appellant-Appellant
SUBMISSIONS ON: 09.09.2016 by the Plaintiff-Respondent-Respondent

DECIDED ON : **29.11.2016**

CHITRASIRI, J.

This action was instituted by the plaintiff-respondent-respondent (hereinafter referred to as the plaintiff) in the District Court of Chilaw seeking *inter alia* for a declaration that the plaintiff is the owner of the land referred to in the Crown Grant bearing No. පුත්/ප්‍ර/3540 dated 4.3.1993. The plaintiff has also sought for a declaration, declaring that the defendant-appellant-appellant (hereinafter referred to as the defendant) is not entitled to claim any right over the land in question since the Agreement to Sell marked V4, relied upon by the defendant has no force or avail before the law. The plaintiff also has sought to have the defendant evicted from the land in suit and has claimed damages as well from the defendant until she obtains the possession of the same.

The defendant having relied upon the terms and conditions of the aforesaid Agreement to sell dated 23.8.1993 which bears the No.4050, attested by P.M.T.Pathiraja, Notary Public, (marked as V4 in evidence) has sought to have a declaration, declaring that he is the owner of the land in question and has prayed to have the action of the plaintiff dismissed. In the alternative he has claimed Rupees Twenty Five Million (Rs.25,000,00/-) as damages and has further sought to remain in possession (*jus retentionis)* of the land until the said sum of Rs.25,000,00/- is paid to him.

Both the learned District Judge and the learned judges in the Civil Appellate High Court have held with the plaintiff and made order evicting the

defendant subject to Rs. Five hundred thousand (Rs.500,000/-) being paid to the defendant considering the improvements that he has made on the land.

When the matter was taken up before this Court, it made order granting leave on the questions of law referred to in paragraphs 14 (ii), (iii), (iv) and (v) of the petition of appeal dated 7.4.2014. The first two questions of law had been raised to ascertain whether or not, the aforesaid Agreement to sell has become unenforceable due to it been frustrated for the reason that it contains a condition which cannot be performed in terms of the law. The other two questions of law are in relation to the compensation awarded to the defendant.

As mentioned before, learned Judges in the courts below have come to the conclusion that the said sale agreement marked V4 cannot be enforced due to it been frustrated because the law, particularly Section 46 of the Land Development Ordinance does not permit the Divisional Secretary to grant written permission to transfer the land to the defendant. (vide at page 17 in the District Court judgment/page 263 in the appeal brief) In other words, the basis for the rejection of the agreement V4 was that it governed by the Roman Dutch principle namely "impossibility of performing the obligation".

At this stage, it is pertinent to refer to the law in this regard. Prof. C.G.Weeramantry in his book "The Law of Contracts" at paragraph 787, states thus:

"To summarize the position, in the Roman-Dutch law the presumption would seem to be that the contract is subject to an implied condition that impossibility operates as a discharge, unless the parties contract to the contrary, whereas in English law the presumption would seem to be in favour of an absolute contract unless it can be shown that the parties had contracted on the basis of a condition that impossibility was to discharge the contract."

In paragraph 790 of the said book, it is stated as follows:

"(a) ***Supervening Illegality****. It has been well recognized in English law since Atkinson Vs. Ritchie [1809 (10) East 530] that supervening illegality discharges the contract. Supervening illegality may arise in various ways, such as by legislation or by new facts causing a clash with public policy, a common illustration of which is the outbreak of war."*

As mentioned before, learned judges in the District court and the Civil Appellate High court, relying upon the aforesaid principle namely "supervening illegality" have decided the case in favour of the plaintiff stating that the sale agreement V4 had been entered into in violation of Section 46 of the Land Development Ordinance.

Accordingly, I will now look at the relevant statutory provisions relied upon by the learned judges in the Courts below in order to decide whether or not the agreement to sell [V4] had been frustrated. Those relevant Sections are the Sections 42 and 46 of the Land Development Ordinance. Section 42 of the

Land Development Ordinance refers to **disposition** of State lands while Section 46 refers to the lands alienated on a permit under the Land Development Ordinance. Aforesaid Section 42 of the Land Development Ordinance reads thus:

> *"The owner of a **holding** may dispose of such holding to any other person except where the disposition is prohibited under this Ordinance, and accordingly a disposition executed or effected in contravention of the provisions of this Ordinance shall be null and void."*
> *(emphasis added)*

The word **"Holding"** referred to therein is defined in Section 2 of that Ordinance and it reads thus:

> ***"Holding"** means a land alienated by a **Grant** under this Ordinance and includes any part thereof or interest therein."*

Section 46 of the said Act reads thus:

> *(1) Subject to the provisions of subsection (2), no **permit-holder** shall execute or effect any disposition of the land alienated to him on **the permit.***
>
> *(2) With the written consent of the Government Agent, a **permit-holder** may mortgage his interest in the land alienated to him on **the permit** to any registered society of which he is a member.*
>
> *(3) Any disposition, other than a disposition in accordance with the provisions of subsection (2), of any land alienated on **a permit** shall be null and void."*
> *[emphasis added]*

Accordingly, it is clear that Section 46 of the Land Development Ordinance imposes a blanket prohibition to transfer the lands alienated by way of a "**Permit"** issued by the State while Section 42 permits an owner of a land

alienated by way of a grant to dispose the same provided such a transfer is not specifically prohibited by law.

Having adverted to the law, I will now briefly refer to the facts of this case. Admittedly, the land which is the subject of this case had been alienated to the father of the plaintiff namely Peththaperuma Arachchige Thomas Appuhamy by way of a Grant by the then Head of the State. The said Grant was marked as P2 in evidence. Since it is a Grant under the aforesaid Section 42 of the Land Development Ordinance, the Grantee namely Thomas Appuhamy entering into an agreement to transfer the land given to him is not unlawful.

Then the question arises as to the manner in which such a transfer could be effected. The Grant marked P2 contains several conditions to observe if the Grantee wishes to transfer the land subjected to in the Grant. Those conditions are as follows:

කොන්දේසි :-

1. **මෙහි සඳහන් අවම අනු බෙදුම් ඒකකය. එනම්, උස්බිම් භාගය ට වඩා ප්‍රමාණයෙන් අඩු වූ මෙම ඉඩමේ බෙදා වෙන්කළ කොටසක් අයිතිකරු විසින් බැහැර නොකළ යුතුය.**
2. **මෙහි නියමිත අවම භාගයට වඩා අඩු එනම්, 1/10 වඩා මෙම ඉඩමේ නොබෙදා වෙන් කළ කොටසක් අයිතිතරකැ විසින් බැහැර නොකළ යුතුය.**
3. **1 වන කොන්දේසියේ සඳහන් අවම අනු බෙදුම් ඒකකයට වඩා අඩු ප්‍රමාණයක් වූ ඉඩමේ බෙදූ කොටසකට කිසිම තැනැත්තෙක් අයිතිකරු නොවිය යුතුය**

4. 2 වන කොන්දේසියේ සඳහන් අවම භාගයට අඩු වූ ඉඩමේ නොබෙදූ කොටසකට කිසිම තැනැත්තෙක් අයිතිකරු නොවිය යුතුය.

5. දැනට ඉදිකරන ලද හෝ ඉදිකර ගෙන යනු ලබන හෝ මින්මතු ඉදිකරනු ලබන වාරිමාර්ග ක්‍රමයකින් මේ බිම් කොටසට හෝ එහි යම් කොසකට වාරිමාර්ග පහසුකම් සැළසෙන්නේ නම්, එකී වාරිමාර්ග පහසුකම් සැලසෙන බිම් කොටස සම්බන්ධයෙන් අයිතිකරු (453 අධිකාරය වූ) වාරිමාර්ග ආඥා පනතේ විධිවිධාන වලට හා ඒ යටතේ සාදන ලද යම් රීතිවලට අනුකූලව කටයුතු කල යුතුය.

6. දිසාපතිවරයාගෙන් ලිඛිත අවසරයද උචිත බලධාරියාගෙන් බලපත්‍රයක් ද ලබා ඇත්නම් මිස, අයිතිකරු විසින් ඉඩමෙහි හෝ ඒ මතුපිට කිසිම ඛනිජ ද්‍රව්‍යයක් සඳහා කැනීම් සෙවීම, එය ලබා ගැණීම, ප්‍රයෝජනයට ගැණීම, විකිණීම හෝ අන්‍යාකාරයකින් බැහැර කිරීම නොකළ යුතුය.

7. සභාපතිවරයාගේ පූර්ව ලිඛිත අවසරයක් ඇතිව මිස, ඉඩමෙහි හෝ එහි කිසිම කොටසක අයිතිය බැහැර නොකළ යුතුය.

8. “මෙම පැවරීමේ නීත්‍යානුකූල ලේඛනයේ ඇතුලත් ලැබුම්කරුගේ නම සහ ලිපිනය දැක්වෙන විස්තර වාක්‍යයෙහි වරදක් ඇති බව දැන් පෙනීයන බැවින් එහි සඳහන් පැවරුම්ලාභියාගේ නම වෙත්ත පෙරුම ආරච්චිගේ තෝමස් අප්පුහාමි යන වචනය වෙනුවට පෙත්ත පෙරුම ආරච්චිගේ තෝමස් අප්පුහාමි යන වචනය යෙදීමෙන් එම වරද නිවැරදි කරන ලදී. / කිරීමට මෙයින් අනුමැතිය දෙමි.

Those conditions in the Grant Marked P2 alone show that it is not unlawful to transfer the land given on the said Grant provided the aforesaid conditions found therein are not violated. At the same time, it is important to note

that another condition had been imposed by the Rules made under the Land Development Ordinance, in the event a Grantee intends to alienate a land given on a Grant. It is mentioned in Rule 37, made under the said Ordinance and it reads as follows:

> "37.**ප්‍රදාන පත්‍රයක් මත දුන් ඉඩමක් සම්බන්ධයෙන් වූ විට දිසාපතිගේ පූර්ව ලිඛිත අවසරය ඇතිව මිස ඉඩමෙහි හෝ එකී කොටසක අයිතිය බැහැර කළ හැකි නොවේ.**"

In terms of the aforesaid Rule made under the land Development Ordinance, Thomas Appuhamy (the father of the plaintiff) should have obtained permission from the Government Agent of the area, if he needed to alienate the land that was given to him by way of a Grant. Admittedly, in the agreement to sell marked V4 also contains such a clause. Indeed, Thomas Appuhamy (plaintiff's father) has sought permission of court to have the said permission obtained, by filing a writ application which bears the No.HCA 40/95 in the High Court of Chilaw. (at page 328 in the appeal brief)

Therefore, it is clear that the parties to the agreement Marked V4 has not violated any provision of law when they entered into it. Neither have they violated the conditions found in the Grant marked P2. In the circumstances, it is incorrect to have decided that the said Agreement to Sell marked V4 had been frustrated due to supervening illegality.

At this stage it is important to mention, the circumstances under which the aforesaid writ application had been filed by Thomas Appuhamy (father of the plaintiff). It had been filed to have a directive on the relevant authorities in the Government,

directing them to allow Thomas Appuhamy to transfer the property to an outsider. That action had been filed due to the claims made by the legitimate children of Thomas Appuhamy. Plaintiff alleged to have been a child born to parents who were not married though she claims that Thomas Appuhamy was her father. Therefore, it is seen that the legitimate children of P.A.Thomas Appuhamy were disputing claims made by the plaintiff over the land in question. However, before a decision was made by court in that case, Thomas Appuhamy had passed away. Therefore, it is clear that Thomas Appuhamy had taken every effort to comply with the law with the intention of transferring the property to the defendant as agreed in the agreement marked V4. Had he been alive, he could have transferred the property to the defendant after complying with the conditions required by law.

In the circumstances, it is clear that no evidence is forthcoming to show that there had been any supervening illegality in performing the conditions contained in the agreement to sell marked V4. Therefore, I am of the opinion that the learned Judges in the Courts below have misdirected themselves when they decided that the conditions in the said agreement marked V4 cannot be enforced due to supervening illegality.

At this stage, it is necessary to mention that by the document marked P7, the District Secretary of Pallama has issued the certificate dated 16.01.2001, declaring that plaintiff, has become the owner of the land in dispute. The said decision had been made only upon considering the nomination made by the Grantee in the Grant making the plaintiff as his successor to the land but it had been decided so by the

District Secretary without holding a proper inquiry. Facts of this case show that such a nomination had been made enabling the nominee, namely the plaintiff in this case, to comply with the conditions referred to in the agreement V4 and then to transfer the property to the defendant. Such a position is evident by the evidence of the Land Officer and the Assistant Land Commissioner of the Provincial land Office. Moreover, the decision of the District Secretary found in P7 had been made without the participation of the defendant. He has not considered those matters when he issued the document P7. He has not even considered the valuable consideration paid by the defendant to the plaintiff and to her alleged father Thomas Appuhamy at the time the agreement V4 was entered into. Neither has he considered the improvements made by the defendant since he came into possession of the land in the year 1993.

For the aforesaid reasons, the first two questions of law framed by this Court are answered in favour of the defendant. In view of the said answer to the first two questions, the issue as to the payment of compensation raised in the remaining two questions of law will not arise.

Accordingly, I make the following orders.

1. Judgment dated 04.11.2009 of the learned District Judge of Chilaw is set aside.
2. Judgment dated 06.03.2014 of the Civil Appellate High Court of Kurunegala is set aside.
3. Plaint dated 14.09.2001 filed by the plaintiff is dismissed.
4. Claim made by the defendant in the case filed in the District Court, Chilaw also is dismissed.

5. The decision contained in the document dated 16.01.2001 (P7) made by the District Secretary Pallama is declared null and void.
6. The Agreement to Sell contained in the deed baring No.4050 dated 23.08.1993 attested by P.M.T.Pathiraja Notary Public shall continue to be in force. This does not mean that the defendant is entitled to the land in question. It is to be decided by the authorities concerned.
7. Accordingly, the Defendant is to make an application to the officer who is entitled to make an order in terms of Rule 37 made under the Land Development Ordinance, to obtain permission from the authorities. The said officer is to hold an inquiry with the participation of all the parties concerned and to make an order according to law as to the title of the land in dispute.
8. Considering the circumstances of the case, no order is made as to the costs of this appeal.
9. The District Judge of Chilaw is directed to enter decree accordingly.

Appeal allowed.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PC J.

I agree

JUDGE OF THE SUPREME COURT

PRASANNA S JAYAWARDENA, PC, J.

I agree

JUDGE OF THE SUPREME COURT