

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 143/2012

SC/ HCCA/LA/ 424/2011

SP/HCCA/MAR/40/2008(F)

DC Matara No/17865/P

Andra Henedige Chandrarathne,

Nakulugamuwa,

Kudawella South.

Plaintiff

Vs.

1. Dayathileke Patabendige Edirisooriya,
“Dayani”,
Dodampahala,
Dickwella.
2. Kusuma Abeysooriya,
Dodampahala North,
Dickwella.

Defendants

AND

Andra Henedige Chandrarathne,

Nakulugamuwa,

Kudawella South.

Plaintiff Appellant

Vs.

1. Dayathileke Patabendige Edirisooriya,
“Dayani”,
Dodampahala,
Dickwella.
2. Kusuma Abeysooriya,
Dodampahala North,
Dickwella.

Defendant Respondents

AND NOW BETWEEN

Kusuma Abeysooriya,
Dodampahala North,
Dickwella.

2nd Defendant Respondent Appellant

Vs.

Andra Henedige Chandrarathne,
Nakulugamuwa,
Kudawella South.

Plaintiff Appellant Respondent

1. Dayathileke Patabendige Edirisooriya,
“Dayani”,
Dodampahala,
Dickwella.

1st Defendant Respondent-Respondent

BEFORE : CHANDRA EKANAYAKE, J.
 B. P. ALUWIHARE, PC, J.
 UPALY ABEYRATHNE, J.

COUNSEL : Dr. Sunil Cooray with Ms. Sudarshani
 Cooray for the 2nd Defendant Respondent
 Respondent Appellant

Erasha Kalidasa instructed by Anusha
 Wickremasinghe for the Plaintiff
 Respondent- Respondent

WRITTEN SUBMISSION ON: 17.09.2012 (2nd Defendant Respondent
 Appellant)
 07.11.2012 (Plaintiff Appellant Respondent)
 07.11.2012 (1st Defendant Respondent
 Respondent)

ARGUED ON : 01.10.2015

DECIDED ON : 30.03.2016

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of Southern Province holden at Matara dated 27.09.2011. By the said judgment the Civil Appellate High Court has set aside the judgment of the learned Additional District Judge of Matara dated 05.09.2007 and allowed the appeal of the Plaintiff Appellant Respondent (hereinafter referred to as the Respondent) and to partition

the land described in the plaint as prayed for. The 2nd Defendant Respondent Appellant (hereinafter referred to as the Appellant) sought leave to appeal from the said judgment of the Civil Appellate High Court and this Court granted leave to appeal on the questions of law set out in paragraph 16 (a) (b) (c) (d) (e) and (g) of the Petition of Appeal dated 24.10.2011. Said questions of law are as follows;

- (a) Did the learned High Court Judges err in holding that “It is not possible to suggest that the 2nd Defendant did not intend to transfer beneficial interests of the land” whereas the 2nd Defendant’s position was never challenged by any evidence at the trial in the District Court of Matara?
- (b) Did the learned High Court Judges err in holding that since the 2nd Defendant agreed to transfer on a specific condition she has intended to part with the beneficial interest, whereas in evidence it was revealed that the 2nd Defendant tried her best to pay back the entire agreed amount according to the said condition in the deed?
- (c) Did the learned High Court Judges err in holding that if the 1st Defendant failed or refused to accept the repayment the 2nd Defendant should have initiated appropriate action to protect her rights which had not been done?
- (d) Did the learned High Court Judges err in holding that the position of the 2nd Defendant in the statement of claim cannot be accepted as there is no legal basis?
- (e) Did the learned High Court Judges err in holding that document marked as P3 has been executed duly within one and half years whereas in evidence it was revealed and un-contradicted that the

1st Defendant has fraudulently sought to execute the said deed marked as P 3 without accepting the money of the 2nd Defendant?

(g) Did the learned High Court Judges err in holding that the learned Additional District Judge has come to a wrong conclusion in dismissing the Plaintiff's action after answering the issue No 1 and 2 in the affirmative, whereas those issues do not directly connect to the real dispute in this case?

According to the facts of the case the Plaintiff Respondent instituted an action in the District Court of Matara seeking to partition the land described in paragraph 02 of the plaint between the Plaintiff Respondent and the 1st Defendant Respondent. The 2nd Defendant Appellant had been added as a party only for the notice of the Partition Action. In her statement of claim the Appellant averred that by a deed bearing No 971 dated 02.03.1979 she became the owner of the land in dispute. On 15.12.1984 she borrowed a sum of Rs 10,000/- with the interest at the rate of 16% per annum from the 1st Defendant Respondent and executed the deed of transfer bearing No 3915 dated 13.10.1984 as a security to the said loan upon the condition of retransferring the said property after the repayment of the said loan of Rs 10,000/- with the interest.

Both parties admitted that the said deed of transfer No 3915 Marked P 2 has been executed subject to a condition. According to P 2 the vendor has reserved the right of retransferring the property upon the repayment of the sum mentioned in P 2 with the interest at the rate of 20% per annum within one year and six months of the date of execution of P 2. Although the facts remained as it is the Appellant in her statement of claim and also in her evidence at the trial, took up the position that there had been no time period fixed for the repayment of the loan obtained from the 1st Defendant Respondent. With regard to the execution of Deed

P 2 the Appellant's position was that her signature was obtained upon a blank sheet. She averred that she did not place her signature upon a deed which contained such a condition.

At the hearing of this appeal the learned Counsel for the Appellant contended that the Appellant did not intend to dispose of the beneficial interest of the property in question. But at the trial, the Appellant had failed to prove the aforesaid position taken up by her on a balance of probabilities. The Appellant in her evidence has complained of the 1st Defendant Respondent's unwillingness to fulfil the conditions contained in P 2 and to retransfer the property whenever she was ready to repay the money she obtained. In this regard it must be noted that the present action has been filed in the District Court on 04th of October 1995 after 10 years from the date of execution of deed P 2. If the Appellant's position was that she had no knowledge about a time period for the repayment of the money borrowed upon P 2, it is surprising to note that she had not taken any action against the 1st Defendant Respondent over the refusal to retransfer the property, even up to the date of filing the present partition action. If there had been no time period for the repayment of money, the Appellant had ample opportunities during the said period of 10 years to fulfil the conditions even after the deadline given in P 2. By adducing evidence to such effect the Appellant had the opportunity of establishing the fact that there was no time period to fulfil the conditions in P 2. But the Appellant has failed to do so. When I consider the said circumstances I am of the view that the Appellant's contention that there was no specific period of time for the repayment of money should fail. Hence it is safe to conclude that the Appellant was well aware of the period of one year and six months laid down in P 2 and also the consequences in the event she failed to make the repayment of money within the stipulated period of time in P 2.

On the other hand the 1st Defendant Respondent had transferred one acre and twenty perches out of one acre and thirty nine perches to the Plaintiff Respondent by the deed of transfer bearing No 8222 dated 15.12.1994 (P 3). It is also pertinent to note that said deed P 3 had been executed ten (10) years after the execution of P 2. It also seems from the length of time taken to execute the deed of transfer P 3 that the 1st Defendant Respondent was not in an indecent hurry to dispose of the property transferred to him by deed P 2. In the circumstances since there had been no evidence to show that the Appellant was making efforts to repay the money obtained, it cannot be concluded that the 1st Defendant has fraudulently sought to execute the said deed marked as P 3 without accepting the money from the 2nd Defendant. Hence I am of the view that the Appellant has failed to adhere to the conditions contained in P 2.

In the circumstances it can reasonably be inferred consistently with the attendant circumstances that the Appellant intended to dispose of the beneficial interest in the property in question to the 1st Respondent after the expiration of the period of one year and six months as agreed in deed of transfer P 2.

At the trial before the District Court the Plaintiff Respondent has raised the issues No 1 and 2 as follows;

1. Was the original owner of the subject matter of this action Edirisooriya Patabendige Milinona?
2. Did the said right devolve on the Plaintiff and the 1st Defendant according to the pedigree set out in the plaint?

The learned District Judge has answered the said two issues in the affirmative. As correctly observed by the High Court of Civil Appeal if the said two issues were answered in the affirmative the learned District Judge had no

option but to deliver a judgment in favour of the plaintiff and to proceed with partition of the corpus as set out in the plaint. Having come to the conclusion that the rights of the original owner, Edirisooriya Patabendige Milinona, devolved on the Plaintiff and the 1st Defendant as set out in the pedigree of the Plaintiff in the same breath the learned trial judge has come to the conclusion that the property in question is held by the Plaintiff and the 1st Defendant in trust for the benefit of the 2nd Respondent. Said findings of the learned District Judge clearly demonstrate that he has erred in law.

In the circumstances I see no reason to interfere with the said judgment of the High Court of Civil Appeal dated 27.09.2011. Hence the questions of law set out in paragraph 16 (a) (b) (c) (d) (e) and (g) of the Petition dated 24.10.2011 are answered in the negative. Instant appeal of the appellant is dismissed with costs.

Appeal dismissed.

Judge of the Supreme Court

CHANDRA EKANAYAKE, J.

I agree.

Judge of the Supreme Court

B. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court