

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

In the matter, of an Appeal with Special Leave to Appeal granted by Supreme Court under Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 16/2009

SC.HC.CA. LA. No. 168/08
WP/HCCA/Kalutara No. 120/2001(F)
DC. Panadura No. 19416/L

Anthony Kanicius Malcolm Perera of
No. 36/4, Horana Road,
Pananadura.

Plaintiff

Vs.

1. Warushahennedige Nimalasiri Fernando
75, Horana Road, Wekada,
Pananadura.

1st Defendant

2. Wagoda Pathirage Premaratne
75, Horana Road, Wekada,
Pananadura.

Added 2nd Defendant

And

Wagoda Pathirage Premaratne
75, Horana Road, Wekada,
Pananadura.

**Added 2nd Defendant-
Appellant**

Vs.

D.H.K. Yasawathie,
19B No. 75,
Eluwila Horana Road,
Pananadura.

Substituted Plaintiff-Respondent

1. Warushahennedige Nimalasiri Fernando
75, Horana Road, Wekada,
Panadura.

Defendant-Respondent

And Between

Wagoda Pathirage Premaratne
75, Horana Road, Wekada,
Panadura.

**Added 2nd Defendant-
Appellant- Petitioner**

Vs.

D.H.K. Yasawathie,
19B No. 75,
Eluwila Horana Road,
Panadura.

**Substituted Plaintiff-
Respondent-Respondent**

1. Warushahennedige Nimalasiri Fernando
75, Horana Road, Wekada,
Panadura.

**Defendant-Respondent-
Respondent**

And Now Between

Wagoda Pathirage Premaratne
75, Horana Road, Wekada,
Panadura.

**Added 2nd Defendant-
Appellant-Appellant**

Vs.

D.H.K. Yasawathie,
19B No. 75,
Eluwila Horana Road,
Panadura.

**Substituted Plaintiff-
Respondent-Respondent**

1. Warushahennedige Nimalasiri Fernando
75, Horana Road, Wekada,
Panadura.

**Defendant-Respondent-
Respondent**

* * * * *

BEFORE : **S. Eva Wanasundera, PC. J**
Sisira J. de Abrew, J. &
Anil Gooneratne, J.

COUNSEL : S. Mandaleswaran with P. Peramunugama and Mrs. D.
Ganeshanathan for 2nd Defendant-Appellant-Appellant.
H. Pieris for Substituted Plaintiff-Respondent-Respondent.

ARGUED ON : **22.06.2015**

DECIDED ON : **22.09.2015**

* * * * *

S. EVA WANASUNDERA, PC.J.

Questions of Law to be decided by this Court was laid down on 20.03.2009 when Leave to Appeal was granted. They are as set out in paragraphs 12(a), (b), (c), (f) and (h) of the Petition dated 15.12.2008. At the hearing of this matter on 22.06.2015, the Appellant's Counsel informed Court that he will not pursue the question of law set out in para (h) of paragraph 12 of the Petition. Therefore, the questions to be decided are as follows:-

12(a) Did the Provincial High Court of Kalutara (Civil Appeals) err by holding that the Learned District Judge has dealt with correctly the issue regarding the payment of the advance of Rs.10,000/= at the time P2 was signed without considering admission of the Plaintiff that the Defendant has denied the receipt of the said advance as far back as 10.07.1985 and the

subsequent conduct of the Plaintiff, i.e. without requesting the 1st Defendant, straight away went to the lawyer and sent P4 or 1D1 and filed action 8 days thereafter even without waiting till the last day of the alleged agreement to sell marked P2.

- (b) Did the Provincial High Court of Kalutara (Civil Appeals) err by holding that the alleged payment of a sum of Rs.10,000/= to the Notary and depositing a sum of Rs.72,500/= to the credit of the case is a proper tender of money for the performance of the alleged agreement to sell marked P2.
- (c) Did the Provincial High Court of Kalutara (Civil Appeals) err by holding that the Learned District Judge has rightly concluded that there was a breach of agreement to sell marked P2 which gave rise to a cause of action in favour of the Plaintiff and that there was no necessity for the Plaintiff to have waited till 31.10.1985 to sue on the said agreement marked P2.
- (f) Did the Provincial High Court of Kalutara (Civil Appeals) err in not considering that there was no existing contract affecting the property in question at the time the 2nd Defendant purchased the subject matter of this action on 1.12.1985 by P7 as the alleged agreement to sell marked P2 was only operative upto 31.10.95 notwithstanding the registration of the "lis pendens".

Facts can be narrated in brief. The original Plaintiff A.K.M. Perera filed action against the 1st Defendant W.N. Fernando in the District Court praying for specific performance of a sales agreement entered into between them marked as P2 with regard to a land. P2 dated 01.5.1985 is the sales agreement. It was registered at the Land Registry on 13th of May, 1985. The Plaintiff states that Rs. 10,000/- was paid to the 1st Defendant at the time the sales agreement P2 was signed. The balance to be paid within 6 months was Rs. 72,000/-. Before the six months lapsed, the Plaintiff deposited the balance amount with the lawyer who executed the sales agreement and through the lawyer informed the 1st Defendant by way of a letter sent by registered post which fact was proved in court requesting him to come to the lawyer's office, collect the money and

sign the transfer deed in favour of the Plaintiff as promised by P2. The 1st Defendant did not come on that day as expected.

Thereafter, the 1st Defendant sold the same land to one W.P.Premaratne on 1st of December, 1985, i.e. even after the Plaintiff instituted the action against the 1st Defendant and lispendens was registered in the Land Registry on 17.10.1985 indicating to the public that there is an action filed in court with regard to the said land. Then W.P. Premaratne was added to the action as a party and named as “Added 2nd Defendant”. The Plaintiff died and he was substituted by D.H.K. Yasawathie, his wife. She is now the Substituted Plaintiff-Respondent. The 1st Defendant-Respondent is the person who signed the sales agreement with the Plaintiff A.K.M. Perera. The Added 2nd Defendant-Appellant W. P. Premaratne, is the person who bought the land while the sales agreement was registered in the Land Registry.

In this matter, the 1st Defendant Respondent who is the seller of the land did not appeal from the District Court judgment and neither did he participate at the proceedings before the Civil Appellate High Court.

The District Court Judge granted the relief claimed by the Plaintiff by his judgment on 15.10.2001 as prayed for in paragraphs I, II, III IV and VI of the prayer to the amended Plaint dated 5th of January, 1987. The 1st Defendant did not appeal. The Added 2nd Defendant appealed. The Civil Appellate High Court by its judgment dated 04.11.2008 dismissed the appeal affirming the District Court judgment.

The narrative of the incident is important. The Plaintiff signed an agreement to sell, namely P2 with the 1st Defendant. The advance paid was Rs.10,000/-. The sale price was stated as Rs.82,500/-. The balance to be paid was Rs.72,500/- on or before 30.10.1985. The 1st Defendant being the owner of the land got the agreement P2 registered in the Land Registry. P2 is Deed No. 516 dated 01.05.1985 by which it was agreed to sell the land in the 2nd Schedule of the said Deed with the right of way over the land in the 3rd Schedule. The land in the 2nd Schedule which is 10 perches in extent is a divided and defined portion from and out of the land in the 1st Schedule. The balance money had to be paid within 6 months from 01.5.1985. **Clause 8 and 9 specifically stated that as soon as the Plaintiff got the money ready the 1st**

Defendant has to come to the Notary Public named by the Plaintiff and sign the deed of transfer. The witnesses were L.J.P.M. Manel Bernedette Fernando (nee Perera) and D.H.K. Yasawathie. The Notary Public was K.V.P. Jayatilaka. P2 (අ) is the protocol of Deed 516 P2(ආ) is the statement on the 1st page of P2(ආ) written by the 1st Defendant himself in his own handwriting as having accepted Rs.10,000/- on the date of the deed. The 1st Defendant admitted this signature and his handwriting when cross examined at the trial. The 1st Defendant is a teacher working in a Government School and cannot be in any way considered as an illiterate person. He admitted the inscription on the protocol which says that he has accepted Rs.10,000/- as an advance but refused that he got the money as stated therein.

The Plaintiff deposited the money Rs.72,500/- with the Lawyer, Notary Public, K.V. P. Jayatillake and the Notary dispatched a letter dated 07.10.1985 to the 1st Defendant to be present in his office on 11.10.1985 to sign the deed of Transfer as promised by agreement P2. The lawyer further states in that letter to the 1st Defendant, that it would be convenient to him as his house is very close to the office of the lawyer. The 1st Defendant did not turn up on that date. Then the Plaintiff instituted action in the District Court on 15.10.1985. He registered the lis pendence on 17.10.1985 to the effect that a case has been filed and deposited the balance money to the credit of the case on 23.10.1985.

Thereafter on 01.12.1985 the **1st Defendant executed another deed, which is a transfer of the same land to the Added 2nd Defendant, namely Deed 2681 for the consideration of Rs.83,000/-.** The Attorney-at-Law and Notary Public was S.D. Rajapaksha and it was registered on 12.12.1985.

The Added 2nd Defendant's position is that his lawyer was someone who knew the 1st Defendant and he was introduced to him by the 1st Defendant. According to the Added 2nd Defendant's evidence on record, the lawyer impressed on him that the title was good and therefore he was entrusted to write the deed. The Added 2nd Defendant seems to be someone who trusted the Attorney at Law Rajapaksha and the seller, the 1st Defendant and bought it for the consideration of Rs. 83000/-. He is in possession of the corpus since then. I believe after having gone through the evidence led at the trial

that the Added 2nd Defendant-Appellant was a person who got caught to the trick to buy the said land having confided in his Attorney-at-Law.

Section 93 of the Trust Ordinance No. 9 of 1917 comes into play in this situation. It reads:-

“Where a person acquires property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract, provided that in the case of a contract affecting immovable property such contract shall have been duly registered before such acquisition”.

Sec. 3 of the Trust Ordinance explains what is meant by “ a person acquires property with notice that another person has entered into an existing contract affecting that property...”

Sec.3 reads:-

“A person is said to have notice of a fact either when he actually knows that fact, or when, but for willful abstention from inquiry or gross negligence he would have known it, or when information of the fact is given to or obtained by any person whom the court may determine to have been his agent for the purpose of receiving or obtaining such information”

In the case in hand, the Added 2nd Defendant would have come to know about the sales agreement that the 1st Defendant had with the Plaintiff, **‘but for willful abstention from inquiry or gross negligence ‘** for which he should get the blame for himself. His version of what happened between himself and the lawyer Rajapaksha who was introduced to him by the seller **cannot be taken as an excuse for having bought the said property without looking into the title at the land registry.**

In the case of **Silva Vs Salo Nona 32 NLR 81**, this situation was very well discussed by Garvin A.C.J and Lyall Grant J. as far back as in the year 1930. It was held that **“Registration of an agreement to sell land is of itself notice**, within the meaning of Section 93 of the Trust Ordinance, to a person who acquires the land subsequent to

such agreement” Garvin A.C.J. went on to say further, “ I hold that for the purpose of Sec. 93 of the Trust Ordinance, due registration of a contract affecting land is notice”. “The means of search are available; there can be no doubt that a prudent purchaser should and almost invariably does search the register in his own interest; if he searches the existence of registered documents is revealed to him and he has knowledge. It seems to me that if such a person refrains from searching, he must be held to have knowledge of those facts which would have come to his knowledge **but for his willful abstention from inquiry**”.

While agreeing with Garvin A.C.J., Lyall Grant J. added, “One object of the land register, if not the main object, is to enable the public to obtain information regarding transactions affecting the land. If it were open to a person acquiring land to say, I had no notice of a previous transaction affecting the land I bought because I failed to see the register, the system of registration would lose much of its value”. “I agree that if the agreement to sell was duly registered the **subsequent purchaser must be held to have had notice of it. It follows that under Sec. 93 of the Trust Ordinance he must hold the land for the benefit of the Plaintiff to the extent necessary to give effect to the contract.** The effect of that Section is to alter the law to the extent that proof of actual fraud is no longer required **in order to enable the person who first registered his contract to enforce it in spite of a subsequent transfer.**”

In **Thidoris Perera Vs Eliza Nona 50 NLR 177**, by an agreement duly registered, first and second defendants agreed to sell to the plaintiff within three months of the final decree in a partition action then pending, the divided lot that would be allotted to them in the final decree. They however sold this lot to the third defendant. In an action by the plaintiff for specific performance of the agreement, **it was held that the agreement was an existing contract within the meaning of Sec. 93 of the Trust Ordinance and that specific performance could be enforced**”.

In **De Silva Vs Senaratne 50 NLR 313**, the case of **Silva Vs Salo Nona** was followed and Jayetileke S.P.J. said that “ If a person agrees to sell a land, and afterwards refuses to perform his contract and then sells the land to a purchaser who has **notice of the agreement**, the latter will be compelled to perform the contract of his vendor”. The “notice of the agreement” is as per Sec. 93 of the Trust Ordinance.

The Appellant argued that the statement “that the money is ready” is not sufficient for the seller to perform specific performance. **Muhandiram Vs. Salam 49 NLR 80** was cited as having no application to the facts of the instant case. When I read the said judgment, I found that it was quite relevant to the instant case in hand. It was an appeal by the plaintiffs from a judgment dismissing an action for specific performance of a contract of sale. I quote Justice Canekeratne, obiter, “ The letter makes it clear that the sum of money was deposited with the Proctor – Notary; the defendant is requested to accept the money, to call at the Proctor’s office, and to execute a transfer on or before July, 13, 1945. The defendant neither called at the office of the Proctor nor sent a reply. He did not at any time take up the position that the Proctor’s office was not a convenient place for the execution of the deed. The appellants did everything they were bound to do for the purpose of obtaining a transfer of the properties.The Appeal is allowed with costs”. This case also supports the fact that when money was made available with the lawyer and the vendor is requested to come and collect the money and sign the deed, the vendor is obliged to adhere to the request as agreed by the contract.

Thus I opine that the letter to the 1st Defendant by the Plaintiff in the instant case, through the Attorney-at-Law to come to his office and sign the transfer is equal to a “proper tendering of the purchase price”, **more so because it is specifically mentioned as such in the agreement to sell marked as P2**. How else can a person tell another to comply with an agreement for specific performance other than inviting him to the lawyer’s office where the agreement was signed first, mentioning specially the fact that the money is already deposited with the Notary and Attorney at Law? It was up to the 1st Defendant to go, accept the money and sign the transfer deed which he failed to do. He purposely did not comply with the clauses in the agreement and thereafter got another buyer who was foolish enough to believe the lawyer of the 1st Defendant, who was the seller. The proper practice is for the buyer to engage his own lawyer of his choice and get him to go through the title recorded in the land registry in which the land is registered and then decide to buy the same. Then he should get his lawyer to prepare the deed of transfer to be signed. The Added 2nd Defendant was introduced to the lawyer Rajapaksha by the seller. It is this lawyer who executed the

transfer deed No. 2681 in favour of the Added 2nd Defendant. It is apparent from the evidence of the Added 2nd Defendant that the 1st Defendant knowingly, for some reason or other, avoided performance of the agreement and fraudulently sold the land to the Added 2nd Defendant.

No sooner than the 1st Defendant did not turn up to sign the transfer deed at the lawyer's office, the Plaintiff had instructed his lawyer, Jayatilleke to file action for specific performance on the agreement to sell, P2. The Appellant's counsel argued that the Plaintiff should have waited till the last date given in the agreement for specific performance is over before filing action. That argument does not hold water because **when there is a breach of the contract by one party, the cause of action arises at that time and not at a later time.**

The Plaintiff filed action for specific performance against only the 1st Defendant and then, later on only, he had come to know that there are some other people in the house on the land which was promised to be sold to him. His lawyer did a search in the land registry and found out that it had been sold to another person. Then that person was added to the action as Added 2nd Defendant.

Those who gave evidence in the case before the District Court are the Plaintiff, his lawyer, Jayatilleke, one witness to the sales agreement, the 1st Defendant and the Added 2nd Defendant. The 1st Defendant's position was that he did not receive the advance of Rs. 10000/- even though he signed on the protocol. He further said that the Plaintiff promised to pay that money later after obtaining a loan from the Development Finance Corporation. If court has to believe him, he should have run to the lawyer and signed the transfer deed as promised which he did not do. Instead, he waited for another one and a half months and sold the land to the Added 2nd Defendant. Then, his argument that he wanted the money soon is not correct.

I find that the District Judge has analysed the evidence well and come to the correct finding. The Judges of the Civil Appellate High Court Judges also have also considered the arguments placed before them and confirmed the judgment of the District Judge. I myself have gone through the evidence and the arguments placed before this court and thereafter come to a finding. I answer the questions of law enumerated above in favour

of the Plaintiff in the District Court whose rights have now passed onto the Substituted Plaintiff- Respondent- Respondent.

I am of the view that in this case, the action complained of being “the Added 2nd Defendant-Appellant’s purchase of the property”, comes under the purview of the provisions of Section 93 of the Trust Ordinance. The Added 2nd Defendant has been holding the said property in trust for the benefit of the person who, at the time he bought the property had entered into a contract of which specific performance could be enforced to the extent necessary to give effect to the contract. At that time, it was for the benefit of the Plaintiff in the District Court case. Now it should be for the benefit of his wife, D.H.K. Yasawathie, who was substituted in his place of the case which has continued for so long up to date.

I hold that both the Civil Appellate High Court Judges and the District Court Judges were quite correct in their judgments. I agree with their findings. Accordingly, now, the Substituted - Plaintiff - Respondent is entitled to get the relief prayed for by the original Plaintiff in his amended plaint dated 05.1.1987, namely paragraphs I, II, III, IV and VI of the prayer in the aforementioned amended plaint, according to the judgment of the District Court dated 15.10.2001. In addition to the said reliefs, the Substituted Plaintiff-Respondent is entitled to costs in the Civil Appellate High Court as well as Costs in this Court. The Appeal is hereby dismissed.

Registrar is directed to send this judgment forthwith to the Civil Appellate High Court of Kalutara under case No. WP/HCCA/ Kalutara/120/2001 (F) and to the District Court of Panadura under D.C. Panadura Case No. 19416/L along with the briefs if they were sent to the Supreme Court on any earlier dates.

Judge of the Supreme Court

Sisira J. de Abrew, J.

I agree.

Judge of the Supreme Court

Anil Gooneratne, J.

I agree.

Judge of the Supreme Court

