

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

IN THE MATTER OF AN APPEAL UNDER AND
IN TERMS OF SECTION 5C(i) OF THE HIGH
COURT OF THE PROVINCES (SPECIAL
PROVISIONS) AMENDMENT ACT NO. 54 OF
2006 READ TOGETHER WITH ARTICLE 127
OF THE CONSTITUTION.

1. HembanapuraSonaliNelunga de Silva,
2. HembanapuraHareshNilanka de Silva,
both of, No. 491, High Level Road,
Wijerama, Nugegoda.

Plaintiffs

SC / Appeal No. 71/2014
SC/HCCA/LA/194/2013
WP/HCCA/MT/36/11(F)
DC Mt. Lavinia Case No.
891/05/SPL

Vs

1. LalithRohanaEdirisingha, No. 743/8A,
MuwanhelaWatta Road, Talangama
North, Malabe. (Deceased)
- 1A. SunithaNandaniChandrasekera,
No. 743/8A, MuwanhelaWatta Road,
Talangama North, Malabe.

2. WaranukuwannaWaduge Don Malrani
Iranganie Mala Perera, No. 46, School
Lane, Station Road, Dehiwala.
3. SajithThumalPanduawala, Kumara Oil
Mills, Kandy Road, Miriswatta,
Imbulgoda.

Defendants

AND

SajithThumalPanduawala, Kumara Oil
Mills, Kandy Road, Miriswatta,
Imbulgoda.

3rd Defendant Appellant

Vs

1. HembanapuraSonaliNelunga de
Silva.
 2. HembanapuraHareshNilanka de
Silva.
- Both of No. 491, High Level Road,
Wijerama, Nugegoda.

Plaintiffs Respondents

1. LalithRohanaEdirisinghe, No. 743/8A,
MuwanhelaWatta Road, Talangama
North, Malabe (Dceased)
- 1A. SunithaNandaniChandrasekera, No.
743/8A, MuwanhelaWatta Road, 4th
Lane, Talangama North, Malabe.

2. Waranukuwanna Waduge Don
Malranilranganie Mala Perera, No. 46,
School Lane, Station Road, Dehiwala.

1st & 2nd Defendants Respondents

AND NOW BETWEEN

Sajith Thumal Panduwawala, Kumara Oil
Mills, Kandy Road, Miriswatta,
Imbulgoda.

3rd Defendant Appellant Appellant

Vs

1. Hembapura Sonali Nelunga de Silva,
2. Hembapura Haresh Nilanka de Silva,
Both of No. 491, High Level Road,
Wijerama, Nugegoda.

**1st and 2nd Plaintiffs Respondents
Respondents**

1. Lalith Rohana Edirisingha, No. 743/8A,
Muwanhela Watta Road, Talangama
North, Malabe. (Deceased)
- 1A. Sunitha Nandani Chandrasekera,
No. 743/8A, Muwanhela Watta Road,
Talangama North, Malabe.
2. Waranukuwanna Waduge Don
Malranilranganie Mala Perera, No. 46,
School Lane, Station Road, Dehiwala.

**1st and 2nd Defendants Respondents
Respondents.**

BEFORE: **S. EVA WANASUNDERA PC,J.**
PRIYANTHA JAYAWARDENA PC,J.
NALIN PERERA J.

COUNSEL: HarshaSoza, PC with HarindraRajapaksha for the 3rd
Defendant Appellant Appellant.
Collin A. Amarasinghe for the 1st and 2nd Plaintiffs
Respondents Respondents.

ARGUED ON: 03. 08. 2016.
DECIDED ON: 24. 11. 2016.

S. EVA WANASUNDERA PC.J.

Leave to Appeal was granted on the following questions :-

1. Did the Honourable Judges of the High Court err in holding that sale of the land to the Petitioner (Appellant) is invalid and/or is subject to a constructive trust?
2. Did the Honourable Judges of the High Court fail to consider that there is no evidence of fraud?
3. Did the Honourable Judges of the High Court err in law in approving the learned District Judge invoking the principle of LaesioEnormis to set aside the deed at the stage of the judgment without an issue at the trial and without affording an opportunity to the Petitioner (Appellant)?

The background facts are pertinent to be noted. The 1st and 2nd Plaintiff Respondents Respondents Respondents (hereinafter referred to as the Plaintiffs) are brother and sister. Their uncle, AluthgamageSomaweera de Silva had died on 19.05.1996. leaving a Last Will dated 16.05.1996. In the Testamentary Case No. 555/97/T in the District Court of Mt. Lavinia , probate was granted to the 1st Defendant Respondent RespondentRespondent (hereinafter referred to as the 1st Defendant, namely LalithRohanaEdirisinghe as executor of the said Last Will. As provided for in the Last Will, **among many other disbursements** such as granting

his own dwelling house to his elder sister Aluthgamage Nandawathie de Silva bearing No. 491, High Level Road, Nugegoda; granting another house bearing No. 39, Siri Niwasa Mawatha, Kalutara North to his niece, Dinali Nilanga de Silva; granting the car park and workshop at No. 485/7, High Level Road, Gangodawila, Nugegoda, again to his elder sister A. Nandawathie de Silva; granting the motor vehicle service station at No. 489, High Level Road, Nugegoda, again to his elder sister A. Nandawathie de Silva; **the deceased uncle Somaweera de Silva**, had provided for Lot 56 of St. Edward Estate, in Glenfall Road, Nuwaraeliya of an extent of 31.5 perches to be bequeathed to both Lalith Rohana Edirisinghe, and W.W.D.M. Irangani Mala Perera together **subject to three conditions**. The said Lalith Rohana Edirisinghe was the appointed executor of the Will. The condition which is the subject matter of this action is that, the testator had stated that the said Lalith and Mala had “to sell the said block of land and provide for the education of his niece and nephew, (who are the Plaintiffs as aforementioned), “if the need arises” “.

Lalith Rohana Edirisinghe and W.W.D.M. Irangani Mala Perera, when they became owners of the said Lot 56 of St. Edward Estate by an executor's deed, sold the said land to Sajith Thumal Panduwawala, the 3rd Defendant Appellant (hereinafter referred to as the 3rd Defendant Appellant) by Deed of Transfer No. 20310 dated 29.05.2002 attested by R.M.N.W. Rajakaruna N.P. The consideration for the transfer was Rs. one million. The Plaintiffs contend that the 1st and 2nd Defendants Respondents (hereinafter referred to as the 1st and 2nd Defendants) had held the said property in trust for the Plaintiffs according to the Last Will of Aluthgamage Somaweera de Silva; that the 1st and 2nd Defendants had executed the transfer of the land to the 3rd Defendant Appellant acting in collusion and acting fraudulently for a lesser sum of money than its true value at that time; and therefore the land should be resold for the market value of the date of the sale and for that purpose the transfer deed of the property should be rescinded and money should be paid to the Plaintiffs for their education.

It is alleged that a constructive trust is created under the Last Will No. 17 marked as P1 at the District Court Trial which contains the following conditions:

“to sell the land and to make use of the proceeds of the sale for the following purposes:-

- (a) The medical attention and expenses of myself and my elder sister the said Aluthgamage Nandawathie de Silva'
- (b) The education of my nephew Hembapura Haresh Nilanka de Silva and my niece Sonali Nelunga de Silva both of No. 39, Siri Nivasa Mawatha, Kalutara North, **if the need arises,**
- (c) The purchase of a plot of land to the value of Rupees One Hundred Thousand (Rs.100,000/-) for Hewaralage Chandrathilake (NIC No. 67133802V) of Ganepalla Vidyalaya, Naligama. "

I observe that the beneficiaries of clauses No. (a) and (c) above have not made any complaint or have not joined the 1st and 2nd Plaintiffs in this law suit. The executant of the Last Will had passed away on 19.05.1996. The Testamentary Case No. 555/97/T was concluded in the District Court of Mt. Lavinia. The value of the land as mentioned in the affidavit of the executor in the testamentary case was Rs.1.5million on 17.01.1997. The Plaintiffs Respondents' valuer had valued the same to be , for Rs. 3.95million, in 1997.

The case was taken up for trial *ex parte* against the 1st and 2nd Defendants in the District Court even though they had filed answer and prayed for a dismissal of the action at the initial stages of the case. Their position had been that they sold the property to the 3rd Defendant Appellant at the correct value because the property was on a hilly terrain and difficult to access and was also occupied by a squatter at that time. They had pleaded that it was sold at that price due to these difficulties. The 1st Defendant had passed away before the trial commenced and the 2nd Defendant could not be found in the given address. However now the 1st Defendant has been substituted. The trial was held *ex parte* against them. The Plaintiffs have the advantage of executing the decree against them at any time.

The 3rd Defendant Appellant is the transferee of the property who is the present owner of the land which is 31.5 perches in extent in Nuwaraeliya. The contesting parties before this Court are the 3rd Defendant Appellant and the Plaintiffs Respondents. The 3rd Defendant Appellant had filed answer and prayed for a dismissal of the action on the grounds that he was a bona fide purchaser for value, and that he had not acted in breach of any trust in favour of the Plaintiffs. He had completely denied the existence of any trust between him and the Plaintiffs.

The Plaintiffs were brother and sister. They gave evidence on behalf of themselves at the trial. They admitted having received Rs. 1,55,000/- from the 1st Defendant and Rs. 44,500/- from the testator's sister Nandawathie acting on behalf of the 1st Defendant, in regard to the expenses they needed in connection with their studies at different times when money was needed. There was no evidence of having requested for any more money in writing except two letters sent by each plaintiff to the 1st Defendant on 11.05.2005, i.e. only 16 days before filing action in the District Court. The date of the Plaint is 27.05.2005. Both of them were working at the time of giving evidence. They were 29 years and 27 years respectively at the time of giving evidence. The evidence did not disclose any fraudulent act of the 3rd Defendant Appellant. The evidence showed that what the Plaintiffs wanted was a part of the consideration of Rs. one million paid to the 1st and 2nd Defendants by the 3rd Defendant Appellant. The evidence of the Plaintiffs show that they wanted a reasonable amount which was in fact not specified either in the Plaint or in evidence. Yet the prayer of the Plaint prayed for rescission of the deed of transfer by the 1st and the 2nd Defendants to the 3rd Defendant Appellant on the ground of fraud.

The District Judge held with the Plaintiffs and gave order to rescind the said Deed. The 3rd Defendant appealed to the Civil Appellate High Court and the High Court dismissed the Appeal and affirmed the judgment of the District Court. Hence the matter is before this Court.

An analysis of the Last Will clearly shows that the deceased person intended to grant the land in question to the 1st and 2nd Defendants. The testator never intended to grant the land to the Plaintiffs.

The testator directed the 1st and 2nd Defendants to sell the land first and then to do three duties, one of which was to spend for the education of the Plaintiffs, if and when the need arises. I am of the opinion that in such a situation, the Plaintiffs cannot be heard to state that the said 1st and 2nd Defendants held the land in trust on behalf of the Plaintiffs. Yet one of the arguments of the Plaintiffs was that the said land was held by the 1st and the 2nd Defendants in trust for the Plaintiffs. The proceeds of the sale after they sell the land was held in trust to comply with the directions in the Last Will.

As such, it is obvious that the limit of the expenditure was the amount of the sale proceeds. Therefore it is understood that even if the need arises as and when the Plaintiffs decide to do studies abroad or do foreign educational degrees, which were some of the reasons given in their evidence at the trial, if the sale proceeds are not enough for the expenditure as the Plaintiffs want for further education as adults, there cannot be a duty to spend any amount of money exceeding the amount gained from the sale.

At the end of the Testamentary case, the 1st and 2nd Defendants received the same by way of an executor's deed. Then the proper owners of the land were the 1st and 2nd Defendants. The Last Will directed them to sell the land and make use of the proceeds to perform certain duties. It is only one of the duties of the 1st and the 2nd Defendants, according to the Will, to give money, only 'if the need arises', for education of the Plaintiffs. There was no limit mentioned about how much money to be paid. There were other things specified in the Last Will to be done after the sale of the land, such as spending for the testator's sister's sickness and also to buy another property for another person specifically named and mentioned in the Will. It may be taken for granted that those duties were done because those parties have not complained and come before court.

The Plaintiffs have not placed before court any request made in writing except two similar letters, a few days before filing action to show that "the need had arisen" and it was requested and that the 1st and 2nd Defendants had failed to comply with the directions given in the Will. Moreover even though fraud was pleaded against the 1st and 2nd Defendants in collusion with the 3rd Defendant, there seems to be no proof placed before court. The Valuer giving evidence had placed the market value of the land at that time. The Defendants had pleaded the reasoning why it was sold at Rs. one million. The balance of probabilities of evidence does not point at the 3rd Defendant having committed a fraud when he bought the land. He was aware that the Plaintiffs were named in the Will to be benefitted by the sale because the title deed by which the 1st and 2nd Defendants had got title, was an executor's deed with conditions mentioned in the Last Will.

Legally, the 3rd Defendant Appellant cannot be held to be liable to be a trustee of the Plaintiffs. He is a total outsider. The direct connection is between the 1st and 2nd Defendants and the Plaintiffs. The testator had intended money to be given for education **only if the need arises**. There was no evidence before court that

the need had arisen and the money **was requested and denied**. In fact I fail to see even a cause of action on that ground because other than the two letters similarly drafted by each of the Plaintiffs which were sent only a few days before filing action, there was no evidence to show that monies requested was not paid. On the contrary, there was money paid at two earlier occasions when it was needed, as accepted by the Plaintiffs in evidence.

The Plaintiffs are at liberty to claim that the 1st and 2nd Defendants had sold the land for a lesser value than the proper market value and disregarded their request to grant any money to the Plaintiffs as there is a trust placed on them by the testator. How can they claim any trust placed on the 3rd Defendant Appellant who is the buyer of the property? The buyer who is a third party cannot be held liable for the decision taken by the 1st and 2nd Defendants to sell the property to him. Fraud has not been proven against the 3rd Defendant Appellant to have acted in collusion with the 1st and 2nd Defendants.

The learned Judges of the District Court and the High Court had invoked the principle of Laesio Enormis to set aside the deed of transfer. The said doctrine applies only between vendors and vendees. Laesio Enormis means the inequality between the value of the thing and the price paid for the same. It implies that the vendor has sold the property at less than half its true value either having been misled by the vendee or in complete ignorance of the true value. Laesio Enormis is pleaded in cases only between the seller and the buyer with regard to the goods/property sold and bought. A third party outside the sale of the property cannot plead the doctrine of laesio enormis. In the present case, **the Plaintiffs are not vendors or vendees. Therefore they cannot plead laesio enormis**. Neither can the Judges apply that doctrine in this situation in relation to the interests of a third party.

The ***Law of Contracts by C.G. Weeramantry Volume 1 at page 332*** states thus:
“ Though the civil law **permits the parties** to make as good a bargain as they can, yet it states that a gross inequality between the price which has been paid and the true value of an article implies something in the nature of fraud or undue influence and on that account **allows one party of his heirs to call upon the other** either to rescind the contract and return the purchase money or the property sold as the case may be, or to correct the price by paying a just value for the article. This inequality between the value of the thing and the price paid is termed

laesioenormis."The judges have considered laesioenormis as a ground for their decision to rescind the deed of transfer which they are not legally entitled to do because it is **not pleaded by the Vendor or the Vendee** both of whom are Defendants in this case. A third party cannot allege that the contract of sale is voidable on account of the doctrine of laesioenormis. In the case in hand the Plaintiffs are not a party to the sale of the land. It is a contract of sale between the vendors, the 1st and 2nd Defendants and the vendee, the 3rd Defendant Appellant.

Anyway there had been no issue on laesio enormis at the trial either.The judges of the District Court and the Civil Appellate High Court have erred in the decision to rescind the Deed of Transfer.

The learned High Court Judges had held that there had been fraud in the sale of the property. In the case of *LakshmananChettiarVsMuttiahChettiar 50 NLR 337*, it was held that "the burden of proving fraud was on the Plaintiff who alleged fraud against the Defendant. **Fraud must be established beyond reasonable doubt and a finding of fraud cannot be based on suspicion and conjecture.**"Howard C.J. in writing this judgment , allowing the Appeal with costs entered as the last sentence of his reasoning in the judgment thus: "**I think that fraud has not been established beyond all reasonable doubt.**"

In the case in hand, I observe that there was no evidence led before the trial court with regard to any fraud having been committed by the 3rd Defendant Appellant. The Valuer who had prepared a valuation on behalf of the Plaintiff at his request placed the valuation before court and gave evidence only on the value of the land at that time. That was all the evidence with regard to the sale price being low. The Plaintiff placed before court the affidavit of the 1st Defendant which mentioned that the value of the land at the time of the Testamentary Case was Rs. 1.5million. Even if it is taken that the sale value is less than what it should have been, any fraud on the part of the 3rd Defendant Appellant was not addressed by the Plaintiffs at all.

The Judges of the High Court has had only a suspicion and conjecture that there was fraud on the part of the 1st and 2nd Defendants and the 3rd Defendant Appellant which was most probably created by the valuer's evidence who valued the land for a bigger price. I am of the opinion that **any fraud has not been**

proven by the Plaintiffs **against the 3rd Defendant Appellant beyond all reasonable doubt** as laid down in the case **of LakshmananChettiarVsMuttiahChettiar(supra)**. I hold that fraud has not been proven by the Plaintiffs against the 3rd Defendant Appellant.

In the circumstances, I answer the questions of law enumerated above in the affirmative and in favour of the Appellant. I set aside the judgment of the High Court of Civil Appeals of Mt. Lavinia dated 2nd April, 2013 and the judgment of the District Court of Mt. Lavinia dated 11th January, 2011.

Appeal is allowed. However, I order no costs.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.

I agree.

Judge of the Supreme Court

H.N.J.Perera J.

I agree.

Judge of the Supreme Court

