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

S.C. Appeal 04/2012

Leave to Appeal Application
No: SC/HCCA/LA/304/2011

Provincial High Court of Civil Appeal
Application No. WP/HCCA/GPH/73/2002

D.C. Gampaha Case No. 38448/L

Gangabada Arachchige Prince Gamini Perera
No. 310/8, Pahala Biyanwila, Kadawatha.

PLAINTIFF

Vs.

Madavita Vidanamudalige Don Joseph
No. 279, Dalupitiya, Kadawatha.

DEFENDANT

AND NOW

Gangabada Arachchige Prince Gamini Perera
No. 310/8, Pahala Biyanwila, Kadawatha.

PLAINTIFF-APPELLANT

Vs.

Madavita Vidanamudalige Don Joseph
No. 279, Dalupitiya, Kadawatha.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Gangabada Arachchige Prince Gamini Perera
No. 310/8, Pahala Biyanwila, Kadawatha.

Now residing at 221/A, Jayagath Mawatha,
Ihala Biyanwila, Kadawatha.

PLAINTIFF-APPELLANT-PETITIONER

Vs.

Madavita Vidanamudalige Don Joseph
No. 279, Dalupitiya, Kadawatha.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: S. E. Wanasundera P.C., J.
Sisira J. de. Abrew J. &
Anil Gooneratne J.

COUNSEL: K. Asoka Fernando with A. R. N. Siriwardena
for Plaintiff-Appellant-Appellant

Anuruddha Dharmaratne with Indunil Piyadasa
For Defendant-Respondent-Respondent

ARGUED ON: 24.11.2015

DECIDED ON: 30.05.2016

GOONERATNE J.

This is an appeal to the Supreme Court based mainly on the doctrine of 'laesio enormis'. The plaintiff-Appellant relies on the sale price which is grossly disproportionate to its true value. On the other hand the Plaintiff-

Appellant (hereinafter referred to as Plaintiff) argues that the High Court erred by its failure to consider a document (VI) relied upon by the Defendant-Respondent (hereinafter referred to as Defendant) to be an invalid document. This court on or about 12.01.2012 granted leave as per paragraph 10 of the petition which reads thus:

(a) Whether the Hon. Judges of the Provincial High Court of Civil Appeal erred in law by their failure to consider that the document marked 'VI' is a legally inadmissible and/or invalid document in view of Prevention of Frauds Ordinance and/or Notaries Ordinance?

(b) Whether the Hon Judges of the Provincial High Court of Civil Appeal erred in law for their failure to interpret the doctrine of laesio enormis in the correct perspective considering the circumstances of the case?

(c) Whether the Hon. Judges of the Provincial High Court of Civil Appeal erred in law for their inability to consider where a property is sold or where there is an implied sale at a price grossly disproportionate to its true value, the law is on the side of the party who stands to lose by the transaction, and not on the side of the party who stands to make an unconscionable profit and thereby erred in law?

(d) Whether the Hon. Judges of the Provincial High Court of Civil Appeal erred in law for their inability to comprehend that a fraud being perpetrated in the circumstances of the case by an unauthorized money lender and thereby erred in law?

Parties proceeded to trial on 3 admissions and on 14 issues.

Admissions are that a person named in paragraph 6 of the plaint was in occupation of the premises in dispute as a tenant and that the tenant left the said premises. It is also admitted that the Plaintiff complained to the police and the Debt Conciliation Board. Issues of the Plaintiff-Appellant suggest that he wanted to obtain a loan of Rs. 200,000/- from the Defendant-Respondent and parties discussed the transaction and debt agreed to grant the loan on security and as such executed deed No. 11421 of 08.09.1994 for that purpose. It is also in issue that as in paragraph 12 of the plaint the Plaintiff signed the original deed and also placed his signature on two blank sheets (හිස් ඔප්පු පිටපත් දෙකට). Defendant–Respondent forceful entry to the premises is suggested in the issues. Issue (6) and the other issue refer to the fact that the value of the property exceed rupees five hundred thousand, and based on the principle of laesio enormis deed to be declared void. Defendant-Respondent by his issues suggests that the Defendant-Respondent purchased the property on a transfer deed for due consideration. It is also suggested in issues raised by the Defendant that there was no agreement to re-transfer the property and that the plaint does not disclose a legal basis for such a re-transfer. The above being each parties' case, and as such this appeal need to be decided on a careful examination of all the evidence led at the trial.

In the process of establishing Plaintiff's case, the Plaintiff testified that he requested for a loan of rupees Two Hundred Thousand and for that purpose had discussed the matter with the Defendant who agreed to grant a loan for the said sum but insisted on security to ensure repayment of the loan. As such deed P1 was executed but the Plaintiff's position was that his signature was obtained by the Notary on blank forms on the day in question. Plaintiff was given only Rs. 190,000/- which was Rs. 10,000/- less, on the agreed amount which sum had been deducted for interest due on the loan. Plaintiff in order to enter into the transaction came with his wife to Notaries office and both were anxious to get back to their home quickly as they had to attend to an alms giving at home. At this point I note the evidence placed before the original court reveal that the position of the Defendant was that the Plaintiff obtained a sum of Rs. 1 million and to prove same document VI, an informal document had been put to the Plaintiff in cross examination and the signature in VI, was admitted by the Plaintiff.

I would at this point of the Judgment wish to advert to two matters. The learned District Judge disbelieves the Plaintiff's evidence on the position as regards placing Plaintiff's signature on blank forms, and its contents. Trial Judge in arriving at this decision had given certain reasons. The other matter is that the trial Judge's views on the question that by document VI the transaction

contemplated by deeds P1/V2 would be concluded and a sum of Rs. 1 million had been paid to the Plaintiff by the Defendant. This is to explain that the property in dispute was alienated by a transfer deed for valuable consideration, i.e Rs. 1 million.

The above two matters are of some importance for comment. However I find on a perusal of the trial Judge's reasoning, another matter was disbelieved by the trial Judge based on Plaintiff's evidence. Learned District Judge also disbelieved the evidence of Plaintiff on matters he testified on Defendant entering the premises in question by force and breaking the padlocks at a time the Plaintiff was not present in the premises. This item of evidence was once again disbelieved by the trial Judge.

All primary facts and truth of the matters in dispute are best to be left in the hands of the trial Judge. (signature obtained on blank sheets) This court does not wish to interfere with the findings of the trial Judge on primary facts as above on that question of fact. (1993(1) SLR 119) It is the trial Judge who hears evidence, sees the witness in the witness box and observe the witness's demeanour at all times in court. As such the learned District Judge's views on disbelieving the Plaintiff on items of evidence as above need not be interfered by this court. However before I get on to the other important matter

concerning document VI and its legal implications, I prefer to consider the following authorities on questions of facts.

Questions of fact

> The expression comprises three distinct issues. In the first place what facts are proved. In the second place what are the proper inferences to be drawn from facts which are either proved or admitted. And in the third place what witnesses are to be believed. In the first two questions no special sanctity attaches to the conclusion of a Court of first instance. 1 A.C.R 126. A Court of Appeal will not interfere with findings of a trial Judge on questions of fact. 20 N.L.R. 282, except where the facts are of such complication that their rights interpretation depends not only on the impression formed by listening to witnesses but also upon documentary evidence and upon the inferences to be drawn from the behaviour of these witnesses both before and after the matters on which they gave evidence. 20 N.L.R. 332, or where the trial Judge fails to discuss the evidence in his judgment. 26 N.L.R. 497. The tests to be applied by an Appeal Court are three. Was the verdict of the Judge unreasonably against the weight of the evidence. Was there a misdirection either on the law or on the evidence. Has the Court of trial drawn the wrong inferences from matters in evidence. 14 Law Rec. 144.

In the manner stated by the above authorities as far as the case in hand is concerned, even if the trial Judge disbelieves the evidence of Plaintiff, what I wish to focus is whether there was a misdirection either on law or on the evidence.

The important document relied upon by the Defendant was document marked VI (folio 199). It is an informal document which is not notarial executed. Plaintiff claims to have signed the blank document along with two witnesses who were also witnesses to deed P1/V2 its signatures are not denied.

The gist of VI refer to the fact that by deed P1 (deed No. 11421) which is an outright transfer of property of Rs. 200,000/- and although stated so, the transaction was in fact concluded for a sum of Rs. 1 million, and that the Plaintiff received a sum of Rs. 1 million on 08.09.1994. There is no doubt that VI was prepared, according to Defendant, to support the transaction or to suggest the correct figure or amount agreed upon between parties to be a sum of Rs. 1 million, and that the Plaintiff received the said sum of Rs. 1 million.

Whatever it may be, the trial Judge has based his conclusions on VI. Is it (VI) legally acceptable or admissible in law? Section 2 of the Prevention of Frauds Ordinance contemplates a bar to property transactions. The said Section reads thus:

> No sale, purchase, transfer, assignment or mortgage of land or other immovable property and no promise, bargain, contract or agreement for effecting any such object or for establishing any security, interest or incumbrance affecting land or other immovable property (other than a lease at Will or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property and no notice, given under the provisions of the Thesawalamai Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses present at the same time and unless the execution of such writing, deed or instrument be duly attested by such notary and witnesses.

The above section brings within it land or other immovable property, and contemplates a wider area of activity connected to land/immovable property whether it be a sale, purchase, transfer etc. or to establish any security, interest etc. affecting any such land or immovable property. Validity to such activity as described above requires notarial execution

A careful examination of document V1 indicates without a doubt that although deed bearing No. 11421 (P1) refer to a sum of Rs. 200000/- as the sale price regarding the land in dispute, in fact a sum of Rs. 1 million was accepted on the said transaction by Plaintiff. It is clear that V1 contemplates a transaction connected to land/immovable property which gives details of deed P1, which is the question. Therefore validity of V1 depends on compliance with Section 2 of the said Ordinance. At this stage the following dicta in *Dissanayakage Malini Vs.Mohamed Babur 1999 (2) SLR 4*, would be an important guide to the case in hand. It was held:

Per G.P.S. de Silva C.J.

Held:

> P2 being a non-notarial document was of no force or avail in law in view of section 2 of the Prevention of Frauds Ordinance. However, in a case where fraud is pleaded, put in issue and is established by the evidence on record, it is open to the court to take into consideration such document.

> The rigour of the provisions of section 2 of the Prevention of Frauds Ordinance may, on proof of fraud as in the present case, be relaxed on the principle that "the Statute of Frauds may not be made an instrument of fraud."

I am unable to accept the argument that document V1 does not contradict the above stated Section 2 of the Prevention of Frauds Ordinance. If V1 confirms that the Plaintiff sold and transferred a property to the Defendant and Plaintiff accepted a sum of Rs. 1 Million, I wonder, why V1, which is described as a receipt was prepared at the same time and moment of executing deed P1/D2? Deed P1 indicates the consideration to be Rs. 200,000/-. What would be the transaction that should attach legal sanctity? To consider both V1 and P1 executed at the same time and moment suggest an element of fraud, but the issues raised in the case does not indicate that fraud was properly pleaded and put in issue. There is un-contradicted evidence of Plaintiff that he would settle the amount of rupees two hundred thousand as stated in P1 within a year, but no evidence led by Plaintiff to establish that he in fact repaid the amount due or part thereof. A mixture of facts elicited on both sides tends to confuse the main issue. Deed P1 indicates an outright transfer in favour of the Defendant and it does not suggest that P1 was executed as security for a loan, or contain a clause to re-transfer the property in dispute on settlement of the loan. At the least what sort of attendant circumstances could be established to prove that the transaction was in the nature of a resulting trust. Further nothing much

could be deduced from the admissions recorded. Plaintiff was the applicant to the Debt Conciliation Board, but the outcome of such proceedings before the Board are unknown to any court?

The valuation report was produced marked P3. Value given in P3 is Rs. 12,51,190/-. Land in dispute consists of land and building. Plaintiff has testified in evidence that the land is valuable property worth more than fifteen hundred thousand rupees (Rs. 15,00000/-). It is in evidence that Plaintiff became entitled to the property in dispute by a deed of gift which was gifted to him by all his brothers after the demise of his father. There is evidence led before the trial court that even in the deed of gift the correct value had not been inserted correctly. Plaintiff admits that the correct value was not inserted in the deed of gift (831-V3) and in cross examination of Plaintiff admits that the amount inserted in the V3, deed of gift was only Rs. 50,000/- but it is worth fifteen hundred thousand rupees. He no doubt defends his position of undervaluation of the deed, (V3) and attempt to testify that it is no fraud to do so. Plaintiff's evidence no doubt suggest that he was aware of the true value of the property in dispute and that the transaction value had been under-valued for different purposes and prevailing circumstances to establish his case.

I have emphasised the fact that the Apex Court is reluctant to interfere with factual matters. Unless the order itself is perverse it would not be

in the best interest of justice to interfere on factual matters ruled by the lower court. As such certain items of evidence of Plaintiff are disbelieved by the trial Judge. On the other hand the evidence transpired was that the Plaintiff was well aware of the true value of the property in dispute and such property in dispute conveyed and sold to a price grossly disproportionate to the true value. I have also observed that validity of V1, is in question. The only remaining issue to be decided is the applicability of the principle laesio enormis. Over the years the principle of laesio enormis was subject to difference of opinion. What matters may be the views of Roman- Dutch Jurist.

I find an explanation of the principle as follows by Professor C.G. Weeramantry in his Text on Law of Contracts Vol. 1 (Part III & iv)

> **Explanation of the Principle**. 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 the one party or 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 laesio enormis.
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> A contract may be avoided by Court on the ground of laesio enormis either when the purchaser pays more than double the true value of the thing or the vendor sells the thing for less than half its value. The person sued has the option of restoring the thing or paying what is wanting to make up the just price. Where the consideration is less than half (or more than twice) the true value of the property, the sale is voidable on the ground of laesio enormis unless there is some special consideration present in the

case which bars the application of the principle. The difference in price must exist at the time of the transaction and not thereafter.

At para 333

The doctrine still obtains in full force and vigour in Ceylon. Bodiga V Nagoor 45 NLR 1 at 4.

At para 335

Action does not lie, where the aggrieved party was aware, or ought to have been aware of the true value at the time of making the contract. Jayawardene Vs. Amerasekera 15 NLR 280; Sobana Vs. Meera Lebbe (1940) 5 C.L.J 46. The burden is on the person claiming the benefit of the true value.

In the case of Jayawardene Vs. Amerasekera (15 N.L.R. 280), I would advert to a further position very much relied upon by the Plaintiff.

As it was held in Jayawardene Vs. Amerasekera (15 N.L.R. 280) a person who knows the value of the property is not entitled to a rescission of the sale merely by reason of the fact that the price at which he has sold it, is less than half its true value. The case is otherwise where the property is sold at a price grossly disproportionate to its true value. In that case the law is on the side of the party who stands to lose by the transaction, and not on the side of the party who stands to make an unconscionable profit.

The annulling of the contract on this head is not permitted when the other party is prepared to increase or reduce the price of the thing to its true value (V.d.L 1. 15. 10).

But one has to gather its application only in the circumstances and facts of the case in hand. Though the above positions had been projected by learned counsel for the Plaintiff, as in Jayawardene Vs. Amerasekera it does not appear to be conclusive. In answer to above I find that Justice Fernando observes in Gunasekera Vs. Amerasekere 1993 (1) SLR at 176/177 the matter has not been decided conclusively in the manner as argued by learned counsel for Plaintiff, for the reasons stated therein as being obiter dictum. This aspect and matter has not been decided by Justice Fernando. I will refer to the relevant portion gathered from pg.176/177.

> Learned Counsel for the defendant submitted that laesio enormis applied even if the vendor was aware of the true value, citing Wessells, Law of Contract, 2nd ed., vol 2, page 1344, section 5100.
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> "There is a considerable dispute amongst the jurists whether the remedy applies in the case of a person who knows the true value of the thing, but nevertheless sells it for less than half, or purchase property knowing that it is only worth half. Voet seems to consider that in both cases the remedy cannot be invoked (Voet, 18.5. 17)……
>
> Counsel then sought to rely on the further observation of Lascelles, C.J., in that case, suggesting that knowledge is immaterial where the price is grossly disproportionate to the value, pointing out that this dictum was cited in Walter Pereira's Laws of Ceylon, 2nd ed., (1913), p. 657. However, that appears to be an obiter dictum not supported by the opinion of any Roman Dutch jurist; and indeed does not appear in the first edition of Walter Perera's work; it is also not cited by Weeramantry, in his discussion of laesio enormis. In Sobana v. Meera Saibo, it was held that the plea of leasio enormis could not be entertained where, assuming the land to have been

> worth Rs. 500, the plaintiff knew that fact at the time he sold the land for Rs. 100. Although Jayawardene v. Amerasekera was cited with approval, that obiter dictum was not applied. While there appears to be some substance in the contention that this obiter dictum does not correctly set out the Roman-Dutch Law (and is possibly based on a misunderstanding of the concluding portion of Voet 18.5.17), the matter need not be decided now in view of my decision on the other questions arising in this case.

In all the facts and circumstances of the case, I find following important factors from which court has to draw conclusions. The factors in point form are as follows:

(a) Certain items of evidence had been disbelieved by the trial Judge, and the Apex Court would not interfere as regards the trial Judge's findings on same.

(b) Validity of document V1 is in question.

(c) Plaintiff was well aware of the true value of the property in dispute. Plaintiff derived title from a deed of gift and his evidence suggest that even the deed of gift was under valued.

(d) 'Fraud' has not been properly and correctly pleaded and put in issue.

On a perusal of both judgments of the District Court and High Court, I have no hesitation in affirming its conclusions, notwithstanding the views expressed by both courts on the application of the law as regards document V1.

There may be some aspects of the Judgments of the lower courts being liable for comment, but conclusions arrived by both courts need not be disturbed.

I answer the questions of law as follows:

(a) Though document V1 was legally inadmissible, the trial court based on a balance of probability, arrived at the correct conclusion.

(b) No. In the context of the case the doctrine of laesio enormis was correctly considered and not applied.

(c) No.

(d) No. Fraud must be properly and correctly pleaded and put in issue

There is no doubt, for cogent reasons supported by evidence, that the Plaintiff was aware that the property in dispute had been under valued and the sale price inserted in deed P1 was not the true and correct price. Having been aware of the proper value of the property and on that basis knowingly and willingly Plaintiff negotiating and admitting a lower price cannot take him anywhere close to the principle of laesio enormis, as it stands today. When it suits the Plaintiff to quote a low price and get a benefit for a loan transaction and sometime latter to retract from the earlier position is not an acceptable position in law. To affirm and disaffirm or to approbate and reprobate the same transaction even if the original transaction subsequently takes a different

flavour cannot in any circumstances favour the Plaintiff. In these circumstances and in the context of the case in hand I affirm as stated above both Judgements of the District Court and the High Court. This appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

S. E. Wanasundera P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew J.

I agree.

JUDGE OF THE SUPREME COURT