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

In the matter of an application for Leave to Appeal under section 4c of the High Court of the Provinces (Special Provisions) Act no. 19 of 1990 as amended, to be read with Sec. 754 (2) of the Civil Procedure Code.

SC Appeal.243/14
WP/HCCA/MT
CASE No.38/201 (F)
DC Mount Lavinia
Case No.3654/2012/M

Ranawaka Arachchige Brigette Alwis
No.31/2, Kuruniyawatta Road,
2nd Lane, Avissawella Road,
Wellampitiya.

Plaintiff

-Vs_

Allen Margret Wijethunga,
No.81/9, Allen Mawatha,
Dehiwala

Defendant (deceased)

Hettiarachchige Kusumalatha,
No.81/9, Allen Mawatha,
Dehiwala

Substituted Defendant

AND/BETWEEN

Hettiarachchige Kusumalatha,
No.81/9, Allen Mawatha,
Dehiwala

Substituted Defendant-Appellant

Ranawaka Arachchige Brigette Alwis
No.31/2, Kuruniyawatta Road,
2nd Lane, Avissawella Road,
Wellampitiya.

Plaintiff-Respondent

NOW AND/BETWEEN

Hettiarachchige Kusumalatha,
No.81/9, Allen Mawatha,
Dehiwala

Substituted Defendant-Appellant-Petitioner

-VS-

Ranawaka Arachchige Brigette Alwis
No.31/2, Kuruniyawatta Road,
2nd Lane, Avissawella Road,
Wellampitiya.

Plaintiff-Respondent-Respondent

**BEFORE:** Buwaneka Aluwihare, PC, J,
Anil Gooneratne, J &
Nalin Perera, J.

**COUNSEL:** Harindra Rajapaksa, instructed by Roshan Gamage for the substituted Defendant Appellant-Petitioner

J. Kroon for Plaintiff-Respondent-Respondent.

**ARGUED ON:** 19.06.2017

**DECIDED ON:** 13.12.2017

ALUWIHARE, P.C., J:

Leave to appeal was granted in this matter on 10.12.2014 on the questions of law referred to in sub-paragraphs 19 (b), 19 (d), 19 (e) and 19 (f) of paragraph 19 of the Petition of the Petitioner dated 24.06.2014.

The questions of law are reproduced verbatim below:

(b) Did the learned judges of the Civil Appellate High Court, Holden in Mount Lavinia err in law in deciding the said appeal, disregarding the vital evidence given by the Plaintiff-Respondent herself and the other witnesses of the Plaintiff-Respondent, to the effect that the 'Promissory Note' in dispute is in fact a security given in a land transaction?

(d) Did the learned judges of the Civil Appellate High Court err in law by failing to analyse the evidence at all given at the trial and by their failure to give adequate reasons for the judgment?

(e) Did the learned judges of the Civil Appellate High Court err in law, by failing to analyze the evidence lead in the original court in its proper perspective?

(f) Did the learned judges of the Civil Appellate High Court err in law, in deciding the appeal, disregarding the evidence to the effect that the Plaintiff-Respondent has in fact obtained the possession of the house in the year 1997 and remained in occupation up to now?

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) filed an action in the District Court of Mount Lavinia against the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant) to recover a sum of Rs.325, 000 and the accrued interest at the rate of 20%, based on a promissory note.

According to the evidence led at the trial of the original Defendant, (who was substituted by her daughter in the course of the proceedings due to her demise) the house, the defendant was in occupation had been acquired by the State for road widening and she had been offered a house from a housing scheme at Wellampitiya. The defendant was required to pay a sum of Rs.245, 000 to the Road Development Authority (RDA) towards the cost of the property. The Defendant, however, had decided to sell this property to the plaintiff.
According to the Plaintiff, she had given a sum of Rs.325, 000/- to the defendant with the intention of buying the house. The Plaintiff's position had been that she had been told by the defendant that once the money is paid to the Road Development Authority, the Road Development Authority would give the title deed in a month and once the Defendant gets the deed, she in turn would transfer the property in the favour of the Plaintiff.

In fact an admission had been recorded to the effect that the Plaintiff gave Rs.325, 000 to the Defendant and the evidence of the Plaintiff was that she gave this amount after executing a promissory note (P1).

It was the position of the Plaintiff that the amount was advanced as a loan, until such time the deed of transfer is executed. Under cross

examination the Plaintiff had said the monies were advanced on interest till she got the deed. " ඔප්පුව ලැබෙන තෙක් මුදල් දුන්නේ පොළියට ".

The Plaintiff, however, admitted that she was handed over possession of a house which was not complete in many aspects.

In response to a question that the Plaintiff enjoyed possession for about eight years, she had said that the house is closed and was handed back. " ගේ වහලා තියෙන්නේ, බාරදිලා තියෙන්නේ ".

Simply the Plaintiff's position was that she no longer is interested in the house and she wants the money that she had advanced, with interest.

Due to extreme old age, the Defendant had not given evidence in this case, but her daughter, the present Appellant had testified on behalf of the Defendant. Her evidence was that the house in question allotted to her mother by the Road Development Authority was sold to the Plaintiff. Her evidence is not at variance with the evidence of the Plaintiff. Substituted Defendant also had admitted that although her mother paid Rs.245,000/-towards the purchase of the house to the Road Development Authority, they never received the title deed to the house as promised by the Road Development Authority. Her position was, the payment of Rs.325, 000/- was an advance of the agreed sale price of Rs.600, 000/-. She also admitted that the amount paid as an advance, as claimed by the witness, was in excess of the amount they were required to pay the Road Development Authority which was Rs.245, 000/-.

One of the main contentions of the Defendant in these proceedings was that the High Court of Civil Appeals erred, in disregarding vital evidence

by the Plaintiff and other witnesses to the effect that the Promissory Note is only security given in a land transaction.

No doubt, the Plaintiff had said in her evidence that she had the intention of buying the house in question, of which the title was not with the Defendant. It is quite evident from the evidence placed by both the Plaintiff and the Defendant that the sale was contingent upon the Road Development Authority transferring the title to the (original) Defendant. The Plaintiff had been quite alive to these uncertain factors and the impediments to proceed with the transaction to a conclusion. It is in that context that the Plaintiff had said that she advanced the money as a loan to the Defendant. The Promissory note (P1) clearly stipulates the percentage of interest that is payable, as well. The Promissory note had been signed before a lawyer who also had given evidence at the trial. If the intention of the parties were to reach an agreement on the sale, the attorney could have been instructed to draw an agreement to sell instead, which was not the case.

On the other hand, having considered the evidence placed at the trial, the learned District Judge had placed credence on the evidence of the Plaintiff and had come to a factual finding which an Appellate Court should not disturb, unless the finding is visibly erroneous.

There may have been arrangements between the parties, which are not documented, with regard to the sale of the house in question, but action before the District Court was instituted based on the Promissory note, the execution of which was not disputed by either party. I am of the view that, unless there is strong and cogent evidence to come to a finding that parties executed the promissory note purely for security, one cannot find

fault with the learned District Judge for holding that the Defendant had borrowed the sum referred to in the promissory note from the Plaintiff.

The learned Counsel for the Defendant also submitted that that the High Court of Civil Appeals failed to analyse the evidence placed before the District court and had not given adequate reasons for these findings by the learned judges of the High Court of Civil Appeals. It was the contention of the learned counsel that the judges of the High Court of Civil Appeals failed to appreciate the fact that the Defendant had obtained possession of the house in 1997 and continued occupation even at present.

The daughter of the original Defendant Kusumalatha in her evidence admitted that the defendant accepted Rs.325, 000 from the plaintiff on the Promissory note P1 and in terms of P1 nowhere it is stated that the money so accepted is an advance payment towards the purchase price of the house. It appears that even as late as 2009, there had been no title deed in favour of the Defendant.

When one evaluates the evidence placed before the learned District Judge, the plaintiff's position is that she gave the money as a loan on the Promissory note P1, payable on demand, but she also had the intention of buying the house that was to be allocated to the original Defendant after the execution of the title deed in favour of the Defendant, which never materialized.

On the other hand, the solitary witness for the Defendant stated that her mother took this money as an advance payment in relation to the house that was to be sold to the plaintiff and the promissory note was executed only as security.

The learned District judge had formed the view that the Plaintiff's version is more credible and had placed reliance on the evidence placed before the court on behalf of the Plaintiff. The learned District Judge had observed that the parties have not executed any document with regard to the purported agreement to sell the property. On that basis the learned District Judge, holding in favour of the plaintiff, had come to a finding that the plaintiff is entitled to the principal sum that was transacted between the parties and the legal interest thereof.

The learned judges of the High Court of civil Appeals having considered the matter had also come to the finding that the learned District judge had come to the correct finding as "it is crystal clear that the Plaintiff has proved that the cause of action has arisen to claim Rs.325, 000 as per the judgement delivered in this case, on a balance of probability".
Part of the function of an appellate court is to ascertain whether there may have been serious and material errors in the manner in which the learned District Judge reached his conclusion as to the facts.

In the case of McGraddie v. McGraddie 2013 UKSC 58 [2013] 1 WLR 2477, commenting on the approach of the Appeal Court to a finding of fact, the Supreme Court of United Kingdom held, "*It was long settled principle, stated and restated in domestic and wider common law jurisdictions that an appellate court should not interfere with the trial judge's conclusions on the primary facts unless satisfied that he was plainly wrong.*

In the case before us, as referred to earlier an admission had been recorded as to the execution of the promissory note P1 and the fact the Defendant was given a sum of Rs.325, 000 by the Plaintiff.

The only issue the learned District Judge was required to consider was whether it was a loan, as stated by the Plaintiff or was the Promissory note executed as security, the position taken up by the Defendant. The learned District Judge upon evaluation of evidence had held that the plaintiff's version is more credible and accordingly gave judgement in favour of the Plaintiff. This court, to my mind, cannot fault the District Judge, which was also the view of the High Court of Civil Appeals, in arriving at that conclusion. As such I answer the questions of law on which leave was granted in the negative.

Accordingly, the appeal is dismissed and under the circumstances of the case, I make no order as to costs.

JUDGE OF THE SUPREME COURT

Justice Anil Gooneratne
I agree

JUDGE OF THE SUPREME COURT

Justice Nalin Perera
I agree

JUDGE OF THE SUPREME COURT