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

S. A. Sandya Kasthurirathne of
Urulamulla, Alawwa.

PLAINTIFF

C.A. No. 138/1998
D.C Kurunegala 3894/L

Vs.

M. A. Amalapala Munasinghe of
Galgamuwa, Veyangoda.

DEFENDANT

M. A. Amalapala Munasinghe of
Galgamuwa, Veyangoda.

DEFENDANT-APPELLANT

Vs.

S. A. Sandya Kasthurirathne of
Urulamulla, Alawwa.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Dr. Sunil Coorey with Sudarshani Coorey
For the Defendant-Appellant

S. N. Vijithsingh for the Plaintiff-Respondent

ARGUED ON: 14.10.2011

WRITTEN SUBMISSIONS TENDERED ON: 25.11.2011

DECIDED ON: 13.01.2012

GOONERATNE J.

This was an action filed in the District Court of Kurunegala on or about May 1991, for cancellation and or to set aside deed of transfer No. 9885 of 29.11.1986, (P3) on the basis of undue influence. (procured upon the Plaintiff-wife by Defendant in contemplation of marriage) Plaintiff also sought a declaration that Defendant has no right/title to the property described in the schedule to the plaint and for declaration of title to the property described in the plaint. The Defendant-Appellant also sought

certain relief by his answer for a declaration of title to the property in question and eviction of Plaintiff from the property. Parties proceeded to trial on 18 issues.

The most important issues to be decided in this case would be issue Nos. 3 – 7 pertaining to the question of undue influence in executing the deed in question and issue No. 18 on prescription since the case in the original court had been filed about 5 years after the execution of the above stated deed marked P3. Several persons including the Notary who attested the deed in question had given evidence in the original court.

The case of the Plaintiff-Respondent is that (before considering the evidence and judgment) she is the owner of the land described in the schedule to the plaint. A marriage proposal was arranged between Plaintiff and Defendant and they married on 30.1.1986. Prior to the wedding day as indicated by Plaintiff's counsel, 10 days before the date of Registration of the marriage, Defendant had suggested that ½ of the above property be transferred to the Defendant and about 4 days prior to the wedding date the Defendant insisted that unless Defendant's request is met the marriage would not take place. As such Plaintiff having no option agreed to execute a deed of gift, but as stated in the written submissions Defendant was not agreeable, and at that point due to humiliation and embarrassment she has to

undergo, agreed to the Defendant's request and met Mr. D.B. Welegedera Proctor and Notary on 29.1.1986 with Defendant and his family members. (the day before the wedding). The story of the Plaintiff is that the Notary advised her to execute a deed of gift for good reason, but as the Plaintiff was embarrassed and to avoid humiliation decided to execute a deed of transfer (P3). In this way Plaintiff-Respondent attempted to demonstrate undue influence in the execution of deed P3, dated 29.01.1986.

Plaintiff gave evidence and in cross-examination, suggestion was made to her that the deed was written in order to raise funds for the wedding, and that a sum of Rs. 25,000/- was given to her. All these questions were denied by Plaintiff. It was also suggested that Rs. 25,000/- was paid by borrowing money from one Silva (5000/-) and Defendant's brother (5000/-) and the balance sum of Rs. 15,000/- by the Defendant. Plaintiff vehemently denied any money transaction on the deed. Letters written by Plaintiff to Defendant were marked V1 – V7. Police complaint marked as V8. (by Defendant) Letters exchanged between parties were marked V9 – V14.

The Proctor D.B. Welegedera also gave evidence and testified that he advised Plaintiff to execute a deed of gift but Plaintiff wanted a deed of transfer executed as the marriage would not take place if the property was

not transferred. The proceedings of 5.5.1995, the Proctor testified that consideration did not pass in his presence. His oral evidence was different from what was stated in deed P3 as the printed form of the deed reflects that consideration did pass. However the Proctor had explained this position in his evidence and stated that it was a standard printed form which was used and he forgot to strike off what was irrelevant. (that money was received by vendor) Proctor explains further that he had in the attestation clause clearly stated that consideration did not pass before him (proceedings of 5.5.1995). I have been furnished with the authority referred to in the text of E.R.S.R. Coomaraswamy.

> E. R. S. R. Coomaraswamy in his book CONVEYANCER AND PROPERTY LAWYER at page 429 deals with the situation where there is a contradiction between a printed part of a deed and a written part of a deed like in this case. The author cites with approval a judgment reported in 1927 A.C at page 711 SASSON AND SONS LTD VS. INTERNATIONAL BANKING CORPORATION
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> "In these cases more attention is given to the writing, because the written words were chosen for the particular occasion while the printed words were general words for all occasions. The written portions are presumed to have commanded the similar attention of the parties and writing must prevail in the case of irreconciliable conflict".

The Appellant seeks to establish and rely on the evidence of Defendant's brother and the Defendant-Appellant that parties got married not on a marriage proposal but as a result of an affair (proceedings of 26.9.1997). In this respect Appellant is critical of Plaintiff's mother's evidence. Defendant-Appellant stress in evidence and in the submissions that Defendant never discussed about a dowry and Defendant parted with Rs. 25,000/- to enable the Plaintiff to spend for the wedding. Appellant is also critical of Plaintiff's evidence and invites court not to rely on her version. Appellant emphasis that the deed was voluntarily executed by Plaintiff-Respondent and that money had been advanced to Plaintiff prior to execution of the deed. Appellant rely on P3 & D15 (Deed of transfer) probably on the printed form and version contained in P3)

As regards the construction of the house, Appellant refer to documents D1 – D7, D9 – D14 to prove that Defendant spent for the construction after marriage. Defendant-Appellant refer to D8 to demonstrate how he was harassed by Plaintiff on the question of prescription (issue No 18). I prefer to incorporate the following, obtained from the written submissions of Appellant since it is an important point to be considered by this court especially in a case where facts are made to look rather

complicated and difficult facts and there was a good deal to be said on each side.

The following submissions considered.

"Only for argumentative purposes if assuming that the deed was written on undue influence, but then Plaintiff new all long that (as per the Plaintiff's cause of action) the deed was written on undue influence, she was not a minor at the time of writing such deed. The Plaintiff was well aware (if according to) her cause of action. Plaintiff is barred from bringing an action against the Defendant after 3 years, as the cause of action arose form the date of executing the deed. There is no doubt that if a deed is written on undue influence that there is a presumption that the deed may be declared null and void, but it is rebuttable presumption, and such deed must be challenged within 3 years from the date of execution. There is no law nor a legal principle governing the fact that prescription only starts to run against a deed executed between a husband and a wife only at the point of divorce. There is of course a principle that prescription starts to run against a deed from the point of getting to know about such a deed, but in this instance the Plaintiff new all along that this deed was executed".

Both parties have dealt with the factual situation relied upon by each of them. Plaintiff and Defendant being husband and wife at some stage share a relationship that gave rise to a fiduciary relationship and the presumption of undue influence which is an equitable doctrine should give

relief to the victim who suffered due to such influence. Mere pestering or persistence would not amount to undue influence. However English law relating to undue influence is part of our law. 54 NLR 553; 1987(2) SLR 260 courts have recognized certain relationship in which undue influence could be presumed, like Proctor and client 52 NLR 536. In the case of in Zamet Vs Hyman 1961 (3) All E.R "Transactions as those involving a deed of arrangement or settlement made between an engaged couple where the transaction appears on its face to be much more favourable to one party than the other, the court may, in the circumstances of the case find that a fiduciary relationship existed such as to cast an onus on the party benefited to prove if the transaction is to stand, that it was completed by the other party after full, free and informed thought about it."

The facts pointed out as narrated by Plaintiff, the influence procured upon her by Defendant, and failure to execute the deed would have resulted in no marriage taking place and views expressed by the learned District Judge on this primary facts cannot be faulted. The impugned transaction on the deed was no doubt due to an abuse of confidence and trust which made the Plaintiff helpless and she had no alternative but to execute the deed of transfer (P3). The learned District Judge had also considered the proctor's evidence and this court sees no reason to reject same. Nor can this

court fault the judgment of the District Judge in this regard. This court has no hesitation in arriving at the conclusion similar to that of the learned District Judge on the question of undue influence. Apart from the above I have noted the following matters dealt by the learned District Judge.

1. Letter as alleged by the Defendant sent by Plaintiff to Defendant indicating that Plaintiff is anxiously waiting to marry the Defendant not produced in court (Folio 232)
2. That the marriage was an arranged/proposed marriage
3. Document D13 does not reflect a request by Plaintiff to Defendant demanding any money for the purpose of marriage.
4. That the Defendant did not have sufficient money and that Defendant-Appellant's position that Rs. 25,000/- was paid had been made up by borrowed money. The statement by Defendant-Appellant that he paid Rs. 25,000/- amounts to a false statement.
5. Prior to execution of deed P3 amount of Rs. 25,000/- being paid to Plaintiff is a false statement and court reject same.
6. No consideration passed on executing deed P3. As such District Judge observes, "ඒ අනුව දැන් විවාහය නිමිතිකොටගෙන පැමිණිලිකාරිය විසින් විත්තිකරුට ලබා දී ඇති ප්‍රතිඥාවකින් තොර ධජ්පුව ඒ අනුව නීතියෙන් බල රහිත විය යුතුය.

The other important question is the plea of prescription. Section 10 of the Prescription Ordinance reads thus:

> No action shall be maintainable in respect of any cause of action not herein before expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued.

The trial Judge's conclusions on the question that the deed (P3) was written and executed in contemplation of marriage cannot be disputed. There is ample evidence placed before the Original Court to support that position. Much depends as to when the cause of action arose? One has to consider the entire transaction connecting the deed (P3). The purpose for executing the deed? Why was it executed just a few days before the wedding? The pressure exercised on the Plaintiff directly or indirectly? When did the marriage collapse? The answers to all these questions are provided by Plaintiff in her evidence. As far as the marriage subsists there cannot be in law and in fact any complaint on the execution of the deed (P3). Both parties were in possession of the property in question until break up of marriage. Facts and circumstances of the case would be the deciding factor as to when the cause of action arose. This would differ from case to case, depending on facts and circumstances, of each case. I have considered the case of Ranasinghe Vs. de Silva 78 NLR 500 (A three bench decision). But I am unable to apply the same standard adopted in the above decided case, when I have to decide as to when the cause of action arose as far as the case in hand.

In Ranasinghe vs. de Silva....

> An action for a declaration that a notarially executed deed is null and void is prescribed within 3 years of the date of execution of the deed in terms of section 10 of the Prescription Ordinance.

It is regrettable that all the facts are not described in the above decided case, which judgment is very brief. As observed above case to case would differ on the cause of action, as to when and where and how it arose. A deed written in contemplation of marriage would never be challenged during the subsistence of a valid marriage. It is only when the marriage break up that the party concerned would give her or his mind to challenge the deed. As such I reject the submission of learned Counsel for the Defendant Appellant on the question of prescription. I am not convinced on the material contained in the written submission of Defendant-appellant.

In all the circumstances of this case I affirm the judgment of the learned District Judge and dismiss this appeal with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL