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

Hameed Noorul Ameen
appearing by his duly appointed
Next Friend, K.B.G. Abdul Hameed
of No. 456/6, Galle Road,
Wellawatta, Colombo 6.

(Minor)
Presently at No. 14/4, 10th Lane,
Colombo 3.

PLAINTIFF

C.A 313/1998 (F)
D.C Mt. Lavinia 4/91/L

Vs.

1. Saleem Jeraldeen Rita Perera
2. Perera Claude Mervyn U. Boldwin
3. Perera Lorita John Fonseka
4. Perera Doole Lord Marian
5. Abdul Raheem Mohamed Saleem

all of No. 15/1, Sunshine Road,
P. T. De Silva Mawatha, Dehiwela

DEFENDANTS

AND BETWEEN

Hameed Noorul Ameen
of No. 456/6, Galle Road,
Wellawatta, Colombo 6.

PLAINTIFF-APPELLANT

Vs.

1. Saleem Jeraldeen Rita Perera
2. Perera Claude Mervyn U. Boldwin
3. Perera Lorita John Fonseka
4. Perera Doole Lord Marian
5. Abdul Raheem Mohamed Saleem

all of No. 15/1, Sunshine Road,
P. T. De Silva Mawatha, Dehiwela

DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: M. Nizam Kariapper with M.C.M. Nawas and M.I.M. Iynullah for the Plaintiff-Appellant

Ikram Mohamed P.C with T. Shyanas Fernando for the Defendant-Respondents

ARGUED ON: 21.02.20121

DECIDED ON: 29.05.2012

GOONERATNE J.

This was an action for a declaration of title and eviction of the Defendants from the property in dispute. Plaintiff has also claimed continuing damages against the five Defendants. The 5th Defendant was

made a party after he intervened and filed answer thereafter on 11.2.1994. Originally only 4 Defendants were made parties. Plaintiff was a minor at the time of institution of action and sued the Defendants by a duly appointed next friend (his father). Plaintiff's father and all the Defendant-Respondents seem to be close relatives. Plaintiff's father I believe was 1st Defendant's brother and 1st Defendant was married to the 5th Defendant. As such Plaintiff's father and 5th Defendant were in-laws. 2nd Defendant was 1st Defendant's father and 3rd Defendant was the mother. Defendants also prayed to set aside deed No. 685 being fraudulently executed and moved for a claim in reconvention against the Plaintiff. The learned District Judge, Mt. Lavinia dismissed Plaintiff's action with costs and allowed the claim in reconvention of the Defendant-Respondents by judgment of 13.2.1998. This appeal is from the said judgment.

The 5th Defendant by his answer prayed to have deed No. 685 be declared null and void and illegal (prayer 'ඇ' and by prayer 'ඇ෮' and invited court inter alia declare that he is legally entitled to the property in dispute. Claim in reconvention of 5th Defendant was allowed by the learned District Judge. It was the position of the Plaintiff-Appellant that by deed No. 685, 5th Defendant transferred the property in dispute to one Ratnayake who had thereafter transferred the property to the Plaintiff-Appellant.

This court observes that the available material placed by Plaintiff suggests that the property in question was subject to three transfers within a very short period of time. All the above 3 transfers were between 01.11.1985 and 07.05.1987. (By deed No. 644, 5th Defendant-Respondent became owner on 01.11.1985 and the alleged transfer by deed 685 was on 14.1.1986 (within 2 months of 5th Defendant becoming owner) by transfer of property by deed No. 926, Plaintiff became owner on 07.08.1987).

It was the case of the Plaintiff simply, that as the 5th Defendant was in need of money to utilize the money for a new business, the property in question was sold to one Ratnayake who was known to Plaintiff's father and 5th defendant (P1) for a consideration of Rs. 2,75,000/-. The said Ratnayake entered into a notorial agreement (P2) requiring vacant possession of the property on or before 15.4.1986, P2 entered on 14.01.1986. The same day as P1. The property was not handed over as in agreement P2, and Plaintiff's father had thereafter purchased the property by P3 from Ratnayake by deed P3 for Rs. 300,000/- on 02.05.1987.

The position of the Defendant-Respondents is that 5th Defendant who was the owner of the premises was carrying on business with Plaintiff's father one Hameed. The 5th Defendant-Respondent at the request of the said Hameed agreed to keep the premises in dispute as a mortgage to

raise a loan for the purposes of the business. Therefore the 5th Defendant signed some blank forms in view of the trust and confidence he had in Hameed his brother-in-law, and the Notary Arumugam. The blank forms had been fraudulently converted to a deed of transfer of the property in dispute. It is the position of the 5th Defendant that he had no intention to sell the property in dispute which is his residential premises. He also complains that he had not received any consideration, and that in any event it is in breach of Section 2 of the Prevention of Frauds Ordinance. As such deed 685 is invalid and null and void.

At the trial paragraphs 2 – 4 of the amended plaint was admitted. Therefore it is admitted that the 5th Defendant was the owner of the premises in dispute by deed No. 644 of 01.11.1985 attested by Notary Arumugam. Parties proceeded to trial on 12 issues. Trial Judge has answered the issue raised by Plaintiff-Appellant (Nos. 1 – 3) in the negative. All other issues raised on behalf of the Defendant-Respondent had been answered in the affirmative in favour of the Defendant-Respondents. The learned trial Judge has very carefully considered the evidence led at the trial, and refer to inconsistencies and contradictions with regard to certain items of evidence, of very material witnesses.

In the submissions of learned Counsel for Appellant the contention of the Appellant was that 5th Defendant in cross examination admitted that he is known to Proctor Arumugam for a long period. Appellant rejected that 5th Defendant signed blank papers. In support learned counsel submitted, in the photocopy (P1) the 5th Defendant signature appears, which photocopy is of a type written original. The 5th Defendant signed both the photocopy and the type written original. He also submitted the protocol (P1a) kept by Proctor Arumugam is a photocopy of the type written original and 5th Defendant signature appear in both (original and photocopy).

It was further submitted that Proctor Arumugam is no stranger and was known to all parties, and the Proctor attested deeds P1, P3 and agreement P2. Proctor has given evidence of due execution of the deeds in questions and the law support the presumption of due execution of the deed in question. Counsel also cited the case of Hemathilake Vs. Allina 2003 (2) SLR and the validity of deed cannot be attacked or effected.

I would at this stage of the judgment refer to certain inconsistencies in the evidence led on behalf of the Plaintiff-Appellant.

(a) the evidence of Hameed reveal that the 5th Respondent after quitting the partnership business (1986) wanted to sell the property in dispute and with the sale proceed to start another business (Folio 47 of the brief). This statement is contradicted by document V1(statement of change of business). V1 indicates that

5th defendant's name was deleted on 15.1.1986. The purported sale by 5th Defendant to Ratnayake was on 14.1.1986 whilst 5th Defendant was still in the business (Folio 68 & 69).

(b) the trial Judge has noted that the signature in V1 of 5th Defendant differ from the purported signature appearing in P1 & P2. Document P1 signed when 5th Defendant was in the business with Hameed (Plaintiff's father) Folio 154.

(c) Trial Judge observes that the 5th Defendant-Respondent having purchased the property in dispute on or about 01.11.1985 for the purpose of residence of him and his family, and having gone into possession, within a period of less than 3 months from the date of purchase sold the property to one Ratnayake by deed P1(executed on 14.1.1986). According to the Appellant by agreement P2, it was the Appellant's position that the 5th Defendant agreed to vacate the premises on 15.4.1986. 5th Defendant had not vacated and action was filed in 1991. There was no demand made from the 5th Defendant for possession during the period 15.4.1986 to 1991, till action was filed. No question posed on 5th Defendant on above. Ratnayake admits that no demand was made on 5th Defendant. This court observe that the trial Judge has given his mind to something natural where in the normal course of human behavior and conduct it would have been prudent to demand for possession. Why was action filed only in 1991? It appears to be a built up tall story or version of the Appellant. (amended plaint filed on 1993). Having regard to the dates trial Judge's version on same is in order, and prudent.

(d) Hameed (Plaintiff's father) in evidence testified that he got involved in the execution of deed P1 by speaking to Ratnayake. Both he and 5th Defendant spoke to Ratnayake. Consideration paid to 5th Defendant when P1 was prepared, consideration paid at Hameed's office, by Ratnayake? Thereafter on the same date deed was executed. Hameed contradicts his own evidence later on by saying that he instructed the Notary to execute the deed and by that time 5th Defendant had already been paid. Notary Arumugam contradicts Hameed. It was Notary's

position that it was 5th Defendant who gave instructions to execute P1 and not Hameed. Arumugam further states that if Hameed had stated he gave instructions it is incorrect. It is to be noted that according to Arumugam the Notary, he had instructions to prepare the deed 2/3 weeks prior to execution and Hameed states he gave instructions 2/3 days before execution. These are all factual contradictions which would tend to diminish the version of Plaintiff-Appellant. Trail Judge has given his mind to same and recorded the evidence on this aspect at folios 161/162 of his judgment.

(e) The address given in deed P1 of the 5th Defendant is incorrect. If Hameed on behalf of Plaintiffs gave instructions to prepare the deed (P1), he should have known better. The addresses appearing in P1 of the 5th Defendant is the address of the 5th Defendant at the time he purchased the property in dispute.

(f) The trial Judge's reasons recorded regarding the protocol would also be noted, as regards Proctor Arumugam. Extract from the judgment reads thus:

5 වන විත්තිකරු නිතිඳ ආරුමුගම් මහතාව හොඳින් දැන ගෙන ඇත. අබ්දුල් හමිඩ්ද ආරුමුගම් මහතාව දැනගෙන ඇත. ආරුමුගම් විසින් පොටෝකෝල් පිටපත් බැඳීම සම්බන්ධයෙන් අධිකරණයේ දී තිබුන සාක්ෂිය එතරම් සතුටුදායක නොවුනි. අවුරුදු 5 ක් 6 ක් පොටෝකෝල් පිටපත් බැන්දේ නැති බව කියා ඇතත් පසුව කියා සිටියේ 1983 වර්ෂයේ සිට බැඳ නැති බවයි. මීට අමතරව 1987 දී පැ 3 දරණ ඔප්පුව ආරුමුගම් මහතා විසින් ලියා තිබුනේ බාල වයස් කැරවෙකුට වුවත් ඒ බවත් සඳහන් කර නොතිබුනි. එසේ සඳහන් කර නොතිබුනේ බාල වයස් කරු අබ්දුල් හමිඩ් ගේ ළමයෙක් බැවින් විය හැක. 5 වන විත්තිකරු අත්සන් කරන ස්ථානවල කතිර සලකුණු කර ඇත. එසේ වුවත් 5 වන විත්තිකරු තමාගේ ඉදිරිපිට අත්සන් කර ඇති බව කියා ඇත. 5 වන විත්තිකරු ආරුමුගම් මහතාව ඉතා හොඳින් හඳුනන බවට සාක්ෂි දී ඇත. ආරුමුගම් මහතා අතර තිබුන සම්බන්ධය සැගවීමට 5 වන විත්තිකරු උත්සහ කර නොතිබුනි. එසේ තිබියදීත් ආරුමුගම් මහතා 5 වන විත්තිකරුට වංචා කර ඇති බවට 5 වන විත්තිකරු විසින් පැමණිලිකර ඇත. 5 වන විත්තිකරුගේ සාක්ෂිය මම පිලි ගනිමි.

(g) Another suspicious point raised by the Respondent was as regards the different ink used on deed P1 & P2 by Proctor Arumugam at the place of signature. The version is whether both deeds were executed at one at the same time and date?

(h) Placing of a cross ('x') to place 5th Defendant's signature was it necessary if signed in the presence of Notary?

The trial Judge has preferred the evidence of the 5th Defendant, on a balance of probability, which is the standard of proof. This court and the original court for that reason has also considered the evidence of the 1st Defendant (wife of the 5th Defendant). Perusal of the proceeding of 2.7.1997 (folios 252/253/254) which include the uncontradicted evidence of the 5th Defendant's wife cannot be ignored or taken lightly. That item of evidence no doubt support the version of the 5th Defendant-Respondent. It establish continued possession of the property in dispute, at least up to the point of issue of summons in 1991. This court also observe that the trial Judge had the benefit of hearing and listening to evidence and watch the actions and reactions of the several witnesses who gave evidence at the trial court. The trial Judge at the first instance, when estimating the value of verbal testimony, has the advantage. The Appellate Court has of course jurisdiction to review the record of the evidence in order to determine whether the conclusions originally reached upon that evidence should stand; but that jurisdiction has to exercised with caution.

M.P. Munasinghe V. Vidanage 69 NLR 97 ....

Held, (i) that this was a case of rather complicated and difficult facts, and there was a good deal to be said on each side. The findings, however, of the District Judge were not unreasonable and, as he had had the advantage of seeing and hearing the witnesses giving their evidence, the Supreme Court should not have set aside his findings and consequently should not have reversed his decision.

(ii) that the statements of the notary in the attestation clause of a deed of sale are admissible evidence, and may well be important evidence, regarding consideration, but are not conclusive.

The jurisdiction of an appellate court to review the record of the evidence in order to determine whether the conclusion reached by the trial Judge upon that evidence should stand has to be exercised with caution.

Further I do not wish to interfere with primary facts of this case which the trial Judge had very carefully analysed and arrived at his conclusion. 1993 (1) SLR 119; 20 NLR 332.

I also note that no attesting witness to the deed in question (P1) were called to give evidence. There appears to be some serious lapses in the evidence led on behalf of the Plaintiff-Appellant as stated above and in the judgment of the trial Judge who on a balance of probability held with the 5th Defendant.

The trial Judge is entitled in law to do so. My attention was drawn to case law namely Hemathilake v. Allina. Even in that case on a balance of probability the case had been decided and the Appellate Court thought it fit not to interfere. The applicability of Section 114 of the Evidence Ordinance had been considered, in that case. In the same way I would refer to Section 114 of the Evidence Ordinance and advert to the point that the bulk of evidence placed by the 5th Defendant-Respondent along with the inconsistence and contradictions of the Appellant's case would support the finding that having regard to common sense, human conduct and common course of natural events the case of the Defendant-Respondent is more probable than that of the appellant. The case cited by the Appellant no doubt fortify the position of the Respondents as far as the case in hand is concerned since the dicta in that case should not be applied in isolation of clear facts and evidence placed by the Respondents. The case cited by Appellant in fact assist this court to arrive at a conclusion.

I have also considered the provisions contained in Section 2 of the Prevention of Frauds Ordinance. Apart from the requirement of signing the documents in the presence of the Notary and two or more witnesses at the same time the party concerned need to sign the deed and it should be in writing according to the said section. The presumption available in law

connecting the above Section 2 would not be available if signatures are obtained in blank forms or if the party concerned like in the case in hand had no intention to transfer the property. It is a rebuttable presumption of law. The facts that favour the 5th Defendant-Respondent are so strong that the presumption available in law has no doubt been rebutted in all the circumstances of this case.

I have also considered the case law reported in 17 NLR 486, 53 NLR 459, 1987(1) SLR 242 all of which support a presumption in law where there is due execution of deeds and the applicability of Section 91 & 92 of the Evidence Ordinance. Those cases are not relevant to the case in hand at all, since fraud and manipulation by the Plaintiff-Appellant is apparent. In all probability facts of this case would apply to proviso (1) of Section 92 of the Evidence Ordinance. The case law cited above need not be re-typed in this judgment since the judgment would unnecessarily make it prolix.

Therefore I affirm the judgment of the learned District Judge and dismiss this appeal with costs fixed at Rs. 50,000/=

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL