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

C.A 1303/1998 (F)
D.C. Galle 12813/L

1. Leif Helling
   3070, Sanday
   Norway.

2. Cristine Helling
   3070, Sanday
   Norway.

   Appearing by their Power of
   Attorney holder Pothupitiya
   Kankanamge Udaya Gunabandu .

   "If"
   Thalpe, Galle.

PLAINTIFFS

Vs.

1. Yasawathie Abeywickrama
   Weerasinghe

2. Kumarapperuma Arachchige Carolis
   Gunapala.

   Both of Liyanagewatta,
   Thalpe, Galle.

DEFENDANTS

AND NOW BETWEEN

1. Yasawathie Abeywickrama
   Weerasinghe
   Liyanagewatta,
   Thalpe, Galle.

2. Kumarapperuma Arachchige Carolis Gunapala.
(Deceased)

2A. Kumarapperuma Arachchige Kumara Liyanagewatta,
Thalpe, Galle.

Vs.

DEFENDANTS-APPELLANTS-RESPONDENTS

1. Leif Helling
3070, Sanday
Norway.

2. Cristine Helling
3070, Sanday
Norway.

Appearing by their Power of Attorney holder Pothupitiya Kankanamge Udaya Gunabandu .

"If"
Thalpe, Galle.

PLAINTIFFS-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: W. Dayaratne P.C., with Ranjika Jayawardena for the Defendant-Appellants

Faiz Mustapha P.C., with Fathima Nadia for Plaintiff-Respondents

ARGUED ON: 10.07.2012 & 13.07.2012

DECIDED ON: 22.10.2012

GOONERATNE J.

Plaintiff-Respondents instituted action in the District Court of Galle for ejectment of the Defendants and their Agents/servants from the premises described in the schedule to the plaint, and for damages as prayed for in the plaint (sub paragraph 'b' of the prayer to the plaint). The Plaintiff's case is that the 1st Defendant transferred the property in dispute to the Plaintiffs by deed No. 3128 (P1) of 10.3.1997, attested by Notary, Charlotte Seneviratne for a consideration of Rs. 75,000/- . Plaintiff maintains that deed P1 is an outright transfer. Plaintiffs also aver that the Defendants by an informal writing marked P3 dated 10.3.1987, the Defendants agreed to hand over vacant possession by 30th May 1987, the property subject to deed marked P1, (P1 and P3 bears the same date). The Defendants failed and neglected to hand over vacant possession and continued to possess the property in dispute. Despite the undertaking to hand over vacant possession the Defendant-Appellant continued to occupy the premises as from 1st of June 1987.

The position of the Defendant-Appellant both in their oral and written submissions are as follows:

The Defendants filed their answer and vehemently denied the said allegation of the Plaintiffs and stated that the 1st Defendant did not transfer possession of the property, because the Plaintiffs had agreed to buy the said land for a sum of Rs. 850,000/- and paid only Rs. 550,000/- to the 2nd Defendant.

Accordingly the Plaintiffs have failed to settle the balance sum of Rs. 300,000/- to the Defendants, and therefore there is no valid Deed of Transfer.

Therefore the Defendants contention is, there is no cause of action which has accrued to the Plaintiff and even if there was a cause of action it has prescribed.

The learned President's Counsel on either side impressed this court in their submissions, to certain items of evidence led at the trial, which favour each others case. Parties proceeded to trial on 16 issues and 4 admissions. This court finds that by the very obvious admissions recorded, good part of the trial judge's findings would be fortified. The subject matter described in the plaint and the execution of the deed (parties signed) No. 3128 (P1) on 10.3.1997 and that the Defendant was in possession at the time of execution of deed are admitted. It is also admitted that 1st Defendant was the owner of the property in dispute at the time of execution of deed. Issue No. 6 was tried as a preliminary issue which was on prescription and the trial judge answered that issue in the negative by his order of 31.5.1996. Therefore parties proceeded to trial on the balance issues and led the evidence of witnesses each other. This court observes that there was no

interim appeal from the order of 31.5.1996, but the learned President's Counsel for the Appellant at the hearing of this appeal thought it fit to press on prescription not under the provisions of Section 4 of the Prescription Ordinance but on other sections of the Prescription Ordinance. The learned trial judge has in his judgment of 8.5.1998 answered issue No. 6 in the negative based on the previous order of 31.5.1996. As such the basis of the argument before this court by learned President's Counsel for Appellant on prescription may not have been agitated subsequent to the order of 31.5.1996, in the original court?

This court need to consider as argued in this appeal, the legal position on the question of declaration of title to property in the absence of a prayer to that effect and a declaration to evict the Defendants from the premises in dispute. If not have the Defendant-Appellants justified their continued occupation on a legal basis? Further on execution of a unconditional transfer deed (P1), were the rights, title and interest to the property in dispute accrue to the Plaintiff, or whether the balance sum due as argued by President's Counsel not being paid, would vitiate the entire sale on the basis that P1, is only a security document. I also wish to add that the Appellants having not moved the Appellate Court to contest the order of

31.5.1996, where parties submitted material to the original court only according to Section 4 of the Prescription Ordinance and not based on any other section of the Prescription Ordinance, has not been able to make submissions before the original court on the other available provisions of the said Ordinance. Is it a lost opportunity being urged at the appeal stage?

The learned District Judge at folio 196 of the original record has arrived at a conclusion having examined deed P1 and informal document P3, that by P3 Defendants without reservation accept that Respondents are entitled to the property in dispute by deed P1 and vacant possession would be given to Plaintiffs by 31.5.1987. As such by conduct the Defendant-Appellants accept transfer by deed P1. Further by letter P4 the position of the Plaintiffs title by deed P1, has been fortified. A close examination of document P4 reveal the following:

(a) Defendants agreed to sell the property in dispute for a consideration of Rs. 855,000/- and accordingly executed deed P1.
(b) Rs. 550,000/- was available with Plaintiff and Defendants was paid the said sum.
(c) Balance sum of Rs. 305,000/- to be paid by Plaintiff and Plaintiff agreed to pay by April 1987.
(d) Balance payment confirmed to be paid by Plaintiff, through Manager of Bank of Ceylon, Galle Brnach.
(e) Until payment of balance sum, property held in trust.

I hold that the trial judge's conclusion based on documents P1, P3 & P4 is more than sufficient to conclude that Plaintiff has title to the property in dispute and that the Defendant-Appellants are in unlawful occupation of the property in dispute as from June 1987 (folios 197/198). I do not wish to disturb such findings which are based on oral and documentary evidence. On the other hand the trial judge has having weighed the evidence boldly observed that the Defendant party has made untruthful statements. This is a basic primary fact and in this instance the Appellate Court should not interfere. 1993(1) SLR 119; 20 NLR 332. That portion of the judgment reads thus:

අතින් අතට විත්තිකරුවන්ගේ සාක්ෂිය අනුව පෙනී යන්නේ ඔහු අධිකරණය ඉදිරියේ අසත්‍ය කරුණු ප්‍රකාශ කළ බවය. මන්ද, ඔහු කියා සිටියේ මෙම දේපල ඔහු විකිණීමට අදහස් කළේ රුපියල් ලක්ෂ පහලොවකට බවය. එය ඔහු පුන පුනා තමා සාක්ෂියේ දී කියා සිටියත්, එය ඔහුගේ උත්තර වාද සහ ඉදිරිපත් වී ඇති සියලුම ලියවිලි වලට පටහැණි බව පෙනී යයි.

I had the benefit of perusing the written submissions of either party, where both parties have placed material to demolish each others case. However the case cited on behalf of the Plaintiff-Respondents regarding the absence of a prayer for a declaration of title would not be a bar for the party concerned in praying for eviction of the opposing party, is very relevant and some what similar with the case in hand. The observation made by this court

as regards title of plaintiff-Respondents is being further supported and fortified by the following case of Dharmasiri Vs. Wickrematunga 2002(2) SLR 218.

> (2) Even though the plaintiff has not asked for a declaration of title it does not prevent him from seeking the relief for ejectment.
>
> (3) Absence in the prayer for a declaration of title causes no prejudice, if in the body of the plaint, the title is pleaded and issues were framed and accepted by Court on the title so pleaded. It cannot be overlooked that title pleaded in the body of the plaint formed the basis for the issues raised at the trial and the question of title was examined by the trial Judge before arriving at a finding that the plaintiff-respondent has obtained title.

At pg. 220..

In Jayasinghe v. Tikiri Banda it was held that although plaintiff has not asked for a declaration of title it does not prevent him from seeking the relief for ejectment. Thus, it would be manifest that absence in the prayer, for a declaration of title causes no prejudice, if in the body of the plaint, the title is pleaded and issues were framed and accepted by Court on the title so pleaded.

I have no hesitation in agreeing with the submissions of learned President's Counsel for the Plaintiff-Respondent that the ratio in the above decided case falls within the case in hand. Title to the land in dispute in the present case is pleaded and put in issue. So is the plea of unlawful/forceful occupation of Defendant-Appellant.

It is settled law that once paper title is established and undisputed burden shifts to the Defendants to show that they had independent rights i.e prescription etc. Pathirana Vs. Jayasundera 58 NLR 169 at 177 "In a rei vindicatio proper the owner of immovable property is entitled on proof of his title to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. The Plaintiff's ownership of the thing is of the very essence of the action. Maasdorp Institutions 7th Ed. Vol. 2 96" In the case in hand the Defendant-Appellants are illegally in possession of the premises in dispute.

At this point of the judgment I need to emphasis about the sum of Rs. 75,000/- mentioned in the deed P1. The said sum paid in the presence of Notary Charlotte Seneviratne seems to be the actual consideration stated in the deed. The evidence of Seneviratne Notary Public confirmed above.

Cooray Vs. Samy and Others 2004 BLR 28..

Their, Lordships' of the Supreme Court interpreting Section 2 of the Prevention of Frauds Ordinance, even assuming but not conceding, as contended by the Defendants that the full consideration in the said Deed 3128 was not paid to them, it does not amount to a cancellation of the sale in the absence of fraud or misappropriation. – remedy is to institute a separate action for recovery of consideration due.

Jayawardene Vs. Amerasekera 15 NLR 280 ..

Lascelles C.J inter alia held that, on the execution of a notarial conveyance the sale is complete, and the mere fact that the whole of the consideration has not been paid cannot, in the absence of fraud or misrepresentation, afford ground for the rescission of the sale and the cancellation of the conveyance.

Mohamadu Vs. Hussim 16 NLR 368..

Pereira J. held that, where a person obtains a conveyance of property without fraud, but afterwards fraudulently refuses to pay the consideration stipulated for, the grantor is not entitled to claim a cancellation of the conveyance, but his remedy is an action for the recovery of the consideration.

I wish to add at this point, in verbatim the following submissions of Plaintiff-Respondent, on damages which I cannot agree with the trial judge's assessment on damages.

"However the learned District Judge had been charitable tot eh Appellant. He had deducted from the damages a sum of Rs. 119,000/- and directed the Plaintiff to deposit a sum of Rs. 91,000/- before obtaining a writ of possession; Vide pg 199. This is on the footing that the balance consideration is Rs. 300,000/- and as such the Appellant has got the entire relief he demanded by. In the circumstances, the Appellant has no cause to complain".

The learned President's Counsel for Appellant has taken another turn forgetting the stance taken in the original court. Re-prescription

under Section 4 of the Ordinance and introduced in the appeal for the first time, Section 6 of the Prescription Ordinance. Appellant in trying to prove that rely on document P3. Defendants even go to the extent by referring to P3 as a written agreement. P3 is only an undertaking given by the Appellants to handover vacant possession and to demolish the building. It is certainly not an agreement where opposing parties agree and sign the document. Plaintiff-Respondent was not a party to P3 but entitled to act upon the representation made in P3. The action of the Plaintiff-Respondent, though a prayer for a declaration of title was not included should be classified as an action for declaration of title as the body of the plaint very correctly plead Plaintiff's title based on deed P1. As such Plaintiff is entitled in law to seek relief for ejectment. One cannot isolate the important documents i.e the deed P1, letter P4, Bank Draft P5, letter P6 etc. and only emphasis on P3 and call it a written agreement merely to get over a lost opportunity not agitated in the original court. The provisions of Section 6 was never put in issue in a specific sense in the original court to enable both sides to present their views and evidence. Even if Defendant proceeded on Section 6, argument against it is a settled position in law.

In the above circumstances I am not inclined to blindly refer to and apply the dicta in a haphazard manner to the case of Samuel Vs. Chettiar

reported in 70 NLR 379. The facts and circumstances of that case is entirely different to the case in hand. In that case Plaintiff sought to recover the purchase price and different persons were in occupation of the lands purchased and not the vendor. In the instant case it was the vendor who was in possession and Plaintiff has not sought to recover the purchase price, but moved court to evict the vendor and claim damages based on an action in the nature of, for declaration of title.

When I consider the entirety of the submissions as contained in the written submissions of the Appellant I am unable to agree with those views which cannot apply in the circumstances of this case. One cannot by reading the evidence which had been carefully considered by the trial judge, conclude that there is a waiver of P3 by document P6. If that be the thinking no party could successfully enter into any transaction. Evidence in it's entirety and in the context of the case has to be considered and as observed by the trial Judge (based on evidence) it is apparent that Plaintiff was always willing to pay the balance sum and he had not evaded payment. Plaintiff no doubt made arrangements with the Bank and Notary to transfer monies to an account to effect balance payment (P5). As such I am unable to view the case law cited by the Appellant to bring it closer to his case.

On the question of the award of damages this court is unable to fall in line with the trial judge's views on same. I do not wish to associate with the ruling by the trial judge, that Rs. 2500/- per mensum is reasonable. Damages need to be proved by evidence and cannot be awarded on account of reasonableness. Plaintiff has not in his evidence quantified damages or itemized it. There is some what a general statement in Plaintiff's evidence about damages to the affect that:

(a) did not have possession
(b) could not build
(c) money spent on air fare
(d) could not enjoy the produce. eg. coconuts.

Plaintiff has not been able to quantify above (a) to (d). Plaintiff seems to limit the damages on a reasonable basis of Rs. 2500/- per month. Having mentioned (a) – (d) in evidence an arithmetical figure would be of much value and also to arrive even at a reasonable sum. In the absence of material figures to court to prove (a) to (d) above this court cannot agree to an award of damages since no oral or documentary form of evidence had been placed before court on this aspect. Precise proof of pecuniary loss or details would be essential. I am not inclined to award damages in the manner as stated by the trial judge, in the absence of proof to establish same. However I hold

with the trial judge's ruling that the Plaintiff need to pay a sum of rupees three hundred thousand which is the balance sum due on the transaction, and Defendants would be entitled to the said sum on handing over vacant possession. This court agrees with the learned District Judge's ruling on payment of the balance sum but not on the award of damages.

In all the above circumstances I am of the view that the action should be properly classified as an action for declaration of title and Plaintiff entitled to judgment subject to the above variation on damages (cannot be awarded) and payment of the balance sum by Plaintiff to Defendant-Appellant should be paid as observed above. The judgment of the learned District Judge is affirmed subject to above variation.

Appeal dismissed with costs.

Dismissed.

JUDGE OF THE COURT OF APPEAL