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

C.A 214/1994 (F)
D.C. Kurunegala 2836/L

T.M. Tillekeratne Banda Tennakoon of
Meegolla, Hindagolla.

1ST DEFENDANT-APPELLANT

Vs.

T.M. Madduma Banda Tennakoon of
"Shanthi" Nakkawatta.
(Deceased)

PLAINTIFF

1. A. T. M. Vajira Kumari Tennakoon
and 3 others

SUBSTITUTED-PLAINTIFF-RESPONDENTS

2. W. M. Podimenike
3. R. M. Dharmasena Ratnayake

Both of No. 724, Sundarapola Road,
Yanthampalawa, Kurunegala.

2ND & 3RD DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: H. Withanachchi for the 1st Defendant-Appellant

N.R.M. Daluwatte P.C., with D. Daluwatte
For the Substituted-Plaintiff-Respondent

Rohan Sahabandu with S.Kumarawadu
for 2nd & 3rd Defendants-Respondents

ARGUED ON: 15.06.2012, 21.06.2012, 26.06.2012

DECIDED ON: 23.10.2012

GOONERATNE J.

Plaintiff-Respondent filed action in the District Court of Kurunegala based on 6 causes of action to invalidate deed No. 2643 of 17.5.1986 marked P4, purported to be executed by the Plaintiff who is now deceased, pertaining to the land described in the schedule to the plaint. The deceased Plaintiff, since his demise has been substituted by his heirs the substituted Plaintiff-Respondents namely, Vajira Kumari Tennakoon and three others. It is common ground that the original Plaintiff became entitled to the land in dispute by a grant (P1) dated 30.12.1982 (also marked as 2V1) issued in terms of the Land Development Ordinance by a former President

of this country H.E. J.R. Jayawardena. I would very briefly refer to the facts of this case as follows:

The deceased Plaintiff on or about 20.1.1983 entered into an agreement to sell marked P2, deed 1344, with the 2nd Defendant-Respondent the said land in dispute, for a sum of Rs. 60,000/=. P2 attested by M.B. Wijekoon N.P. An advance payment of Rs. 2000 was also made for the purpose. However the deceased Plaintiff could not sell the land to 2nd Defendant according to the said agreement P2 as the 1st Defendant-Appellant instituted action bearing No. 2014/L against the Plaintiff preventing, Plaintiff from alienating the land and obtained an enjoining order against the Plaintiff (vide 1V12). The Plaintiff thereafter entered into another agreement to sell the said land in dispute to the 2nd Defendant by deed 1630 (P3) of 5.12.1983 attested by Notary Wijekoon, before the lapse of 6 months from the termination of case No. 2012/L. The crux of this case is that as alleged by the Plaintiff, is that the 1st Defendant by undue influence got the signature of the deceased Plaintiff on deed 2643 (P4) of 17.5.1986 attested by K.L.G.L.W. Perera N.P. by which an undivided 100 perches of undivided land was purported to be transferred to the 1st Defendant-Appellant. Action was more particularly filed by Plaintiff-Respondent to get deed P4

invalidated. Plaintiff had by deed 36 of 29.5.1986 attested by B.L. Udveriya N.P. (2V2) transferred the land in dispute to the 2nd and 3rd Defendants.

The learned District Judge has very correctly identified the two main arrears for decision of court, that:

(a) whether deed 2643 (P4) is an invalid deed?
(b) If the above deed is not declared invalid, on prior registration the deed No. 36 executed in favour of the 2nd & 3rd Defendant the Plaintiff-Respondent get, priority above deed 2643 (P4)?

The learned counsel for 1st Defendant-Appellant in his oral and written submissions to this court urged several points by reference to certain items of evidence. I would deal with the following important points which are only relevant to the case.

(A) The allegation of intoxication and non volunteriness on the part of Plaintiff and in the light of allegation of fraud, the burden is on the Plaintiff. Learned counsel refer to the case of Chettiar Vs. Muttiah Chettiar 50 NLR 337 at 344.. fraud like any other charge of a criminal offence made in civil or criminal proceedings must be established beyond reasonable doubt. A finding on fraud cannot be based on suspicion and conjecture.

The item of evidence on this aspect transpired by the daughter of the deceased Plaintiff, when she gave evidence who happened to be one of the

substituted Plaintiff-Respondent. It is relevant and important to consider the evidence on this aspect prior to considering the legal basis. The daughter in her evidence, at pgs. 107/108 of the brief Vajira Kumari Tennakoon, states 1 year prior to her father's demise her father told her that the 1st Defendant met him at the Kurunegla town and had given her father 'arrack' and got the father to sign a document stating that it is necessary to get the signature for a earlier case, and took him to a Proctor. Along with the above item of evidence the father had told her.

(i) 1st Defendant had made it known in the village that the 1st Defendant owns the land in question.

(ii) As such father had made inquiries about it.
Having checked at the Land Registry father found that 1st Defendant had obtained 100 perches of land පර්.100 ඔහු ලියාගෙන ඇති බව.

(iii) Father also told her that he would file action to invalidate the deed and transfer the land to the 2nd Defendant.

In cross-examination of this witness it appears to this court that the above items of evidence was confirmed by the above witness (pg 119). There was no challenge or contest to the above items of evidence on consumption of liquor in cross-examination, but fortified the position that 1st Defendant gave liquor to the father (Plaintiff) and obtained his signature,

before a Proctor, except that witness was not able to tell the correct date of obtaining the signature.

At pg. 104 of the brief the trial judge has very correctly posed the question connections the above item of evidence to ascertain the fact that father was fond of consuming liquor and he died as a result of excessive consumption of liquor ..

ප්‍ර : මිය යාමට හේතුව මොකක්ද?

උ : තාත්තා හරියට බීවා, බීමත්කම තමා හේතුව කියා කිව්වේ.

Even the 1st Defendant had admitted Plaintiff's addiction to liquor and that both met near the Grand Hotel, Kurunegala, next to a liquor bar.

I have to emphasis at this point of this judgment that the above item of evidence no doubt suggest and establish undue influence on the part of the 1st Defendant to compel the plaintiff to execute deed P4. Above evidence is not conjecture or suspicion. The fraud required to invalidate a deed could be clearly seen. I totally reject the learned counsel for Appellants submissions on this aspect of the case that such evidence is not corroborated/unreliable. The trial judge's views need not be disturbed, at all since the trial judge correctly posed questions from the witness, the daughter of the deceased, to ascertain the position of the Plaintiff or his way of life

which no doubt contribute to form the view where fraud is in the forefront of the entire case. and trial judge is entitled to draw an inference.

In M.H. Peiris & another Vs. W.D.S. Weerakkody 2009 BLR 183...

Held:

(a) Once issues are framed and accepted by court the case goes to trial on those issues and the case is tried and determined on the admissions and issues raised at the trial. The pleadings crystallized in the issues and the pleadings recede to the background.

(b) Generally corroboration is not the sine qua non in matters where fraud is alleged

(c) One could have recourse to defence of non est factum only if the application of that defence is necessitated by facts.

(d) In Roman Law fraud is defined as omnis calliditas, fallacia, machination, adcircumveniendum, alterem, adhibita meaning any craft, deceit or machination used to circumvent, deceive or ensnare another person.

(e) A fraudulent deed, unlike a deed executed by a person not competent in law to enter into a contract is, under the Roman Dutch Law, valid until it is set aside or cancelled, and when it is cancelled, the cancellation refers back to the date of the deed.

(f) In Sri Lanka the earlier view was that the burden of proving fraud in regard to a civil transaction must be satisfied beyond reasonable doubt But the law as it stands to day is that the standard or proof remains on a balance of probabilities although the more serious the imputation, the stricter is the proof which is required.

Cases cirted

Godamune Pannakiththio Thero – v- Thellulle Bnarada Thero CA No. 65/90 D.C 1418/L

Dharmasiri v. Wickremasinghe 2002 (2) SLR 218

Fernando v. Lakshman Perera 2000 SLR Vol. 2 at page 413

Haramanis v. Haramanis 10 NLR 32

Madar Saibo v. Sirajudeen 17 NLR 97

Yoosoof v. Rajaratnam, (1970) 74 NLR at page 9

Associated Battery Manufacturers Ltd. v. United Engineering Workers Union (1975) 77 NLR 541 at 545

Foster v. Mackinnon (1869) L.R 4 CP 704

Lewis v Clay (1898) 67 L.J. Q

As submitted by learned counsel for Plaintiff-Respondent sufficient evidence was led on behalf of the Plaintiff to prove a fact in probandum, 1st Defendant has miserably failed to cross-examine on the question of intoxication. In Edrick de Silva vs. Chandradasa de Silva 70 NLR 169..

H.N.G. Fernando C.J.

"where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff, There is then an additional 'matter before court' which the definition in Section 3 of the Evidence Ordinance requires the court to take into account viz. that the evidence led by the plaintiff is uncontradicted.

(B) On the payment of consideration. Appellant urge that there was sufficient consideration for the execution of the deed in question. Learned counsel refer to the evidence on this aspect and argue that

(1) lease rental due on permit was paid by 1st Defendant from 1965 and receipts produced in the case 1D2 to 1D6 produced by 1st Defendant.

(2) When the Government Agent informed that by 1D7 a sum of Rs. 7173/70 should be paid as purchase price for transfer of land to Plaintiff, 1st Defendant paid that sum of money 1D8 – 1D9 receipts produced by 1st Defendant.

(3) Letter marked 1D15 Plaintiff to 1st Defendant. It shows Plaintiff was in need of money and would sell the land to 1st Defendant and not an outsider.

(4) Affidavit P3 tendered to G.A that Plaintiff has consented to sell the land to 1st Defendant P3. produced in case No. 2014/L.

In order to consider the position in 1 -4 above I would advert to some items of evidence adverted to on behalf of Plaintiff-Respondent and 2/3rd Defendant-Respondent, though it is apparent that documents 1D2 – 1D6, 1D8 & 1D9 are all issued in the name of Plaintiff-Respondent. What is important is that the contents of the documents. However one cannot isolate the following evidence which create doubts of consideration passing on execution of deed?

The 1st Defendant-Appellant states he paid Rs. 25,000/= on the day of executing deed and another Rs. 5000/= later (pg. 157 of transfer). Then he also states he paid money before execution of deed. At pgs. 167 – 170 1st Defendant's position was that he paid Rs. 25,000/= after the deed was written and informed Notary that he was giving money for the transfer and paid on 17.5.1986. Defendant-Appellant admits that the attestation clause is not consistent with his oral evidence (pg. 175). Further no payment receipts produced. This is an important item of evidence which create some doubt. The Appellant does not accept the contents of the attestation clause in deed P4 and does not know about the attestation clause which state to set off

against the debts owing to him and did not give instructions to Notary in that respect (Pg 200). I agree with learned President's Counsel for Plaintiff-Respondent's submissions that 1st Defendant gets no benefit from the transaction.

This court also observes that having perused the evidence, the evidence of witness Wilson Tennakoon does not tally with the evidence of 1st Defendant, on payment of money (Evidence at pgs. 230 – 236). The trial judge very correctly and carefully analysed the evidence of 1st Defendant and the attesting witnesses to the deed in question and based on evidence conclude that the evidence was contradictory and also ridiculous. He observes .. ඔවුන්ගේ සාක්ෂි එකිනෙකට පරස්පර වුවා පමණක් නොව හාස්‍ය උපදවීමට ද සමත් වී තිබුණ බව පෙනුනි. Trial judge's findings on this aspect is well supported by verification of evidence. The learned District Judge has dealt with all primary facts and this court is reluctant to interfere with same.

The trial judge saw and heard the evidence of the 1st Defendant, and his attesting witnesses to the deed and arrived at a conclusion and emphasized the fact that evidence transpired from them is highly unreliable and contradictory to each other. In this regard my views are fortified by the following authorities. Trial Judge having observed the credibility and

demeanor of the Defendant-Appellant's witnesses has ruled on primary facts.

Alwis Vs. Piyasena Fernando 1993(1) SLR 119 held The court of Appeal should not have disturbed the findings of primary facts made by the District Judge, based on credibility of witnesses.

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

"It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal"

Fradd Vs. Brown & co. Ltd. 20 NLR 282 at 283...

"Where it is stated that it is rare that a decision of a Judge so express and to explicit upon a fact purely, is overruled by a Court of Appeal, because Courts of Appeal recognize the principle, advantage which a judge of first instance has in matters of that kind as contrasted with any judge of a Court of Appeal who can only learn from paper or from narrative of those who were present. Once again in Powell vs. Streathen Manor Nursing Home 19351 Ac 243 – 'Appellate3 Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanor. In Watt vs. Thomas 1947 1 All ER 581 it was held that 'if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony (like in this case) by a Court which saw and heard the witnesses, the Appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to greater weight.."

(C) Can the action proceed in the absence of Plaintiff who is dead? The learned counsel for the 1st Defendant-Appellant argues this right of the Plaintiff to defend and title, is a personal right having the effect of a right. He relies on Jayasuriya Vs. Samaranayake 1982 (2) SLR 460. Deed of gift on grounds of gross ingratitude was an action in person and did not survive the Plaintiff.

This point is raised for the first time in appeal. This should have been tried at the appeal stage. It is a judicial waste of time. In a personal action if a party died at the litis contestasio stage action cannot proceed. Krishnasamy Vangodasalam vs. Karuppan 1979 (2) NLR 150.

The 1st Defendant-Appellant never objected in the trial court for substitution of the legal heirs of the deceased Plaintiff-Respondent. No issue raised on continuation of action? 1st Defendant participated in the trial and now he has thought it fit to raise this plea. It is arguable that continuation of the action by the heirs is valid in law 19 NLR 461.

I wish to observe that both deeds P4 & P5 refer to vendors and his heirs and administrators do hereby covenant with the purchaser their heirs executor/administrator. As such on the death of the vendor the benefit will accrue to the heir or executors/administrator. In deed 36 (P5) permits Plaintiff to warrant and defend vendees title. The recital in deed 36 states "I

the said vendor and his afore writer (may heirs and administrators, assign) will at all times hereafter warrant and defend the title to the land against every person or persons... Therefore this court is of the view that action could proceed mainly for the reason that both deeds in controversy does permit and include the heirs like any other transfer deed. On death of a party the property vests immediately on the heirs.

(D) Sanction of Government Agent necessary in case of grants or permits issued under the Land Development Ordinance? The Appellant states sanction of Government Agent essential to transfer of the holding and must be referred to by Notary in the Attestation Clause. Appellant argues that this provision applies to both deed P4 and P5.

Deed P4 (2643) vendor recites his title in the last two lines in the schedules as "deeds of L S K U 126 and registered in A 347/153" This refer to permit No. 208 of 23.10.1994 produced by 1st Defendant. No reference to grant of 30th December 1982. The law under the Land Development Ordinance makes no reservation and state in Section 46 that land held by a permit cannot be alienated without permission of Government Agent. Further Section 162(2) prohibits a Notary from attesting a deed. If the Notary fails to comply with Section 162(2) he could be dealt with as in Section 162(3) before a Magistrate and tried accordingly.

Section 162(1) and (2) reads thus:

(1) A notary shall not attest any instrument operating as a disposition of a holding which contravenes the provisions of this Ordinance.

(2) An instrument executed or attested in contravention of the provisions of this section shall be null and void.

As such apart from deed P4 being executed due to undue influence And consequently same has to be invalidated on that ground, it is also apparent that same has been executed in breach of the above provisions of the Land Development Ordinance. As long as grants and permits are issued in terms of the said Ordinance, strict compliance with the provisions of the statute is essential.

If one examines the grant P1 (2V1) it is apparent that H.E the then President has issued the grant in terms of the Land Development Ordinance and certified under Section 23(2) of the State Lands Ordinance. Where State land is granted or sold or leased for a period exceeding the prescribed period it has to be signed by the President of the Republic, and Section 23 (1) & (2) refer to Authentications of instruments required to be signed by the President.

Section 19 (1) of the Land Development Ordinance refer to the manner of alienation of State land and sub-section 6 of Section 19 of the said Ordinance enacts that owner of the holding shall not dispose of such holding

except with the prior approval of the Government Agent. Holding means land alienated by Grant (Section 2). It is apparent that both deeds P4 & P5 (No. 36) have been executed without prior permission of the Government Agent. Therefore the transfers effected in P4 & P5 are null and void.

It is too late to deal with the respective Notaries who attested the two deeds. Apart from undue influence, deeds executed in breach of statutory provisions cannot be ignored. The trial judge should have considered the above, prior to ruling on the case before the Original Court. However the land in question would remain and be the property of the deceased Plaintiff-Respondent on the land grant issued marked P1/2V1. In view of his demise the heirs would be entitled as stated in P1/2V1. Therefore the land in dispute is the property of the Substituted Plaintiff-Respondent (vide Section 72 and 3rd schedule to the Ordinance). As such I have to dismiss this appeal. The Substituted Plaintiff-Respondent could in view of agreements to sell marked P2 & P3 proceed with the sale and transfer the property in dispute to the 2nd & 3rd Defendant-Respondents. This court also declare that the 1st Defendant-Appellant has no right/title to the property in dispute. The question whether the rights and liabilities of deceased Plaintiff-Respondent devolve on the heirs as regards deeds P2 & P3 was not specifically put in issue, in the trial court.

Judgment of the learned District Judge affirmed only as regards sub-paragraphs 'a', 'b' and 'c' (අ, ආ & ඇ) of the prayer to the plaint. Subject to the above variation appeal dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL