

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

In the matter of an application for
leave to appeal

Court of Appeal No: CALA 424/2004

District Court of Kandy No: 49/2004/SPL

D.N. Abeywardene

Plaintiff-Petitioner

vs.

Bank of Ceylon and two others

Defendant-Respondents

Before: Eric Basnayake J

K. T. Chitrasiri J

Counsel: Rohan Sahabandu for the Plaintiff-Petitioner

M.K. Muthukumar with Jinadasa Gamage for the 1st Defendant-Respondent

Argued On: 28.7.2010

Written submissions tendered on: For the Plaintiff-Petitioner: 19.3.2008

For the 1st Defendant-Respondent: 5.6.2007

Decided On: 20.6.2012

Eric Basnayake J

1. The plaintiff-petitioner (plaintiff) filed this leave to appeal application to have the order dated 29.10.2004 of the learned District Judge of Kandy set aside. By this order the learned Judge had refused to issue an interim injunction to restrain the 1st defendant-respondent (1st defendant) from selling the property described in the schedule to the plaint.
2. The plaintiff filed this action in the District Court of Kandy inter alia for a declaration that the property in this case is held by the 3rd defendant-respondent subject to a trust in favour of the plaintiff.
3. This property was originally leased to One Daniel Abeywardena for a period of 30 years under the Crown Lands Ordinance (Cap 454). The original lease is produced marked P1. **Daniel Abeywardene was the husband of the plaintiff. The plaintiff states that her husband**

had mortgaged this property to the State Mortgage Bank and constructed a house where the plaintiff is residing. The plaintiff states that her husband obtained the consent of the Mahaweli Authority prior to the mortgage.

4. The plaintiff's husband died intestate on 7.9.1991 leaving the plaintiff (widow) and two children. The plaintiff claims that on the death of her husband the property devolved on the plaintiff and her two children, one of whom is the 3rd defendant. The plaintiff and her other son who is not a party to this case had expressed their willingness to the Resident Manager of the Sri Lanka Mahaweli Authority to transfer the lease of this property in favour of the youngest son, the 3rd defendant, subject to her life interest.
5. The plaintiff states that the approval to transfer the lease to the 3rd defendant subject to the life interest of the plaintiff was obtained from the Minister of Land, Irrigation and Mahaweli Development and this approval was intimated to the Manager (lands), Mahaweli on 26.8.1993. The plaintiff states that the authorisation has been registered in the Land Registry.
6. In August 2002 the plaintiff became aware that the 3rd defendant had obtained several overdrafts from the 1st defendant Bank by mortgaging this property. The plaintiff states that on further perusal the plaintiff discovered that by Grant (p10) dated 7.3.1996 this land had been transferred to the 3rd defendant without leaving a life interest. The plaintiff states that she had informed the 1st defendant Bank with regard to her life interest. However the Bank had passed a Resolution to recover the dues on the mortgages executed between the 1st defendant and the 3rd defendant without any mention of the life interest in favour of the plaintiff. The plaintiff states that the said Grant is contrary to document P6 by which the State consented to transfer this property to the 3rd defendant subject to the life interest of the plaintiff.
7. The plaintiff claims that the 3rd defendant could not have mortgaged this property without her consent. She states that this property was advertised for sale in a Sinhala newspaper on 22.3.2004 to recover the several loans obtained by the 3rd defendant. The plaintiff claims that the Grant in favour of the 3rd defendant should be subject to the life interest of the plaintiff.
8. The document P6 is dated 31.3.1994. That was concerning a lease. The Grant dated 7.3.1996 was made to the 3rd defendant making the 3rd defendant the absolute owner. The 3rd defendant had mortgaged this property to the 1st defendant Bank on the documents marked P11, P12, P13 and P14 and had obtained Rs. 6,752,829. The mortgages have been duly registered in the Land Registry.

9. The plaintiff sought a declaration from court that the 3rd defendant's rights are subject to the life interest of the plaintiff. The plaintiff thus claims that the mortgages nos. 296/16.9.1996, 3008/7.1.1997, 3098/1.11.1997 and 3156/13.8.1998 should be subject to a trust in favour of the plaintiff.
10. The plaintiff also prayed for an interim injunction restraining the 1st and the 2nd defendants (Bank) from selling the property without making it subject to her life interest.

Judgment

11. The learned Judge after inquiry had observed that the Resolution was passed to recover a debt. The 3rd defendant had obtained Rs.6,752,829 from the 1st defendant bank by mortgaging the property on the documents marked P11, P12, P13 and P14. The property was owned by the 3rd defendant on a Crown Grant dated 7.3.1996 (P10). The 3rd defendant became the absolute owner after making a payment of Rs.7475.20. This grant is not subject to a life interest. The 3rd defendant defaulted payment.
12. The learned Judge had also observed that the document P6 is with regard to a lease. However the 3rd defendant became the absolute owner through a Grant. This Grant is not connected to a previous lease. Therefore the learned Judge rejected the stance of the plaintiff with regard to a trust and refused to issue an interim injunction.

Submission of the counsel for the plaintiff

13. The learned counsel for the plaintiff concedes that the respondent bank could proceed with the auction under *parate* execution. However the sale has to be subject to the life interest of the plaintiff.
14. The plaintiff admits that the property had been conveyed to the 3rd defendant absolutely and free of a life interest. This was on 17.3.1996 by P10. The plaintiff is not seeking to have this document declared void. The plaintiff merely claims that the 3rd defendant's ownership is subject to her life interest.
15. The Grant P10 gives the 3rd defendant absolute ownership. Therefore the issue would be whether the plaintiff has a prima facie case? That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights to be tried at the hearing and that he has a good chance of winning (Felix Dias Bandaranike vs.State Film Corporation (1981) 2 Sri L.R. 287, Jinadasa v. Weerasinghe 30 N.L.R. 283 & 31 N.L.R. 33, Ceylon Cold Stores v. Whittal Boustead (1980) 2 Sri L.R. 120, Peoples' Bank v. Hewawasam

(2000) 2 Sri L.R. 29, Amerasekera v. Mitsui Co. Ltd (1993) 1 Sri L.R. 22, Mallowa v. Keerthiratne (1982) 1 Sri L.R. 384).

16. The plaintiff admits the title of the 3rd defendant. The defendant's title is the Grant P10. This Grant is free of life interest. The plaintiff states that she has a life interest and the Grant should have been subject to the life interest. However she does not intend to challenge the Grant. Her complaint is that by P6 the State had given her an assurance that the lease would be transferred subject to the life interest of the plaintiff.
17. The consent of the plaintiff to transfer the lease to the 3rd defendant was given on 1.7.1992 (P4a & b). The Minister's approval was given on 26.8.1993 (P5). The authorisation for the transfer was given on 31.3.1994 (P6). However this lease was never transferred. Instead the 3rd defendant was given a Grant. The Grant is dated 7.3.1996. This Grant was given on a payment by the 3rd defendant. It is this Grant that the 3rd defendant had mortgaged to the 1st defendant Bank.
18. The mortgages were executed between the periods 16.9.1996 and 13.8.1998. At all times material to this case, the 3rd defendant had been residing with the plaintiff. The plaintiff states that she discovered the Grant only in the year 2002, and having informed the Bank she has stayed doing nothing until the property was put on sale in 2004.
19. Considering the above facts I am of the view that the plaintiff has failed to establish that she has a winnable case as the plaintiff is not seeking to challenge the Grant. Therefore I am of the view that the learned Judge was right in refusing an interim injunction. Hence leave is refused. On the facts of this case I make no order for costs.

Judge of the Court Appeal

K.T. Chitrasiri J

I agree

Judge of the Court of Appeal