

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

Nimalasiri Guruge,
Akuretiya, Baddegama

Plaintiff – Appellant

1. Surasena Jayasinghe,
Kiribathawila, Halpotha South.
2. Kalahe Kodithuwakku Siriyawatie,
Kiribathawila, Baddegama South
3. Dodampe Gamage Nonahami,
Thimbi Ela, Poddala.
4. Ewlagala Siripala Mendis

Defendant-Respondents

C.A.1212/98 (F)

D.C.GALLE CASE NO.10012/P

BEFORE : K.T.CHITRASIRI, J

**COUNSEL : M.S.A.Wadood with Palitha Subasinghe and Charitha
S.B.Kulatunga Attorneys-at-Law for the Plaintiff -
Appellant**
**E.M.D.Upali with Hemantha Boteju and Sujewa
Wijayalatha Attorneys-at-Law for the 1st Defendant -
Respondent..**

ARGUED ON : 14. 12. 2012

DECIDED ON : 22. 01. 2013

CHITRASIRI, J

Plaintiff-appellant (hereinafter referred to as the Plaintiff) sought to set aside the judgment of the learned District Judge of Galle delivered on 17.08.1998. By that judgment, learned District Judge dismissed the action filed to partition the land referred to in the schedule to the plaint dated 14.11.1986. In that plaint, Plaintiff claimed 2/3rd share of the land sought to be partitioned whilst allocating the balance 1/3rd share to the 1st defendant-respondent (hereinafter referred to as the 1st Defendant).

At the commencement of the trial in the District Court, parties admitted that the land sought to be partitioned is the land depicted in Plan No.753 dated 14.07.1987 drawn by U.D.C.Gunasinghe, Licensed Surveyor. It was also admitted that the land sought to be partitioned was originally owned by U.K.Megilin who became entitled by the Final Decree entered in the case bearing No.38765. Thereafter, the devolution of title to this land was narrated in evidence by the Plaintiff and accordingly he became entitled to 2/3rd share of the land by deed bearing No.21607 marked **P7** whilst the 1st Defendant by deed 14449 became entitled to the balance 1/3 share. **Execution of the deeds** that were marked in evidence was not challenged by either party.

However, the 1st Defendant claimed that the property referred to in the deed bearing No.14448 (P4) is being held by the Plaintiff in trust on his behalf though the said deed is titled as a deed of transfer. Accordingly, learned Counsel for the Defendant further submitted that the learned District Judge is correct in dismissing the action when the plaintiff cannot claim title to the land sought to be

partitioned relying upon the said deed 14448. Accordingly he argued that the 1st Defendant is entitled in law to have the action dismissed once he establishes the defence of constructive trust over the property claimed by the plaintiff.

I will now turn to consider whether the 1st Defendant has established the plea of constructive trust in respect of the property for which the Plaintiff has obtained title by the execution of the deed 14448. In this connection, both Counsel relied upon two judgments namely **Tissa Nona and 3 others v. Premadasa [1997 (1) SLR at page 169]** and **Piyasena v. Don Vansue. [1997 (2) SLR at page 311]**. In both those decisions Vigneswaran J had extensively discussed the attendant circumstances that are being made use of, in order to create a constructive trust. Those include the fact of paying stamp and notary's charges, the fact of execution of several deeds when claiming title after the deed on which constructive trust is claimed, the fact of continued possession of the premises in suit and the inability of the plaintiff to go to the land and to check its boundaries.

I will now look at the available attendant circumstances in relation to the execution of the deed 14448 in order to ascertain whether or not there exists a constructive trust in favour of the 1st Defendant over the property claimed by the plaintiff. Vendor of the property in the deed 14448 is the 1st Defendant whilst the purchaser is Shriyawathie Violet. She was added as a party to the action and was named as the 2nd Defendant. She has transferred her 2/3 share of the property to Nonahamy by deed 14264 (P5). Nonahamy also was added as a party and was named as the 3rd Defendant. She in turn had transferred her entitlement to Siripala Mendis. (P6) He too was added as a party to the action and was named as the 4th

Defendant. Plaintiff purchased the property from said Siripala Mendis by deed 21607. (P7) The devolution of title according to the deeds marked in evidence had not been challenged.

However, **if the 1st defendant is successful** in establishing that he never intended to transfer the title of the property referred to in the deed 14448 to Sriyawathie by executing the said deed 14448, **then the plaintiff's claim** to the land sought to be partitioned **would be jeopardized.**

Significantly, a specific condition had been included by the Notary namely H.G.Hewavithana in the deed 14448 at the time he executed the same. The said condition is to retain with the 1st Defendant he being the vendor, the right to purchase the property referred to in the deed, upon returning the purchase price of Rs.1360/- to the person who holds the paper title of the land. The said condition reads thus:

“වර්ෂ 1972 අගෝස්තු මස 7 වන දින සහ අංක 14034 ද දරණ කේ.ඊ. හේවාච්චාන නොතාරිස් මහතා සහතික කළ සින්නක්කරය පිට අයිත්ම මා විසින් නිරවුල්ව බුක්ති විඳගෙන එන මෙහි පහත උපලේඛනයෙහි විස්තර කරනු ලබන දේපල අද දින සිට පුරා අවුරුදු දෙකක් ඉකුත්වනට පෙර මෙහි සඳහන් මුදල රුපියල් එක්දහස් තුන්සිය හැට මෙහි ගැණුම්කාරීට හෝ ඕනෑමගේ උරුමක්කාරාදීන් වෙත එක වර ගෙවා මෙම දේපල ආපසු ලබා ගැනීමේ හිමිකම මා වෙත ඉතිරි කර තබා ගෙන.”

Certainly, a condition such as above in a deed would not have come into the picture if it was a fully fledged deed of transfer. Having such a condition shows that the intention of the vendor may have been to furnish a guarantee to a loan secured by him from the purchaser of the land subjected to the transfer. Hence, the inclusion of the condition referred to above in the deed would strongly support the contention of the learned Counsel for the 1st Defendant.

More importantly, it must be noted that the Defendant had purchased 1/3 share of the land on the same date by deed 14449 for a sum of Rs.1000/-only. It is accepted and relied upon by the Plaintiff himself. Purchase price mentioned in the deed to purchase 2/3 share is Rs.1360/-. Difference between the two sums is only Rs.360/- where as the difference in extent of the two lands is considerably large. Such a minute difference of the price to purchase a bigger share of the land creates a doubt as to the genuineness of the nature of the transaction that took place.

Counsel for the Defendant submitted that the deed 14448 being the deed executed prior to the deed 14449 show that the money borrowed by executing the deed 14448 had been used to purchase the land referred to in the deed 14449. Such an argument cannot be dismissed outright. 1st Defendant may have borrowed the money to purchase 1/3 share of the land by executing the deed 14448. The evidence of the 1st Defendant also supports this position. Moreover, the 1st defendant in his evidence has stated that the difference of Rs.360/- was used as the interest due on Rs.1000/- that he borrowed to purchase 1/3 share of the land.

Evidence on this point is quoted below.

- “ප්‍ර : එම ඔප්පුව එනම් 1973 ජනවාරි 6 දින දරණ අංක 14448 දරන ඔප්පුව තමා ‘වී2’ වශයෙන් තමන් ඉදිරිපත් කරනවා?
- උ : ඔව්.
- ප්‍ර : එම ඔප්පුව අනුව තමා ශ්‍රීයා වයලට් කොඩිතුවක්කුගෙන් එම දේපල නියා කොපමන මුදලක් ලබා ගත්තද? තමාට කොපමන මුදලක් අවශ්‍ය වෙලා තිබුනද?
- උ : රු. 1000/- ක් අවශ්‍ය වෙලා තිබුණා.
- ප්‍ර : තමන්ගේ අතේ ඒ වේලාවේ රු. 1000/- ක් තිබුණේ නැහැ?
- උ : ඔව්.
- ප්‍ර : ඒක නිසා තමයි රු. 1000/- මුදල ලබා ගත්තේ?
- උ : ඔව්.
- ප්‍ර : රු. 1000/- න් කියක් තමන්ගේ අතට ලැබුනද?
- උ : රු. 640/- යි.
- ප්‍ර : ඒ මොකද?
- උ : මුදලට පොලිය වශයෙන් රු. 360/- ක් අඩු කර ගෙනයි දුන්නේ.
- ප්‍ර : රු. 360/- ක් අඩු කර ගෙනයි තමන්ට දුන්නේ?
- උ : ඔව්.
- ප්‍ර : ඒ අනුව කියා තියෙනවා අවුරුදු 3 කින් එම මුදල ගෙවා ආපසු තමන්ට පවරා ගන්න?
- උ : මම කිව්වා මුදලක් පොලියක් දුන්න විටක මට ඉබම ආපසු ඔන කියා.

- ප්‍ර : ඒකට එකග වුනාද?
- උ : එකග වෙලා ලිව්වා.
- ප්‍ර : ඔප්පුවේ සඳහන් වෙලා තියෙනවද අවුරුදු 2 ක සීමාවක් ගැන?
- උ : ඔව්.
- ප්‍ර : තමන්ගේ බලාපොරොත්තුවක් තිබුනද මේ දේපල පවරා දෙන්න?
- උ : නැහැ.”

The other important attendant circumstance of the issue is the continued and uninterrupted possession of the 1st Defendant over the land in dispute. Admittedly, the 1st defendant had been in continued and undisturbed possession of the entirety of the land even before he transferred his rights to Sriyawathie whose rights the Plaintiff claims. According to the evidence, it is revealed that he had been in possession from the time he purchased 2/3 share of the land in the year 1972 by deed 14034. (P3). Admittedly, Plaintiff or his predecessors in title had never been in possession. Accordingly, the said continued and uninterrupted possession of the 1st Defendant without it been handed over to the purchaser will be an important factor to establish that the execution of the deed 14448 was effected not to alienate the ownership of the property but it was to form a collateral in order to secure a loan to purchase a part of the same land.

Furthermore, on the face of the deed 14448 it shows that the Notary had not checked or searched the title of the land prior to the execution of the deed 14448. It is also in evidence that the payment of the stamp fees and the Notary's

fees were met by the 1st defendant despite the fact that he was not the purchaser of the land referred to in the deed 14448.

The circumstances mentioned herein before show that the 1st Defendant had never intended to transfer the title of the property in dispute to Sriyawathie though the deed 14448 was titled as a deed of transfer. Hence, it is clear that the deed 14448 does not pass clear title to Sriyawathie or to her successors in title including that of the Plaintiff. Accordingly, it is my opinion that even though the Plaintiff is holding the title of the land in dispute under the deed 14448, he is having such a right over the property in favour of the 1st Defendant as a trust on his (1st Defendant) behalf.

The 1st defendant also had claimed prescriptive rights to the land in dispute. As mentioned before, the entirety of the land in dispute had been in continuous possession of the 1st defendant. However, the title deeds in respect of the land which had been marked in evidence show that the 1st Defendant is only a co-owner of the land at all material times. Under those circumstances, the law requires to prove possession adverse to the other co-owners with cogent evidence having established an overt act exercised against the other co-owners.

As mentioned hereinbefore, no person other than the 1st defendant had been in possession of the land. The plaintiff had never been in possession. Having established continued and uninterrupted possession as stated above by the 1st Defendant, it is then necessary to establish an *overt act* which is capable of

creating an opposition over the rights of the other co-owners, if the 1st Defendant needs to establish prescriptive title to the land.

The execution of the two deeds bearing Nos.14448 and 14449 on the same day plays a vital role in this connection. Both deeds were attested by the same Notary. The deed No.14448, it being the deed prior to the deed No.14449, had been written with a condition to re-transfer the property, in the event the consideration mentioned therein namely Rs.1,360/- is returned by the vendor who is the 1st defendant. The deed bearing No.14449 is a transfer deed executed in the name of 1st defendant by Nandoris in order to effect a fully pledged transfer of his 1/3rd share to the 1st defendant. There is no condition found in the deed 14449 as in the deed 14448. The consideration referred to in the deed 14449 is Rupees One Thousand (Rs1,000/). The 1st defendant in his evidence had said that the Rupees One Thousand (Rs.1,000/-) given by him to the vendor in the deed 14449, as its consideration was formed part of Rupees One Thousand Three Hundred and Sixty (Rs.1,360/-) referred to in the deed No.14448. Balance Rupees Three Hundred and Sixty (Rs.360/-) was considered as the interest due on the said Rupees One Thousand (Rs.1,000/-). Total of the said two amounts namely Rs.1360/- had been the amount that made to insert the condition referred to in the deed No.14448.

Above, circumstances of those two transactions show that the intention of the 1st defendant was to become the sole owner of the land in dispute. Condition to repay Rupees One Thousand Three Hundred and Sixty (Rs.1,360/-) vehemently supports this position. Therefore, the manner in which the deed 14448 was

executed could easily be considered as the overt act of the 1st defendant, against the other co-owners of the land sought to be partitioned.

In the circumstances, it is abundantly clear that the 1st defendant had intended to obtain a loan from Shriyawathie Violet in order to become the sole owner of the land having included the above mentioned condition in the deed 14448 at the time it was executed. In the circumstances, it becomes the *overt act* of the 1st defendant in order to establish possession adverse to the other co-owners of the land.

In the circumstances, 1st Defendant's claim on prescription also should succeed. Indeed, it is on this basis that the learned District Judge has decided to dismiss the action of the Plaintiff. However, as I have already decided that the property subjected to the deed 14448 is being held by the Appellant in trust for the 1st Defendant, I do not wish to elaborate much on the prescriptive rights of the 1st Defendant.

For the aforesaid reasons, it is my view that the learned District Judge is correct when she decided to dismiss the action of the Plaintiff. Accordingly, I do not wish to interfere with the findings of the learned District Judge.

In the circumstances I decide to dismiss the appeal with costs.

Appeal is dismissed with costs.

JUDGE OF THE COURT OF APPEAL