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

C.A. No. 205 / 98 F

D.C. Kalutara No. 4079 / L

Edirimuni Asoka Rohini
No 67/B, Shramadana Road,
Kaluwamodara
Aluthgama.

Plaintiff

Vs.

1. Gonagala Vithanage Malani Chandralatha,
   Malewangoda, Dharga Town,
2. Gonagala Vithanage Padma Rohini,
   Welipenna Road, Aluthgama.
3. Kamalawathie Seneviratne,
   Malewangoda, Dharda Town.

Defendants

AND NOW BETWEEN

Edirimuni Asoka Rohini
No 67/B, Shramadana Road,
Kaluwamodara
Aluthgama.

Plaintiff Appellant

Vs

1. Gonagala Vithanage Malani Chandralatha,
   Malewangoda, Dharga Town,
2. Gonagala Vithanage Padma Rohini,
   Welipenna Road, Aluthgama.
3. Kamalawathie Seneviratne,
   Malewangoda, Dharda Town.

Defendant Respondents

BEFORE : UPALY ABEYRATHNE, J.

COUNSEL : S. N. Trimanna for the Plaintiff Appellant.
W. Dayaratne PC with R. Jayawardene and
Uditha Bandara for the Defendant Respondents.

ARGUED ON : 02.09.2013
DECIDED ON : 06.11.2013

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) has instituted the said action against the Defendant Respondents (hereinafter referred to as the Respondents) in the District Court of Kalutara seeking inter alia that the deed bearing No 60 dated 28.07.1986 be declared as a mortgage and the Respondents be ordered to re-transfer the land described in the said deed. The Respondents have filed an answer denying the averments contained in the plaint and praying for a dismissal of the Appellant's action. After trial the learned District Judge has dismissed the Appellant's action. This appeal is from the said judgment dated 26.02.1998.

The Appellant's position was that she had mortgaged the property described in the schedule to the deed bearing No. 60 in order to obtain a loan of Rs. 50,000/- from the 3rd Respondent and when she prepared to discharge the said mortgage bond she realised that the said deed has been executed as an outright transfer in the name of 1st and 2nd Respondents. In addition the Appellant has

challenged the said deed on the ground of *laesio enormis*. The Respondents' position was that the said deed bearing No 60 was an outright transfer.

At the trial the Appellant has produced her title deed bearing No 4613 dated 03.08.1984 marked P 2. According to P 2 the consideration passed on the deed was Rs. 50,000/-. The deed in question bearing No 60 dated 28.07.1986 has been produced marked P 3. According to P 3 the consideration was Rs 51,000/-. It seems that the deed in question (P 3) has been executed just two years after the execution of P 2. In the said premise the Appellant must prove that Rs. 51,000/-, the price at which the land was sold, was less than half the true value of the property. In this regard the Appellant has led the evidence of Wijesiri Gunawardana, licensed surveyor. He has valued the property in question at Rs. 100,000/- in 1986. But in his evidence he has admitted that the property in question would be worth about Rs.90,000/-. Accordingly the Appellant has failed to prove that the true value of the property in suit was more than double the consideration shown on the face of the deed P 3.

In the case of Gooneratne vs. Don Philip 5 NLR 268 In order to succeed in an action for rescission of sale on the ground of *enormis Iaesio:* plaintiff must prove that the property was at the date of the sale worth double the price the defendant paid for it.

The terms of the deed P 3 in this case are clear and unambiguous. It is an outright transfer of the property to the Respondent. The transfer is not subject to any undertaking by the Respondent to re-convey the property. On the other hand the Appellant, in her evidence has testified that she knew that the property was worth more than Rs. 120,000/- at the time of the execution of deed P 3 (V 2).

In the case of Jayawardene vs. Amarasekera 15 NLR 280 Lascelles C.J. observed that "A person who knows the value of his property is not entitled to rescission of the sale merely by reason of the fact that the price at which he has sold the property is less than half its true value."

Apart from that in the present case the Appellant has not pleaded a trust. She has pleaded that the deed bearing No 60 dated 28.07.1986 (P 3) be declared as a mortgage. No doubt that there must be a notarially executed document to create a mortgage. A mortgage cannot be impressed on a deed of sale. Unlike in a trust, in a mortgage, there is no question of a beneficial interest retained. In terms of Section 92 of the Evidence Ordinance no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms.

In the case of Perera vs. Fernando 15 NLR 486 it was held that "Where a person transferred a land to another by a notarial deed, purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage, and that the transferee agreed to re-convey the property on payment of the money advanced. The admission of oral evidence to vary the deed of sale is in contravention of section *92* of the Evidence Ordinance.

In the case of B.M.G. Setuwa vs. B.T. Ukku 56 NLR 337 it was held that "It is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that in reality it is a deed of mortgage and not of sale."

In this case Gratiaen J. observed that "The respondent did not rely on any proviso to section 92 of the Evidence Ordinance. Nor did he allege a trust of the kind which section 5 (3) of the Trusts Ordinance permits to be established by oral evidence. In the result, the learned trial Judge should not have admitted evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of two notarial instruments each of which unambiguously purported to record a transaction between a vendor and his purchaser (not between a mortgagor and his mortgagee)."

In the case of W. N. William Fernando vs. N. Roslyn Cooray 59 NLR 169 (Basnayake C. J., dissenting), (a bench of five Judges) it was held that "in the absence of any allegation of fraud or trust, it is not open to a party, who conveys immovable property for valuable consideration by a deed which is ex facie a contract of sale but subject to the reservation that he is entitled to re-purchase it within a stipulated period on the repayment of the consideration together with interest thereon, to lead parol evidence of surrounding circumstances to show that the transaction was not a sale but a mortgage. Such parol evidence, even if admitted without objection, would offend the provisions of section 92 of the Evidence Ordinance and cannot be acted upon."

In the said circumstances I find no reason to interfere with the said judgment of the learned District Judge dated 26.02.1998. Therefore I dismiss the instant appeal of the Appellants with costs.

Appeal dismissed.

Judge of the Court of Appeal