

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

N.G. Kusumawathie,

Defendant-Appellant

CA 1222/96(F)

DC-KANDY-17266/L

Vs.

1. Pahala Muthuranwelli
Gedara Rathnasiri
Muthuranwela
2. Pahala Muthuranwelli
Gedara Saartha
Muthuranwela

Plaintiff-Respondents

Before : K.T. Chitrasiri, J.

Counsel : Parties are absent and unrepresented

Decided on : 19.11.2013

K.T. Chitrasiri, J.

When this matter was mentioned on 22.10.2013, Defendant-Appellant was absent and unrepresented even though the Registrar of this court has sent notices under registered cover to the Defendant Appellant as well as to her Registered Attorney, Surangani Kodituwakku directing them to be present in this court. The notice sent to the appellant had been returned with the endorsement that she has left the given address. It is to the address given in the petition of appeal that the notice had been sent. Notice sent to her Registered Attorney had not been returned. However, no appearance has been marked on behalf of the Defendant Appellant even on that date.

On that date namely 22.10.2013, the Plaintiff-Respondents were represented by Sudath Bakmeewatta. Accordingly, the matter was fixed for argument today. Today, neither the appellant nor the Respondents are present in court. They are not being represented by an Attorney-at-Law either. Accordingly, this appeal is taken up for consideration in the absence of the parties.

This is an appeal seeking to set aside the judgement dated 25.10.1996. By that judgement, learned District Judge of

Kandy decided the case in favour of the plaintiffs as prayed for in paragraph 'a' in the amended plaint filed on 23.09.1993. However, the learned District Judge has declined to grant the other reliefs prayed for in the aforesaid amended plaint. Being aggrieved by the said decision of the learned District Judge, the Defendant-Appellant (hearing after referred to as the appellant) filed this appeal.

In the petition of appeal dated 23.12.1996, it is stated that the appellant did not intend to transfer the ownership of the land subjected to in this case and therefore the deed bearing No. 309 (P1) was executed only as a security for the money that she obtained from the plaintiff-Respondents (hearing after referred to as the Respondents). Accordingly, the amended plaint and the issues framed on behalf of the appellant had been on the basis that the appellant was ready with the money that she obtained with the interest accrued thereto, in order to have the property in suit transferred in her name though the respondents were not prepared to do so. Accordingly, she has taken up the position that it caused her unbearable loss and has sought to dismiss the plaint.

In the circumstance, it is clear that the action in the District Court had been on the basis of the agreement between the parties as to the payment of money that the appellant has obtained from the Respondents. The Respondents have stated that they gave Rs. 60,000/- to the Appellant with the condition that they will re-transfer the property in the event the appellant returns the money with interest. The appellant in her evidence has stated that she obtained only Rs. 40,000/- and the Rs. 60,000/- referred to by the respondents included the interest component as well. However, in the deed marked P1, the Notary who executed the deed has stated that Rs. 60,000/- was paid in his presence by the Respondents to the appellant. (Vide page 75 in the appeal brief). Accordingly, the learned District Judge has declined to accept the position taken up by the appellant. I do not see any error in concluding so by the learned District Judge.

The evidence also reveals that the appellant has failed to return the money as agreed. Therefore, it is clear that the learned District Judge is correct when he rejected the position taken up by the appellant having considered the facts in issue raised by the parties.

At this stage, it must be noted that the appellant has not taken up any defence on the basis of a constructive trust or on the basis of lesio enormis. Such failure on the part of the appellant has been referred to even by the learned trial Judge. Had the appellant taken up such a defence, the trial judge could have considered the matter on those lines.

In the circumstance, I am not inclined to interfere with the findings of the learned District Judge. For the aforesaid reasons, this appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

LA/-