

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

A.V.M.Mangalika Abayagunasekera
 221/A, Saranapala Mawatha
 Akaravita, Gampaha.

Plaintiff-Appellant

Vs

C.A.NO.137/98 (F)
D.C.GAMPAHA CASE NO.31388/L

Anestus Perera alias Saman Perera

Hewapathirannahalge Emalin

Both of Saranapala Mawatha,
 Akaravita, Gampaha

**Deceased 1st & 2nd Defendant-
 Respondents**

H. P. Sumithra Malkanthi
 No.48/F, Samagai Mawatha,
 Dombawala, Udugampola.

And others

**Substituted-Defendant-
 Respondents**

BEFORE : **K.T.CHITRASIRI, J.**

COUNSEL : Sumith Senanayake with Damitha Wickrama
 for the Plaintiff- Appellant

S.A.D.S.Suraweera
 for the Substituted Defendant Respondents

ARGUED ON : 06TH MAY 2014

DECIDED ON : 10TH JUNE 2014

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 27th February 1998 of the learned District Judge of Gampaha. In the petition of appeal, the plaintiff-appellant (hereinafter referred to as the plaintiff) has also sought to have a judgment as prayed for in the plaint dated 17th August 1988.

In that plaint the plaintiff sought to have a judgment declaring that she is entitled to the land morefully described in the schedule to the plaint by virtue of the deeds that she has pleaded including that of the deed bearing No.1449 marked P3 in evidence. The defendants in their answer has averred that the aforesaid deed 1449 marked P3 should not be treated as a deed of transfer but it should be treated as a deed executed in order to secure a loan obtained from one Kingsley Dias. Accordingly, the defendants have prayed that the said deed 2449, it being one of the deeds which the plaintiff relies on to claim title, be declared null and void.

By the aforesaid judgment, learned District Judge having accepted the position taken up by the defendants, dismissed the plaint and made order revoking the deed 1449 marked P3. However, it is to be made effective subject to the conditions referred to in the said judgment dated 27.02.1998. Conditions so imposed are to pay Rupees Fifty Thousand (Rs.50,000/-) with interest accrued thereto, to the plaintiff by the 2nd defendant-respondent. (hereinafter referred to

as the 2nd defendant) Both Counsel submitted that though the learned District Judge has imposed such a condition in the impugned judgment, no reliefs had been prayed for, to have such damages. Moreover, no reasons are given by the trial judge, for the awarding of damages in that manner. No evidence too, is found to pay such an amount as damages. Therefore, it is erroneous to have awarded damages to pay the plaintiff by the 2nd defendant in a sum of Rupees Fifty Thousand (Rs.50,000/) with interest payable thereto. Hence, the direction to pay damages by the 2nd defendant to the plaintiff cannot be allowed to stand.

On the face of the aforesaid deed 1449 (P3), it is a deed of transfer by which the 2nd defendant has alleged to have sold her rights to the aforesaid Kingsley Dias. Heirs of Kingsley Dias have transferred their rights referred to in the deed marked P3, to the plaintiff by executing the deed bearing No.7490 marked P2. In the answer of the defendants, they have taken up the position that deed No.1449 was executed not as an outright transfer but it was executed as a security for a loan obtained by the 2nd defendant and has pleaded that it amounts to a mortgage. They have also taken up the defence of *laesio enormis*. Defendants also have stated that the plaintiff cannot claim clear title to the property referred to in the deed P2 since no testamentary proceedings have been instituted to administer the estate of Kingsley Dias in terms of Section 545 of the Civil Procedure Code. Having looked at the evidence, learned District Judge decided to revoke the deed marked P3 on the basis that no proper consideration had been

passed to the vendor in that deed namely to the 2nd defendant when it was executed. His findings in this regard are as follows:

“ඒ අනුව පැ. 3 ඔප්පුවේ සඳහන් වටිනාකම පිළිනොගැනීමටත්, එහි වටිනාකම අඩුවෙන් දමා ඇති වටිනාකමක් යන කරුණු මත එම ඔප්පුව අවලංගු විය යුතුය.”

[Vide proceedings at page 218 in the appeal brief]

Admittedly the 2nd defendant became entitled to the property put in suit by virtue of the deed bearing No.9113 having purchased the land from Krishanthi Samarasinghe on 26.12.1979. 2nd defendant alleged to have sold her rights to Kingsley Dias by executing the deed 2449. As mentioned before, the 2nd defendant sought to have the said deed 2449 be declared as a deed executed as a security for a loan obtained from Kingsley Dias and has further sought to have the same revoked on that basis.

The execution of the deed 2449 marked P3 had been admitted by the parties at the commencement of the trial in the District Court. Vendor to that deed is the 2nd defendant in this case. On the face of that deed, the 2nd defendant has transferred the property referred to in the schedule to the plaint to Kingsley Dias. The plaintiff has bought the property by deed marked P2 from the wife and the children of Kingsley Dias after his death. The position of the 2nd defendant is that the plaintiff cannot claim title if the vendee to the deed 2449 did not have clear title for his heirs to part with the same.

Therefore, the issue in this instance is to determine whether the deed No.1449 marked P3 is in fact an outright transfer or not. The Issue No.3 raised on behalf of the defendants is directly on this point. In accordance with the deed P3, the property had been transferred for a sum of Rupees Eighteen Thousand (Rs.18,000/-). However, the 2nd defendant in her evidence has stated that she received only Rupees Fifteen Thousand (Rs.15,000/-) and the balance Rupees Three Thousand (Rs.3,000/-) was set off against the interest to be accrued until the said Rupees Fifteen Thousand (Rs.15,000/-) is returned to Kingsley Dias. The witness Gertrude Jayasinghe who is the wife of Kingsley Dias from whom the plaintiff has purchased the property has admitted that Rupees Fifteen Thousand (Rs.15,000/-) was given by her husband to the 1st defendant and the balance money was paid as the fees for the broker. [*Vide proceedings at pages 72 & 73 in the appeal brief*]. Therefore, it is clear that the maximum consideration passed at the time of the execution of the deed marked P3 was only Rupees Eighteen Thousand (Rs.18,000/-).

This property in question had been valued by Jagath Liyanaarachchi and he has prepared a valuation report of the same and it was marked as V4 in evidence. In that report he has assessed the property for a sum of Rupees One Hundred Fourteen Thousand and Two Hundred. (Rs.114,200/-) It was the value of the property in the year 1983 during which period the deed P3 had been executed. He, in his evidence has stated the manner in which he arrived at the aforesaid valuation. He has taken into consideration the value of the properties adjacent to the property in dispute when he came to his findings. He is a person

who is having experience for over 26 years having attended to the matters connected with Court proceedings. I do not find any question posed to him even in cross-examination suggesting any other amount as the value of the property. Under those circumstances, I do not see any reason to reject the valuation of the property, arrived at by the witness Jagath Liyanaarachchi who prepared the valuation report marked V4. (vide at page 301 in the appeal brief)

Having considered the evidence;

- ✓ as to the value of the property at the time the deed P3 was executed;
- and
- ✓ the sale price referred to in the aforesaid deed which was the full consideration passed as the sale price;

it is abundantly clear that no proper consideration had been received by the 2nd defendant, for the property she alleged to have sold to Kingsley Dias. Indeed, the value of the property is around six times more than the money received by the 2nd defendant as the sale price when she executed the deed P3. In the light of those circumstances, I do not see any wrong when the learned District Judge decided to revoke the deed 1449 marked P3 on the basis that the vendor who is the 2nd defendant did not receive the real value of the property when she sold the property to Kingsley Dias. Hence, I am not inclined to interfere with his decision to revoke the deed P3.

When the title referred to in the deed marked P3 is bad, the transferee of that deed or his successors will have no title to part with. Therefore, the heirs of

Kingsley Dias did not have clear title to transfer it to the plaintiff. Accordingly, the plaintiff cannot claim good title by executing the deed marked P2 though the mere execution of the deed had been admitted by the 2nd defendant at the commencement of the trial. Therefore, it is correct to conclude that the plaintiff is not entitled to claim title through the deed P2.

Learned Counsel for the respondents also submitted that the deeds marked V1 and V2 would indicate that Kingsley Dias had been in the habit of executing deeds of transfer having given loans to various people. The evidence reveals that Kingsley Dias had been only a pensioner at material times. Therefore, the said contention of the learned Counsel for the respondents also cannot be rejected when deciding the question as to the real nature and character of the deed 1449 marked P3.

Learned Counsel for the plaintiff-appellant submitted that once the 2nd defendant has taken up a defence in terms of Section 545 of the Civil Procedure Code, he is prevented from challenging the defects in the title of Kingsley Dias whose estate had not been administered under the said Section 545. Even though the 2nd defendant has taken up both the defences simultaneously, Court will not be in a position to ignore the infirmities of the title claimed by the plaintiff since this action is filed to obtain a declaration of title depending on the very same title of the person namely Kingsley Dias whose estate had not been administered according to law. It is clear that both the defences have been taken up in order to challenge the title of the plaintiff. Therefore, I am not inclined to agree with the aforesaid contention of the learned Counsel for the appellant.

For the aforesaid reasons, this appeal is dismissed with costs. Furthermore, as referred to hereinbefore in this judgment, the plaintiff is not entitled to have the damages awarded by the learned District Judge as mentioned in his judgment dated 27th February 1998.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL