617/99(F)

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

Madappuli Arachchige Saradiyas

Millagaha Watta, Madagoda,

Badigama, Vitharandeniya.

Plaintiff-Appellant

C.A.Case No:-617/99(F)

D.C.Mount Laviia Case No:-54/93/L

V.

Langappulige Pinidiyas(deceased)

No.20, Lauris Road,

Bambalapitiya.

Defendant-Respondent

1a. Madappuli Arachchige Francina,

No.20, Lauris Road,

Bambalapitiya.

1b.Langappulige Chandana,

No.21, Gamunu Road,

Hiribure, Galle.

1c.Langappulige Thamara,

'Damayanthi' Puwak Watta,

Ellalagoda, Imaduwa.

1d.Langappulige Ananda,

No.20, Lauris Road,

Bambalapitiya.

1e.Langappulige Janaka,

No.43/5, Papiliyana Road,

Nugegoda.

Substituted-Defendant-Respondents

Before:- H.N.J.Perera.J.

Counsel:-Wijedasa Rajapaksa P.C with Nilantha Kumarage for the Plaintiff-Respondent

Dr.Jayatissa De Costs P.C with Lahiru N.Silva for the 1E Defendant-Respondent

Argued On:-01.07.2014

Written Submissions:-10.12.2013/18.11.2014/19.11.2014

Decided On:-10.07.2015

H.N.J.Perera, J.

Plaintiff-appellant instituted this action in the District Court of Mt.Lavinia against the defendant-respondent praying for a declaration that the plaintiff-respondent is the owner of the land more fully described in the schedule to the plaint and for ejectment of the defendant-respondent and all those holding under defendant-respondent from the said premises and for damages.

It was the position of the plaintiff-appellant that he became the owner of the subject matter by virtue of deed of transfer No 412 dated

27.11.1984 and he constructed a boutique in the subject matter and leased it out to the defendant-respondent (deceased) under deed of lease No 281 dated 04.10.1990.It is alleged by the plaintiff-appellant that the defendant–respondent failed to pay the lease after 1990 and the plaintiff-appellant cancelled the said lease upon the execution of deed No 289 dated 1991 .Even though a notice to quit dated 27.10.1992 was sent to the defendant-respondent through his lawyer the defendant-respondent failed to hand over the vacant possession of the subject matter to the plaintiff-appellant.

The defendant-respondent(deceased) filed answer stating that it was the defendant-respondent who provided the consideration for the execution of the said deed of transfer N0 412 in the plaintiff-appellant's name on the verbal promise that the plaintiff-appellant would transfer the property to the defendant-respondent. It was the position of the defendant-respondent that it was the defendant-respondent who constructed the boutique in the subject matter and that the plaintiff is the elder brother of the wife of the defendant-respondent and that the plaintiff-appellant was working under the defendant-respondent at the Laundry owned by the defendant-respondent.

The defendant-respondent further pleaded in his answer that the said deed of lease N0. 181 was executed as a temporary settlement for the dispute arisen between the parties when the plaintiff-appellant made an attempt to occupy the subject matter forcibly. The defendant-respondent further claimed that there was a constructive trust and that the plaintiff-appellant was holding the property in trust for the benefit of the defendant-respondent who is the beneficiary of the trust.

Therefore, the facts in issue are whether the consideration was paid by the defendant-respondent and whether the defendant-respondent never intended to pass beneficial interests of the subject matter. In order

to decide these vital issues, the attendant circumstances of this case must be looked into.

In dealing with the question of trust attendant circumstances are considered very material. In the case of Eliya Lebbe V. Majeed 48 N.L.R 357, at page 359 Dias, J stated thus:-

"There are tests for ascertaining into which category a case falls. Thus, if the transferor continued to remain in possession after the conveyance, or if the transferor paid the whole cost of the conveyance or if the consideration expressed on the deed be utterly inadequate to what would be the fair purchase money for the property conveyed- all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration or something else."

See also Thisa Nona and 3 others V. Premadasa [1997] 1 Sri.L.R 169.

Section 84 of the Trust Ordinance reads as follows:-

"Where property is transferred to one person for a consideration paid or provided by another person and it appears that such person did not intend to pay or provide such consideration for the benefit of the transferee the transferee must hold the property for the benefit of the person paying or providing the consideration."

In the case of Wijesundera V. Neela Wickremasinghe (2002) 2 SLR 307 it was held that , a party who has sought to establish a constructive trust as per the section 84 of the Trust Ordinance, and in order to succeed in an action, is required to establish two elements. Those are, that the consideration was paid or provided by the said party though the property was transferred in the name of the transferee and that the said party did not intend to pay or provide such consideration for the benefit of the transferee.

The defendant-respondent has specifically stated in evidence that it was he who provided Rs.50,000/- for the execution of deed marked P1 and how he traced money. Also, the evidence of two other witnesses was led to corroborate this position. Apart from the evidence of the defendant-respondent, Sumanadasa Matarage who was present at the scene of the execution of he said deed has specifically stated that the defendant-respondent paid the consideration. Also, Asilin Nona who was one of the attesting witnesses of the said deed has also stated in her evidence that the defendant-respondent paid the consideration and that she saw the defendant-respondent giving the money at the time of the execution of the deed marked P1. The plaintiff-appellant did not summon the Notary who executed this deed to contradict this position. Although the plaintiff-appellant has given evidence and stated that he provided the said consideration the learned trial Judge after considering the evidence that was placed before him by the parties has held with the defendant-respondent in this case.

The plaintiff-appellant had admitted that he was accompanied by the defendant-respondent for the purchase of the property. Sumanadasa Matarage who was the broker in the transaction, in giving evidence stated that he showed the land to the defendant-respondent and the defendant-respondent purchased the land.

Even though the plaintiff-appellant took up the position that he constructed the boutique in the subject matter, mason who constructed the boutique namely Ellolu Gamage in giving evidence has stated that the building was constructed at the instance of the defendant-respondent and that he received Rs. 85,000/- from the defendant-respondent for the said constructions. The other witness who was called on behalf of the defendant-respondent. Asilin Nona too has stated that she received money from the defendant-respondent for lunch packets given by her to the basses and workers who constructed the boutique.

This evidence has clearly established the fact that although the plan to build the said boutique had been obtained by the plaintiff-appellant from the Municipal Council, the said boutique was constructed by the defendant-respondent.

The plaintiff-appellant in his statement to the police has clearly admitted that the defendant-respondent is the owner of the said laundry and that he was told that he would not be given employment once again .Although the plaintiff-appellant had denied that he was employed by the defendant-respondent this clearly indicate that he was employed by the defendant-respondent. He also had stated to the police that the defendant-respondent had purchased two vans by keeping the said deed P1 as the security and having settled the installments, the defendant-respondent kept the deed with him.

The plaintiff-appellant in this case had produced a lease agreement marked P3 and had taken up the position that it corroborated that the defendant-respondent is only a lessee of the plaintiff-appellant. The document marked p4 was admitted by the plaintiff-appellant. The plaintiff-appellant had sent this letter marked p4 to the lawyer of the defendant-respondent stating that he was willing to cancel the lease agreement marked 3 if he was granted the permission to carry on business at the boutique.

It was contended by the Counsel for the defendant-respondent that if the defendant-respondent did not have the beneficial interests over the subject matter there was no need for the plaintiff-appellant to seek permission of the defendant-respondent to carry on business in the said premises. And the refusal of the plaintiff-appellant to retransfer the property to the defendant-respondent clearly suggests that there was a demand that the property be transferred to the defendant-respondent and the dispute has arisen due to this refusal.

It was contended by the Counsel for the defendant-respondent that the deed of lease P3 has not been executed for the true purpose of creating a lessor and lessee relationship. The plaintiff-appellant whilst giving evidence had admitted that he never said to execute a deed of lease but he tried to cancel the same since he wanted to live peacefully. He has very clearly stated that he never wanted to enter in to a lease agreement but did so on the advice of his lawyer. And that as he wanted to live peacefully he tried to revoke it. This clearly establish the fact that the intention of the execution of the said lease agreement was not to create a lessor-licensee relationship but to settle the dispute existed at the time of the execution.

The evidence led in this case clearly establishes the fact that the defendant-respondent has never parted with the beneficial interests of the property. The plaintiff-appellant under cross examination had admitted that the defendant-respondent never gave up possession of the subject matter and that the defendant-respondent was occupying the premises from the year 1984.The attendant circumstances show that the defendant-respondent did not intend to dispose the beneficial interest in the subject matter.

It is clear from the judgment of the learned trial Judge that he accepted and was impressed by the evidence of the defendant-respondent and the other witnesses who gave evidence on his behalf.

In DharmaThero Buddharakkitha Thero [1990]1 Sri L.R 211 it was held:-

"The District Judge who heard and saw the witnesses and watched their demeanour had found for the defendant. Where the personality of the witnesses is an essential element, the appellate court should not set aside the decision of the trial Judge save in the clearest of cases."

In M.P.Munasinghe V. C.P.Vidanage 69 N.L.R 98, it was held that the jurisdiction of an appellate court to review the record of the evidence in order to determine whether the conclusion reached by the trial Judge upon evidence should stand has to be exercised with caution.

"If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so as to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion been arrived on conflicting testimony by a tribunal which saw and heard witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." Per Viscount Simon in Watt in Thomas V. Thomas (1947 A.C.484 at pp 485-6).

Further in Gunewardene V. Cabral and others (1980) 2 Sri L.R 220, it was held that the appellate court will set aside inferences drawn by the trial Judge only if they amount to findings of fact based on:-

(a)inadmissible evidence; or

(b)after rejecting admissible and relevant evidence; or

(c)if the inferences are unsupported by evidence; or

(d)if the inferences or conclusions are not rationally possible or perverse.

In the case before me I do not see that the findings of the learned District Judge and the inferences drawn by him are vitiated by any of these considerations. In my view there is no justification for interfering with the conclusions reached by the learned District Judge which I perceive are warranted by the evidence that was before him.

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeal of the plaintiff-appellant is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL